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Briefings on How To Use the Federal Register
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Contents

Federal Register

Vol. 58, No. 249

Thursday, December 30, 1993

Reader Aids
Additional information, including a list of public laws, telephone numbers, and finding aids, appears in the Reader Aids section at the end of this issue.

Electronic Bulletin Board
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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

Federal Register
Vol. 58, No. 249
Thursday, December 30, 1993

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 531

RIN 3206–AF46

Pay Under the General Schedule; Locality-Based Comparability Payments

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations on locality-based comparability payments for General Schedule employees, as required by the Federal Employees Pay Comparability Act of 1990. The final regulations reflect the determination of the President's Pay Agent concerning the "locality pay areas" within which locality-based comparability payments will be made. In addition, the final regulations provide that the "locality rate of pay" is to be calculated in all cases on the basis of the employee's "scheduled annual rate of pay," which excludes a special salary rate authorized by OPM (whether local, nationwide, or worldwide in coverage). The final regulations also include pay administration rules, as well as conforming changes in the regulations governing interim geographic adjustments and special pay adjustments for law enforcement officers.

EFFECTIVE DATE: The regulations are effective January 1, 1994, and are applicable on the first day of the first pay period beginning on or after January 1, 1994.

FOR FURTHER INFORMATION CONTACT: James Weddel, (202) 606–2858.

SUPPLEMENTARY INFORMATION: On August 31, 1993, the Office of Personnel Management (OPM) published proposed regulations to implement 5 U.S.C. 5304, which provides for the payment of locality-based comparability payments to General Schedule (GS) employees when the rates payable to GS employees are generally lower than the rates paid for the same levels of work by non-Federal workers in the same locality. Interested parties were invited to comment for a 30-day period. During the comment period, OPM received comments from 2 Members of Congress, 12 agencies, 4 labor organizations, 7 professional organizations and associations, and 243 individuals.

On January 8, 1993, OPM published an interim rule implementing certain changes made by the Technical and Miscellaneous Civil Service Amendments Act of 1992 (Public Law 102–378). One of the provisions of the interim rule was that special pay adjustments for law enforcement officers would be paid on top of nationwide or worldwide special salary rates authorized by OPM under 5 U.S.C. 5305. As explained below, OPM proposed a change in this provision when the proposed locality pay regulations were published. The proposed change is made final by these regulations. OPM will publish final regulations implementing other provisions of the Technical and Miscellaneous Civil Service Amendments Act of 1992 in the near future.

Locality Pay Areas

OPM received comments on the establishment of locality pay areas from more than 225 individuals, agencies, and organizations. Section 5304(f)(1) of title 5, United States Code, authorizes the President's Pay Agent (consisting of the Secretary of Labor, the Director of the Office of Management and Budget (OMB), and the Director of OPM) to provide for such pay localities as the Pay Agent considers appropriate. Comments on the establishment of locality pay areas were reviewed by the President's Pay Agent. After considering these comments, the Pay Agent decided to establish the same 28 locality pay areas that were recommended by the Federal Salary Council and included in the proposed locality pay regulations. The final regulations list each of these locality pay areas and are issued by OPM under the authority in 5 U.S.C. 5304(i).

For the most part, the boundaries of the locality pay areas follow those of the corresponding Metropolitan Statistical Areas (MSA's) and Consolidated Metropolitan Statistical Areas (CMSA's). MSA's and CMSA's are defined by OMB and published in OMB Bulletin No. 93–17 (June 30, 1993). One agency suggested that OPM include criteria used by the Federal Salary Council for evaluating proposed exceptions to MSA and CMSA definitions in defining locality pay areas. However, OPM has determined that there is no need to do so.

Locality Pay for Employees Receiving Special Rates

Several commenters objected to OPM's proposal to calculate locality pay on the basis of an employee's scheduled annual rate of pay, excluding a special salary rate authorized by OPM under 5 U.S.C. 5305 (whether local, nationwide, or worldwide in coverage). A labor organization argued that there is no reason for OPM to "divest" special salary rate employees from the benefits of locality-based comparability payments. An organization representing Federal physicians criticized the proposal because the compensation of Federal physicians (many of whom received worldwide special salary rates) is significantly below that of non-Federal physicians. An agency commented that treating newly-hired employees differently than on-board employees who have their adjusted rates of pay continued under § 531.106 or § 531.307 will create recruitment problems.

Section 3 of Executive Order 12748 of February 1, 1991, delegated to OPM the President's authority under 5 U.S.C. 5305(g)(1) to determine the extent to which employees receiving special salary rates will receive locality pay. Section 5 of Executive Order 12786 of December 26, 1991, delegated to OPM the President's authority under section 302(e) of the Federal Employees Pay Comparability Act of 1990 (FEPCA) (Pub. L. 101–509) to determine the extent to which employees receiving special salary rates will receive interim geographic adjustments (IGA's).

After careful consideration of the comments received, OPM has concluded that the rates of pay established under the special salary rate program were established primarily to

reduce staffing problems caused by differences between Federal and non-Federal pay. To make locality payments on top of such special salary rates would inappropriately pyramid similar pay entitlements. In the final rule, OPM has exercised its authority under section 3 of E.O. 12748 and section 5 of E.O. 12786 by providing that IGA's and locality payments will be based on an employee's scheduled annual rate of pay, excluding a special salary rate established under 5 U.S.C. 5305 (whether local, nationwide, or worldwide in coverage). No employee will suffer a reduction in pay as a result of implementing locality pay.

An agency commented that the pay retention regulations should be reviewed to prevent windfall pay increases when special salary rate authorizations are eliminated because the "locality rate of pay" equals or exceeds the special rate. By law, employees affected by a reduced or terminated special salary rate receive pay retention. Since the retained rate of pay is the employee's rate of basic pay for all purposes, locality pay must be paid on top of the retained rate. However, OPM does not plan to eliminate special salary rate authorizations solely because locality rates of pay overtake special rates.

An agency commented that there is a potential inequity if a promotion is based on a GS rate for an employee who is entitled to a locality rate of pay, but would be based on a special rate if the special rate is higher than the locality rate of pay. Since special salary rates will not be automatically eliminated solely because locality rates of pay overtake special rates, a promotion will continue to be based on the special rate, even if the employee is receiving a higher locality rate of pay.

Other Pay Administration Comments

A Federal managers' association and a labor organization commented that locality pay should be paid in addition to IGA's. OPM has not adopted this recommendation since IGA's were designed to allow the President to provide interim relief, pending implementation of the locality pay system in January 1994. The law (section 302(d)(2) of FEPCA) provides that IGA's may be reduced as the locality pay system takes effect. OPM also has authority under section 5 of E.O. 12786 to reduce the amount of IGA's when employees receive locality pay. Finally, the law requires that IGA's must be administered consistent with the administration of locality payments. Thus, both IGA's and locality payments must be calculated from the same rate of basic pay.

Section 404(a) of FEPCA provides OPM parallel authority to reduce the amount of special pay adjustments for law enforcement officers when such employees receive IGA's, special salary rates, or locality payments. The final regulations reflect OPM's exercise of this authority. (See § 531.304 (a) and (k).) Similarly, the final regulations reflect OPM's exercise of the authority in 5 U.S.C. 5305(g)(1), which provides that the President (or his designee) may determine the amount of a locality payment (if any) that may be granted to an employee who is also receiving a special salary rate authorized by OPM under 5 U.S.C. 5305. (See § 531.606(k).) As noted above, this authority was delegated to OPM by Executive Order 12748. Remarks on Notifications of Personnel Action (SF–50's) will inform employees when an IGA or special pay adjustment for LEO's has been reduced because an employee is entitled to locality pay.

As mentioned above, an agency expressed concern that recruitment problems might result if IGA's are continued for employees on nationwide or worldwide special salary rates when locality pay is implemented, but not permitted on top of special salary rates for new employees. Agencies have pay flexibilities available to them to resolve recruitment and retention problems, such as recruitment and relocation bonuses, retention allowances, and superior qualifications appointments above the minimum rate of the appropriate GS grade.

A professional organization and an agency commented that references to the Performance Management and Recognition System (PMRS) are obsolete, since the PMRS expired on October 31, 1993. We have changed references to PMRS employees to "GM employees (as defined in § 531.202)." This definition, which is incorporated in an interim rule that was published in the **Federal Register** on December 15, 1993 (58 FR 65531), provides that a GM employee is "an employee who was covered by the Performance Management and Recognition System under chapter 54 of title 5, United States Code, on October 31, 1993, and who continues to occupy a position as a supervisor or management official (as defined in paragraphs (10) and (11) of section 7103(a) of title 5, United States Code) in the same grade of the General Schedule and in the same agency without a break in service of more than 3 calendar days. Any reference to employees, grades, positions, or rates of basic pay under the General Schedule shall include GM employees for the purposes of subchapters I and III of chapter 53 of title 5, United States Code."

An employee noted that a GS employee may receive a retained rate of pay under 5 U.S.C. 5334(b)(2) and recommended that this authority be added to the other pay retention authorities cited in the definitions of scheduled annual rate of pay in three sections of the regulations. We have made these changes.

A professional association commented that an employee should be permitted to retain a locality rate of pay when he or she "transfers" into a locality pay area with a lower rate of locality pay. OPM has not adopted this recommendation since the locality pay system is designed to reflect differences in Federal and non-Federal pay in the locality where the employee's official duty station is located.

In addition, it should be noted that an entitlement to an adjusted annual rate of pay continued under § 531.106 or § 531.307 will end when an employee voluntarily or involuntarily moves to an official duty station in a non-IGA or non-special pay adjustment area, as applicable, or to a position that is not covered by a nationwide or worldwide special salary rate. On the other hand, an entitlement to an adjusted annual rate of pay continued under § 531.106 or § 531.307 will continue at the same dollar amount if an employee's official duty station is moved voluntarily or involuntarily to another IGA or special pay adjustment area, as applicable, where the employee's position will be covered by a nationwide or worldwide special salary rate.

An agency suggested that an employee retain a locality rate of pay when involuntarily downgraded within a locality pay area. As noted above under "Locality Pay for Employees Receiving Special Rates," locality pay must be paid on top of a retained rate of pay. The agency's suggestion would pyramid the locality-based comparability payment on top of a retained rate that was itself based on the locality rate of the higher grade. Under the final regulations, the retained rate will be based on the underlying GS rate, and locality pay will then be based on the retained rate of pay.

Two agencies recommended that the final regulations indicate that lump-sum payments for accumulated and accrued annual leave under subchapter VI of chapter 55, United States Code, must include the locality pay an employee would have received had he or she remained in Federal service. OPM has adopted this recommendation and has

made conforming amendments to the regulations for interim geographic adjustments and special pay adjustments for law enforcement officers. (See §§ 531.103(d), 531.304(d), and 531.606(d).)

An agency recommended that the regulations specifically state that locality pay will be basic pay for purposes of the Thrift Savings Plan (TSP) under chapter 84 of title 5, United States Code, as well as the premium pay limitations in 5 U.S.C. 5547. The law specifies that locality pay will be basic pay "for purposes of retirement under chapters 83 or 84" (of title 5, U.S.C.), and the TSP is authorized by chapter 84. Although the final regulations do not specifically mention the TSP, they encompass the TSP by referring to chapters 83 or 84 of title 5, United States Code. (See §§ 531.103(b)(1), 531.304(b)(1), and 531.606(b)(1)). With regard to the comment about premium pay limitations, § 531.606(b)(3) of the final regulations states that locality pay will be considered basic pay for premium pay purposes, including the computation of premium pay limitations under 5 U.S.C. 5547.

Two agencies recommended that OPM include a list of personnel actions for which a locality rate of pay is not basic pay. Lists of purposes for which a locality rate of pay is basic pay, and for which IGA adjusted annual rates of pay and special law enforcement adjusted rates of pay are basic pay, are included in the regulations. The regulations have been revised to clarify that the same lists apply for IGA adjusted annual rates of pay and special law enforcement adjusted rates of pay that are continued under §§ 531.106(a) or 531.307(a), respectively. (See §§ 531.103(b) and 531.304(b).) In addition, the final regulations also include a number of technical and editorial corrections intended to clarify the intent of the proposed regulations.

Locality rates of pay, IGA adjusted annual rates of pay, special law enforcement adjusted rates of pay, and IGA or special law enforcement adjusted rates of pay that are continued under § 531.106(a) or § 531.307(a), respectively, are not to be used for any other pay administration purposes, such as setting pay when an employee is promoted, determining an employee's "highest previous rate," administering within-grade increases, determining supervisory differentials, and for grade and pay retention purposes. Instead, GS rates of basic pay, retained rates of pay, LEO special rates under section 403 of FEPCA, or special salary rates authorized by OPM under 5 U.S.C. 5305, as applicable, are used to set pay for these other personnel actions. (Please note, however, that OPM regulations generally preclude using special salary rates to determine an employee's "highest previous rate." See 5 CFR 531.203(d)(2).)

An agency commented that the definition of local special salary rate in § 531.301 did not appear in the January 1, 1993, revision of title 5, Code of Federal Regulations. (The final rule deletes this definition.) The definition was added by interim regulations on special pay adjustments for law enforcement officers that were published in the **Federal Register** on January 8, 1993 (58 FR 3200).

A professional association asked OPM to clarify the phrase "equivalent increase in pay within the meaning of section 5335 of title 5, United States Code" (§ 531.606(h)). An "equivalent increase" means an increase or increases in an employee's rate of basic pay equal to or greater than the difference between the rate of pay for the GS grade and step occupied by the employee and the rate of pay for the next higher step of that grade. (See 5 CFR 531.403.) Under 5 U.S.C. 5335(a), an employee normally begins a new waiting period for within-grade increase purposes when he or she receives an increase in pay equal to or greater than the amount of a within-grade increase.

An agency recommended that the regulations clarify what happens if the locality pay percentage decreases within a locality pay area. In the event of a reduction in the percentage rate of a locality payment, OPM will issue regulations or guidance to agencies as needed.

Comments Beyond the Scope of These Regulations

Several individuals opposed the implementation of locality pay, citing reasons such as the impact on the Federal budget and the adequacy of special salary rates. Since the law mandates a locality pay system for GS employees, such comments are beyond the scope of these regulations.

A professional association raised several questions concerning the precise method of calculating the locality pay percentage for each locality pay area. Such methodological issues were addressed in the report of the President's Pay Agent, which was sent to the President on November 30, 1993.

Several commenters requested the extension of locality payments to employees under non-GS pay systems, such as administrative law judges and members of the Senior Executive Service, the Foreign Service, and members of Boards of Contract Appeals. By Executive Order 12883 of November 29, 1993, the President has delegated to the President's Pay Agent his authority to extend locality-based comparability payments to employees under non-GS pay systems. On December 21, 1993, the Pay Agent determined that locality-based comparability payments should be extended to employees in certain categories of positions covered by non-GS pay systems. Further information about this determination has been provided to Federal agencies separately.

An employee asked whether the "dollar amount" of a pay increase for an employee whose adjusted annual rate of pay is continued under § 531.106(a) is an increase in the GS rate or the nationwide or worldwide special salary rate. The supplementary information for the proposed regulations clarified that this pay increase is the dollar amount of the "general adjustment under 5 U.S.C. 5303,"—i.e., the dollar amount of the increase in the GS rate of basic pay or, if applicable, a special rate for LEO's under section 403 of FEPCA.

Requests for Additional Information and Examples

Several commenters asked OPM to provide additional explanatory and clarifying information—such as training materials and computation and pay administration examples. OPM plans to provide agencies with additional explanatory information in the near future. An agency asked OPM to develop a computer-friendly pay table for each locality pay area. OPM is currently developing such pay tables.

Waiver of Delay in Effective Date

Pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists for making these rules effective in less than 30 days. Section 305(b) of FEPCA provides that "the first calendar year in which comparability payments under section 5304 of title 5, United States Code (as amended by this Act), are paid shall be the calendar year beginning on January 1, 1994." These regulations are being made effective on the first day of the first pay period beginning on or after January 1, 1994, in order to carry out that statutory requirement.

E.O. 12291, Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they apply only to Federal agencies and employees.

List of Subjects

5 CFR Part 531

Government employees, Wages.

U.S. Office of Personnel Management.

James B. King,

Director.

Accordingly, OPM is amending 5 CFR part 531 of title 5, Code of Federal Regulations, as follows:

PART 531—PAY UNDER THE GENERAL SCHEDULE

1. The authority citation for part 531 is revised to read as follows:Q04

Authority: 5 U.S.C. 5115, 5307, 5338, and chapter 54; E.O. 12748, 56 FR 4521, February 4, 1991, 3 CFR 1991, Comp., p. 316;

Subpart A also issued under section 302 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), 104 Stat. 1462, 5 U.S.C. 5304, 5305, and 5553, and E.O. 12786, 56 FR 67453, December 30, 1991, 3 CFR 1991 Comp., p 376;

Subpart B also issued under 5 U.S.C. 5303(g), 5333, 5334(a), 5402, and 7701(b)(2);

Subpart C also issued under section 404 of FEPCA, 104 Stat. 1466, section 3(7) of Pub. L. 102–378 (October 2, 1992), section 302 of FEPCA, 104 Stat. 1462, and 5 U.S.C. 5304, 5305, and 5553;

Subpart D also issued under 5 U.S.C. 5335(g), and 7701(b)(2);

Subpart E also issued under 5 U.S.C. 5336;

Subpart F also issued under 5 U.S.C. 5304, 5305(g)(1), and 5553, and E.O. 12883, 58 FR 63281, November 29, 1993.

Subpart A—Interim Geographic Adjustments

2. In § 531.101, the definition of *Local special salary rate* is removed, and the definition of *Scheduled annual rate of pay* is revised to read as follows:

§ 531.101 Definitions.

* * * * *

Scheduled annual rate of pay means—

(1) The General Schedule rate of basic pay for the employee's grade and step (or relative position in the rate range), including a special rate for law enforcement officers under section 403 of the Federal Employees Pay Comparability Act of 1990 (FEPCA) (Pub. L. 101–509), but exclusive of a special salary rate established under 5 U.S.C. 5305 or similar provision of law (other than section 403 of FEPCA), an adjusted annual rate of pay continued under § 531.106, a "special law enforcement adjusted rate of pay" under subpart C of this part (including a rate continued under § 531.307), a "locality rate of pay" under subpart F of this part, or additional pay of any kind;

(2) For a GM employee (as defined in § 531.202) who is receiving a special salary rate established under 5 U.S.C. 5305 or similar provision of law, the rate of pay resulting from the following computation—

(i) Using the special salary rate schedule established under 5 U.S.C. 5305 or similar provision of law, subtract the dollar amount for step 1 of the employee's grade on the special salary rate schedule from the dollar amount for the employee's special salary rate; and

(ii) Add the result of paragraph (2)(i) of this definition to the dollar amount for step 1 of the employee's grade on the General Schedule; or

(3) A retained rate of pay under part 536 of this chapter, 5 CFR 359.705, or 5 U.S.C. 5334(b)(2), if applicable.

3. In § 531.103, paragraphs (a), (b) introductory text, (b)(1), (d), and (f) are revised, and a new paragraph (k) is added, to read as follows:

§ 531.103 Administration of adjusted rates of pay.

(a) An employee shall receive the greatest of—

(1) His or her rate of basic pay, including any applicable special salary rate established under 5 U.S.C. 5305 or similar provision of law or special rate for law enforcement officers under section 403 of FEPCA;

(2) An adjusted annual rate of pay under this subpart, where applicable, including an adjusted annual rate of pay continued under § 531.106;

(3) A "special law enforcement adjusted rate of pay" under subpart C of this part, where applicable, including a "special law enforcement adjusted rate of pay" continued under § 531.307; or

(4) A "locality rate of pay" under subpart F of this part, where applicable.

(b) An adjusted annual rate of pay and an adjusted annual rate of pay that is continued under § 531.106(a) are considered basic pay for the purpose of computing—

(1) Retirement deductions and benefits under chapters 83 or 84 of title 5, United States Code;

* * * * *

(d) An adjusted rate of pay is paid only for those hours for which an employee is in a pay status, except that an adjusted rate of pay shall be included in a lump-sum payment for annual leave under 5 U.S.C. 5551 or 5552.

* * * * *

(f) Except as provided in paragraph (g) of this section, entitlement to an adjusted annual rate of pay under this subpart terminates on the date—

(1) An employee's official duty station is no longer located in an interim geographic adjustment area;

(2) An employee is no longer in a position covered by this subpart;

(3) An employee separates from Federal service;

(4) An employee's special salary rate under 5 U.S.C. 5305 or similar provision of law (other than section 403 of FEPCA) exceeds his or her adjusted annual rate of pay under this subpart;

(5) An employee's "special law enforcement adjusted rate of pay" under subpart C of this part exceeds his or her adjusted annual rate of pay under this subpart; or

(6) An employee's "locality rate of pay" under subpart F of this part exceeds his or her adjusted annual rate of pay under this subpart.

* * * * *

(k) When a employee's adjusted annual rate of pay under this subpart is greater than any applicable "locality rate of pay" under subpart F of this part or special salary rate under 5 U.S.C. 5305 or similar provision of law (other than section 403 of FEPCA), the payment of the rate resulting from the comparison required by paragraph (a) of this section shall be deemed to have reduced the interim geographic adjustment payable under section 302 of FEPCA, as authorized by section 302(d)(2) or 302(e) of FEPCA, as the case may be.

4. A new § 531.106 is added to read as follows:

§ 531.106 Continuation of an adjusted annual rate of pay.

(a) Except as provided in paragraph (c) of this section, the dollar amount of an adjusted annual rate of pay that was calculated under regulations which included nationwide or worldwide special salary rates established under 5 U.S.C. 5305 in the definition of "scheduled annual rate of pay" shall not be reduced.

(b) At the time of an adjustment in pay under 5 U.S.C. 5303, an adjusted annual rate of pay continued under paragraph (a) of this section shall be increased by the lesser of—

(1) The dollar amount of the adjustment (including a zero adjustment) made under 5 U.S.C. 5303 in the General Schedule rate of basic pay for the employee's grade and step (or relative position in the rate range); or

(2) The dollar amount of the adjustment (including a zero adjustment) in the special salary rate applicable to the employee as a result of the annual review of special rates required by 5 CFR 530.304.

(c) An adjusted annual rate of pay that is continued under paragraph (a) of this section terminates on the date any of the conditions specified in § 531.103(f) is satisfied or on the date an employee is

reduced in grade or is no longer in a position covered by a nationwide or worldwide special rate authorization (or, in the event of the conversion of a nationwide or worldwide special rate authorization to a local special rate authorization, a position covered by the new local special rate authorization).

Subpart C—Special Pay Adjustments for Law Enforcement Officers

5. In § 531.301, the definition of local special salary rate is removed, and the definition of scheduled annual rate of pay is revised to read as follows:

§ 531.301 Definitions.

* * * * *

Scheduled annual rate of pay means—

(1) The General Schedule rate of basic pay for the employee's grade and step (or relative position in the rate range), including a special rate for law enforcement officers under section 403 of the Federal Employees Pay Comparability Act of 1990 (FEPCA) (Pub. L. 101–509), but exclusive of a special salary rate established under 5 U.S.C. 5305 or similar provision of law (other than section 403 of FEPCA), an "adjusted annual rate of pay" under subpart A of this part (including a rate continued under § 531.106), a "locality rate of pay" under subpart F of this part, or additional pay of any kind;

(2) For a GM employee (as defined in § 531.202) who is receiving a special salary rate under 5 U.S.C. 5305 or similar provision of law, the rate of pay resulting from the following computation—

(i) Using the special salary rate schedule established under 5 U.S.C. 5305 or similar provision of law, subtract the dollar amount for step 1 of the employee's grade on the special salary rate schedule from the dollar amount for the employee's special salary rate; and

(ii) Add the result of paragraph (2)(i) of this definition to the dollar amount for step 1 of the employee's grade on the General Schedule; or

(3) A retained rate of pay under part 536 of this chapter, 5 CFR 359.705, or 5 U.S.C. 5334(b)(2), if applicable.

* * * * *

6. In § 531.304, paragraphs (a), (b) introductory text, (b)(1), (d), and (f) are revised, and a new paragraph (k) is added, to read as follows:

§ 531.304 Administration of special law enforcement adjusted rates of pay.

(a) A law enforcement officer shall receive the greatest of—

(1) His or her rate of basic pay, including any applicable special salary rate established under 5 U.S.C. 5305 or similar provision of law or special rate for law enforcement officers under section 403 of FEPCA;

(2) An "adjusted annual rate of pay" under subpart A of this part, where applicable, including an "adjusted annual rate of pay" continued under § 531.106;

(3) A special law enforcement adjusted rate of pay under this subpart, where applicable, including a special law enforcement adjusted rate of pay continued under § 531.307; or

(4) A "locality rate of pay" under subpart F of this part, where applicable.

(b) A special law enforcement adjusted rate of pay and a special law enforcement adjusted rate of pay that is continued under § 531.307(a) are considered basic pay for the purpose of computing—

(1) Retirement deductions and benefits under chapters 83 or 84 of title 5, United States Code;

* * * * *

(d) A special law enforcement adjusted rate of pay is paid only for those hours for which a law enforcement officer is in a pay status, except that a special law enforcement adjusted rate of pay shall be included in a lump-sum payment for annual leave under 5 U.S.C. 5551 or 5552.

* * * * *

(f) Except as provided in paragraph (g) of this section, entitlement to a special law enforcement adjusted rate of pay under this subpart terminates on the date—

(1) An employee's official duty station is no longer located in a special pay adjustment area;

(2) An employee is no longer in a position covered by this subpart;

(3) An employee separates from Federal service;

(4) An employee's special salary rate under 5 U.S.C. 5305 or similar provision of law (other than section 403 of FEPCA) exceeds his or her special law enforcement adjusted rate of pay under this subpart; or

(5) An employee's "locality rate of pay" under subpart F of this subpart exceeds his or her special law enforcement adjusted rate of pay under this subpart.

* * * * *

(k) When an employee's special law enforcement adjusted rate of pay under this subpart is greater than any applicable "adjusted annual rate of pay" under subpart A of this part, "locality rate of pay" under subpart F of this part, or special salary rate under 5 U.S.C. 5305 or similar provision of law (other than section 403 of FEPCA), the payment of the rate resulting from the comparison required by paragraph (a) of this section shall be deemed to have reduced the special pay adjustment for law enforcement officers payable under section 404 of FEPCA, as authorized by section 404(a) of FEPCA.

7. A new § 531.307 is added to read as follows:

§ 531.307 Continuation of a special law enforcement adjusted rate of pay.

(a) Except as provided in paragraphs (c) and (d) of this section, the dollar amount of a special law enforcement adjusted rate of pay that was calculated under regulations which included nationwide or worldwide special salary rates established under 5 U.S.C. 5305 in the definition of "scheduled annual rate of pay" shall not be reduced.

(b) At the time of an adjustment in pay under 5 U.S.C. 5303, a special law enforcement adjusted rate of pay continued under paragraph (a) of this section shall be increased by the lesser of—

(1) The dollar amount of the adjustment (including a zero adjustment) made under 5 U.S.C. 5303 in the General Schedule rate of basic pay for the employee's grade and step (or relative position in the rate range); or

(2) The dollar amount of the adjustment (including a zero adjustment) in the special salary rate applicable to the employee as a result of the annual review of special rates required by 5 CFR 530.304.

(c) When an employee who is receiving a special law enforcement adjusted rate of pay continued under paragraph (a) of this section moves to a position in another special pay adjustment area to which a lesser special pay adjustment factor is applicable under § 531.302(a), the continued rate shall be reduced. The reduced continued rate shall be derived by—

(1) Determining the special law enforcement adjusted rate of pay to which the employee would have been entitled immediately before the employee's continued rate was first established if the special pay adjustment factor for the new area had been applicable; and

(2) Adjusting that rate as required under paragraph (b) of this section during the intervening period.

(d) A special law enforcement adjusted rate of pay that is continued under this section terminates on the date any of the conditions specified in § 531.304(f) is satisfied or on the date an employee is reduced in grade or is no longer in a position covered by a

nationwide or worldwide special rate authorization (or, in the event of the conversion of a nationwide or worldwide special rate authorization to a local special rate authorization, a position covered by the new local special rate authorization).

8. A new subpart F is added to read as follows:

Subpart F—Locality-Based Comparability Payments

Sec.

Subpart F—Locality-Based Comparability Payments

§ 531.601 Purpose.

This subpart provides regulations to implement 5 U.S.C. 5304, which authorizes locality-based comparability payments to reduce pay disparities with non-Federal workers within each locality when the locality is determined to have a pay disparity of greater than 5 percent. These regulations must be read together with 5 U.S.C. 5304.

§ 531.602 Definitions.

In this subpart:

CMSA means a Consolidated Metropolitan Statistical Area, as defined by the Office of Management and Budget (OMB).

Continental United States means the several States and the District of Columbia, but does not include Alaska or Hawaii.

Employee means—

(1) An employee in a position to which subchapter III of chapter 53 of title 5, United States Code, applies and whose official duty station is located in a locality pay area within the continental United States, including a GM employee (as defined in § 531.202) and an employee in a position authorized by 5 CFR 213.3102(w) whose rate of basic pay is established under the General Schedule; and

(2) An employee in a category of positions described in 5 U.S.C. 5304(h)(1) (A), (B), (D), or (E) for which the President (or his designee) has authorized locality-based comparability payments under 5 U.S.C. 5304(h)(2) and whose official duty station is located in a locality pay area.

General Schedule means the basic pay schedule established under 5 U.S.C. 5332, as adjusted by the President under 5 U.S.C. 5303.

Locality pay area means an area listed in § 531.603 of this part, as established and modified under 5 U.S.C. 5304 by the Pay Agent designated by the President under 5 U.S.C. 5304(d)(1).

Locality rate of pay means an employee's scheduled annual rate of pay increased by the percentage determined under § 531.604(a) and rounded to the nearest whole dollar, counting 50 cents and over as the next higher dollar.

MSA means a Metropolitan Statistical Area, as defined by the Office of Management and Budget (OMB).

Official duty station means the duty station for an employee's position of record as indicated on his or her most recent notification of personnel action.

Scheduled annual rate of pay means—

(1) The General Schedule rate of basic pay for the employee's grade and step (or relative position in the rate range), including a special rate for law enforcement officers under section 403 of the Federal Employees Pay Comparability Act of 1990 (FEPCA) (Pub. L. 101–509), but *exclusive of* a special salary rate established under 5 U.S.C. 5305 or similar provision of law (other than section 403 of FEPCA), an "adjusted annual rate of pay" under subpart A of this part (including a rate continued under § 531.106), a "special law enforcement adjusted rate of pay" under subpart C of this part (including a rate continued under § 531.307), or additional pay of any kind;

(2) For a GM employee (as defined in § 531.202) who is receiving a special salary rate under 5 U.S.C. 5305 or similar provision of law, the rate of pay resulting from the following computation—

(i) Using the special salary rate schedule established under 5 U.S.C. 5305 or similar provision of law, subtract the dollar amount for step 1 of the employee's grade on the special salary rate schedule from the dollar amount for the employee's special salary rate; and

(ii) Add the result of paragraph (2)(i) of this definition to the dollar amount for step 1 of the employee's grade on the General Schedule;

(3) The retained rate of pay under part 536 of this chapter, 5 CFR 359.705, or 5 U.S.C. 5334(b)(2), if applicable; or

(4) The rate of basic pay for an employee in a category of positions described in 5 U.S.C. 5304(h)(1) (A), (B), (D), or (E) for which the President (or his designee) has authorized locality-based comparability payments under 5 U.S.C. 5304(h)(2).

§ 531.603 Locality pay areas.

(a) Locality rates of pay under this subpart shall be payable to employees whose official duty stations are located in the locality pay areas listed in paragraph (b) of this section.

(b) The following are locality pay areas for the purpose of this subpart:

(1) Atlanta, GA—consisting of the Atlanta, GA MSA;

(2) Boston-Worcester-Lawrence, MA–NH–ME–CT—consisting of the Boston-Worcester-Lawrence, MA–NH–ME–CT CMSA;

(3) Chicago-Gary-Kenosha, IL–IN–WI—consisting of the Chicago-Gary-Kenosha, IL–IN–WI CMSA;

(4) Cincinnati-Hamilton, OH–KY–IN—consisting of the Cincinnati-Hamilton, OH–KY–IN CMSA;

(5) Cleveland-Akron, OH—consisting of the Cleveland-Akron, OH CMSA;

(6) Dallas-Fort Worth, TX—consisting of the Dallas-Fort Worth, TX CMSA;

(7) Dayton-Springfield, OH—consisting of the Dayton-Springfield, OH MSA;

(8) Denver-Boulder-Greeley, CO—consisting of the Denver-Boulder-Greeley, CO CMSA;

(9) Detroit-Ann Arbor-Flint, MI—consisting of the Detroit-Ann Arbor-Flint, MI CMSA;

(10) Houston-Galveston-Brazoria, TX—consisting of the Houston-Galveston-Brazoria, TX CMSA;

(11) Huntsville, AL—consisting of the Huntsville, AL MSA;

(12) Indianapolis, IN—consisting of the Indianapolis, IN MSA;

(13) Kansas City, MO–KS—consisting of the Kansas City, MO-KS MSA;

(14) Los Angeles-Riverside-Orange County, CA—consisting of the Los Angeles-Riverside-Orange County, CA CMSA, plus Santa Barbara County, CA, and that portion of Edwards Air Force Base, CA, not located within the Los Angeles-Riverside-Orange County, CA CMSA;

(15) Memphis, TN–AR–MS—consisting of the Memphis, TN–AR–MS MSA;

(16) New York-Northern New Jersey-Long Island, NY–NJ–CT–PA—consisting of the New York-Northern New Jersey-Long Island, NY–NJ–CT–PA CMSA;

(17) Norfolk-Virginia Beach-Newport News, VA–NC—consisting of the Norfolk-Virginia Beach-Newport News, VA–NC MSA;

(18) Oklahoma City, OK—consisting of the Oklahoma City, OK MSA;

(19) Philadelphia-Wilmington-Atlantic City, PA–NJ–DE–MD—consisting of the Philadelphia-Wilmington-Atlantic City, PA–NJ–DE–MD CMSA;

(20) Sacramento-Yolo, CA—consisting of the Sacramento-Yolo, CA CMSA;

(21) St. Louis, MO–IL—consisting of the St. Louis, MO–IL MSA;

(22) Salt Lake City-Ogden, UT—consisting of the Salt Lake City-Ogden, UT MSA;

(23) San Antonio, TX—consisting of the San Antonio, TX MSA;

(24) San Diego, CA—consisting of the San Diego, CA MSA;

(25) San Francisco-Oakland-San Jose, CA—consisting of the San Francisco-Oakland-San Jose, CA CMSA;

(26) Seattle-Tacoma-Bremerton, WA—consisting of the Seattle-Tacoma-Bremerton, WA CMSA;

(27) Washington-Baltimore, DC–MD–VA–WV—consisting of the Washington-Baltimore, DC–MD–VA–WV CMSA, plus St. Mary's County, MD; and

(28) Rest of U.S.—consisting of those portions of the continental United States not located within another locality pay area.

§ 531.604 Determining locality rates of pay.

(a) To determine the locality rate of pay payable to an employee, the applicable scheduled annual rate of pay shall be increased by the percentage authorized by the President for the locality pay area in which the employee's official duty station is located.

(b) Except as provided in paragraph (c) of this section, locality rates of pay may not exceed the rate of basic pay payable for level IV of the Executive Schedule.

(c) The locality rates of pay approved by the President for an employee in a position described in 5 U.S.C. 5304(h)(1) (A)–(E), or in a position under 5 U.S.C. 5304(h)(1)(F) which the President or his designee may determine, may not exceed the rate of basic pay payable for level III of the Executive Schedule.

§ 531.605 Computation of hourly, daily, weekly, and biweekly locality rates of pay.

When it is necessary to convert an annual locality rate of pay to an hourly, daily, weekly, or biweekly rate, the following methods apply:

(a) To derive an hourly rate, divide the annual locality rate of pay by 2,087 and round to the nearest cent, counting one-half cent and over as the next higher cent;

(b) To derive a daily rate, multiply the hourly rate by the number of daily hours of service required by the employee's basic daily tour of duty;

(c) To derive a weekly or biweekly rate, multiply the hourly rate by 40 or 80, as the case may be.

§ 531.606 Administration of locality rates of pay.

(a) An employee shall receive the greatest of—

(1) His or her rate of basic pay, including any applicable special salary rate established under 5 U.S.C. 5305 or similar provision of law or special rate for law enforcement officers under section 403 of FEPCA;

(2) An "adjusted annual rate of pay" under subpart A of this part, where applicable, including an "adjusted annual rate of pay" continued under § 531.106;

(3) A "special law enforcement adjusted rate of pay" under subpart C of this part, where applicable, including a "special law enforcement adjusted rate of pay" continued under § 531.307; or

(4) A locality rate of pay under this subpart, where applicable.

(b) A locality rate of pay is considered basic pay for the purpose of computing—

(1) Retirement deductions and benefits under chapters 83 or 84 of title 5, U.S. Code;

(2) Life insurance premiums and benefits under parts 870, 871, 872, and 873 of this chapter;

(3) Premium pay under subparts A and I of part 550 of this chapter (including the computation of limitations on premium pay under 5 U.S.C. 5547, overtime pay under 5 U.S.C. 5542(a), compensatory time off under 5 U.S.C. 5543, and standby duty pay under 5 U.S.C. 5545(c)(1));

(4) Severance pay under subpart G of part 550 of this chapter; and

(5) Advances in pay under subpart B of part 550 of this chapter.

(c) When an employee's official duty station is changed to a different locality pay area, the employee's entitlement to the locality rate of pay for the new locality pay area begins on the effective date of the change in official duty station.

(d) A locality rate of pay is paid only for those hours for which an employee is in a pay status, except that a locality rate of pay must be included in a lump-sum payment for annual leave under 5 U.S.C. 5551 or 5552.

(e) A locality rate of pay shall be adjusted as of the effective date of any change in the applicable scheduled annual rate of pay.

(f) Except as provided in paragraph (g) of this section, entitlement to a locality rate of pay established for a locality pay area under this subpart terminates on the date—

(1) An employee's official duty station is no longer in the locality pay area;

(2) An employee is no longer in a position covered by this subpart;

(3) An employee separates from Federal service; or

(4) An employee's special salary rate under 5 U.S.C. 5305 or similar provision of law (other than section 403 of FEPCA) exceeds his or her locality rate of pay.

(g) In the event of a change in the geographic coverage of a locality pay area (as a result of a change made by OMB in the definition of an MSA or CMSA or as a result of a change made by the President's Pay Agent in the definition of a locality pay area), the effective date of the change in an employee's entitlement to a locality rate of pay under this subpart shall be the first day of the first applicable pay period beginning on or after the date on which the change in geographic coverage is made effective.

(h) Payment of, or an increase in, a locality rate of pay is not an equivalent increase in pay within the meaning of section 5335 of title 5, United States Code.

(i) A locality rate of pay is included in an employee's "total remuneration," as defined in 5 CFR 551.511(b), and "straight time rate of pay," as defined in 5 CFR 551.512(b), for the purpose of computations under the Fair Labor Standards Act of 1938, as amended.

(j) Reduction or termination of a locality rate of pay under paragraph (f) of this section is not an adverse action for the purpose of subpart D of part 752 of this chapter or an action under 5 CFR 930.214.

(k) When an employee's locality rate of pay under this subpart is greater than any applicable special salary rate under 5 U.S.C. 5305 or similar provision of law (other than section 403 of FEPCA), the payment of the rate resulting from the comparison required by paragraph (a) of this section is deemed to have reduced the locality rate of pay payable under 5 U.S.C. 5304, as authorized by 5 U.S.C. 5305(g)(1).

§ 531.607 Reports.

The Office of Personnel Management may require agencies to report pertinent information concerning the administration of payments under this subpart.

[FR Doc. 93–32009 Filed 12–29–93; 8:45 am]
BILLING CODE 6325–01–M

OFFICE OF GOVERNMENT ETHICS

5 CFR Parts 2600, 2636, 2637, and 2638

RINs 3209–AA13, 3209–AA14

Corrections and Updating to Certain Regulations of the Office of Government Ethics

AGENCY: Office of Government Ethics (OGE).

ACTION: Final rule; technical amendments.

SUMMARY: The Office of Government Ethics is correcting and updating some of its regulations.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: William E. Gressman, Office of Government Ethics, telephone: 202–523–5757, FAX: 202–523–6325.

SUPPLEMENTARY INFORMATION: The Office of Government Ethics (OGE) is amending certain of its regulations, codified at 5 CFR parts 2600, 2636, 2637, and 2638, to correct a few minor typographical errors and update two authority citations.

Administrative Procedure Act

Pursuant to 5 U.S.C. 553 (b) and (d), as Director of the Office of Government Ethics, I find good cause exists for waiving the general notice of proposed rulemaking and 30-day delay in effectiveness as to these minor revisions. The notice and delayed effective date are being waived because these regulations concern matters of agency organization, practice and procedure and because it is in the public interest that correct and up-to-date information be contained in OGE's regulations in time for inclusion in the 1994 edition of title 5 of the CFR, if possible.

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this rulemaking will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this rulemaking does not contain information collection requirements that require the approval of the Office of Management and Budget.

List of Subjects in 5 CFR Parts 2600, 2636, 2637, and 2638

Administrative practice and procedure, Conflict of interests, Government employees, Reporting and recordkeeping requirements.

Approved: December 23, 1993.

Stephen D. Potts,

Director, Office of Government Ethics.

Accordingly, the Office of Government Ethics pursuant to its authority under title IV of the Ethics in Government Act is amending and correcting 5 CFR parts 2600, 2636, 2637, and 2638 as follows:

PART 2600—[AMENDED]

1. The authority citation for part 2600 is revised to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

PART 2636—[CORRECTED]

2. The authority citation for part 2636 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

§ 2636.305 [Corrected]

3. In § 2636.305, the heading of paragraph (b) *"Definitons"* is revised to read *"Definitions"*.

PART 2637—[AMENDED]

4. The authority citation for part 2637 is revised to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 207 (1988).

PART 2638—[CORRECTED]

5. The authority citation for part 2638 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

§ 2638.203 [Corrected]

6. In § 2638.203, the cross-reference in paragraph (b)(3) "§ 2634.604(c)" is revised to read "§ 2634.605(c)" and the word "effectivelly" in paragraph (b)(4) is revised to read "effectively".

§ 2638.204 [Amended]

7. In § 2638.204, the respective second cross-references in both paragraphs (a) and (b) "§ 2634.604(c)(2)" are revised to read "§ 2634.605(c)(2)".

[FR Doc. 93–31926 Filed 12–29–93; 8:45 am]

BILLING CODE 6345–01–U

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. 92–177–2]

Importation of Fruits and Vegetables

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are allowing a number of previously prohibited fruits and vegetables to be imported into the United States from certain parts of the world. All of the fruits and vegetables, as a condition of entry, will be subject to inspection, disinfection, or both, at the port of first arrival as may be required by a U.S. Department of Agriculture inspector. In addition, some of the fruits and vegetables will be required to undergo prescribed treatments for fruit flies or other injurious insects as a condition of entry, or to meet other special conditions. This action will provide the United States with additional kinds and sources of fruits and vegetables while continuing to provide protection against the introduction and dissemination of injurious plant pests by imported fruits and vegetables.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Mr. Frank E. Cooper, Senior Operations Officer, Port Operations, Plant Protection and Quarantine, APHIS, USDA, room 635, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436–8295.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR 319.56 through 319.56–8 (referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of injurious insects that are new to or not widely distributed within and throughout the United States.

On August 10, 1993, we published a document in the **Federal Register** (58 FR 42504–42513, Docket No. 92–177–1) in which we proposed to amend the regulations to allow additional fruits and vegetables to be imported into the United States from certain parts of the world under specified conditions. The importation of those fruits and vegetables had been prohibited because of the risk that the fruits and vegetables

could introduce injurious insects into the United States. We proposed to allow those importations at the request of various importers and foreign ministries of agriculture, and after determining that the fruits or vegetables could be imported under certain conditions without significant pest risk. In the proposed rule, we also proposed to modify the format of one section of the regulations for the sake of clarity.

We solicited comments on the proposed rule for a 30-day period ending on September 9, 1993. We received two comments by that date, from a State agricultural agency and a foreign embassy. One comment supported the proposed importation of peppers from Israel without commenting on any other aspect of the proposed rule. The other commenter had two concerns regarding our proposal.

First, the commenter pointed out the need for the Animal and Plant Health Inspection Service (APHIS) to constantly monitor and review the fruit fly detection programs used by other countries to establish designated fruit fly-free areas. We fully recognize this need, and have APHIS personnel stationed overseas to evaluate the effectiveness of the survey and regulatory programs that are used by foreign plant protection organizations to maintain recognized plant pest-free areas. APHIS has had experience with plant pest-free areas in several countries, and we believe that such areas are an important part of our approach to preventing the introduction of plant pests while allowing international trade in produce.

The commenter was also concerned that the burden of inspection and pest detection has been placed on APHIS inspectors who, due to a lack of resources, have only a limited ability to thoroughly inspect commodities arriving in the United States. Inspection at the port of first arrival is only one aspect of APHIS' approach to plant pest exclusion, and is never the sole means of plant pest exclusion for any commodity. Before a fruit or vegetable is approved for importation into the United States, a plant pest risk analysis is conducted for the commodity. If a plant pest risk is found to be associated with a commodity proposed for importation, APHIS then determines what, if any, measures can be taken to reduce the risk to a level that would allow the commodity to be safely imported into the United States. For example, in certain cases our regulations impose restrictions such as specific growing and shipping requirements or inspection in the country of origin. Certain commodities are required to be treated for pests at the point of origin, while in transit, or upon arrival in the United States. As a final precaution, all fruits and vegetables are subject to inspection at the port of first arrival. APHIS inspectors are aware of potential pest risks associated with a particular commodity and conduct their inspections accordingly. We consider the measures taken in the exporting countries, coupled with the safeguards required by the regulations, to be adequate to prevent the introduction of injurious plant pests into the United States.

Therefore, based on the rationale set forth in the proposed rule, we are adopting the provisions of the proposal as a final rule.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866.

This rule amends the regulations governing the importation of fruits and vegetables by allowing a number of previously prohibited fruits and vegetables to be imported into the United States under specified conditions. The importation of these fruits and vegetables had been prohibited because of the risk that they could introduce injurious plant pests into the United States. This rule revises the status of certain commodities from certain countries, allowing their importation into the United States for the first time.

Our changes are based on biological risk assessments that were conducted by APHIS at the request of various importers and foreign ministries of agriculture. The risk assessments indicate that the fruits or vegetables listed in this rule can, under certain conditions, be imported into the United States without significant plant pest risk. All of the fruits and vegetables, as a condition of entry, will be subject to inspection, disinfection, or both, at the port of first arrival as may be required by a U.S. Department of Agriculture (USDA) inspector. In addition, some of the fruits and vegetables in this rule will be required to undergo mandatory treatment for fruit flies or other injurious insects as a condition of entry, or to meet other special conditions. Thus, this action will provide the United States with additional kinds and sources of fruits and vegetables while continuing to provide protection against the introduction of injurious plant pests by imported fruits and vegetables.

Of the fruits and vegetables included in this rule, domestic production information is available only for basil, blueberries, carrots, limes, peppers, tomatoes, and watermelon.

Basil

Domestic commercial production of basil is centered largely in California, Florida, and Hawaii. Only Hawaii, however, reports its herb production. A total of 390,000 pounds of basil, with an estimated value of $715,000, was produced in Hawaii in 1991 (Hawaii Agriculture Statistics Service, Hawaii Department of Agriculture, "Hawaii Herbs," November 19, 1992). The number of farms producing basil is not known, nor is it known how many of the producers are considered to be small entities (annual gross receipts of $0.5 million or less, according to Small Business Administration [SBA] criteria).

This rule allows basil from Chile to be imported into the United States under certain conditions. Although Chile has not indicated the amount of basil it plans to export to the United States, we do not expect the importation of basil from Chile to have a significant economic impact on U.S. producers of the herb.

Blueberries

In the United States in 1987, 109.4 million pounds of cultivated blueberries were harvested on nearly 4,000 farms in 36 States. An additional 32.6 million pounds of wild blueberries were harvested on about 500 farms in 6 of those States (U.S. Department of Commerce, "1987 Census of Agriculture," Table 29). The total value of the 1987 blueberry harvest and the number of producers that meet the SBA's criteria for a small business (annual gross receipts of less than $0.5 million) are not known.

This rule allows blueberries from Bolivia and Mexico to be imported into the United States under certain conditions. APHIS does not anticipate that high volumes of blueberries will be imported from Bolivia and Mexico, so the economic impact of those importations on domestic blueberry producers is expected to be small.

Carrots

In 1987, a total of 1,580 U.S. farms harvested carrots (U.S. Department of Commerce, "1987 Census of Agriculture," Table 29); 960 of those farms were located in the 10 States that accounted for nearly 99 percent of domestic carrot production (USDA, National Agricultural Statistics Service [NASS], Agricultural Statistics Board [ASB], "1992 Vegetable Summary"). In 1991, domestic producers of carrots harvested approximately 1.9 billion pounds of carrots for sale as fresh,

which is about 69 percent of total domestic carrot production. The remaining carrots were sold for processing. The total value of the fresh carrot production was estimated at $281.6 million (USDA, NASS, ASB, "1992 Vegetable Summary"). The number of domestic carrot producers meeting SBA criteria for small entities—annual gross receipts of less than $0.5 million—is not known, but given the number of producers and the value of production, it is likely that most carrot producers could be classified as small entities.

This rule allows carrots from Peru to be imported into the United States under certain conditions. According to the United Nations Food and Agriculture Organization (FAO), Peru produced approximately 121.3 million pounds of carrots in 1991, which is about 6.3 percent of U.S. production (FAO, "FAO Production Year 1991," Volume 45). The United States imported approximately 137 million pounds of carrots in 1991, with about 23 percent (31.3 million pounds) coming from Mexico. Even if the volume of carrots imported into the United States from Peru approaches the level of carrot imports from Mexico—which is unlikely—that volume equals only 1.6 percent of domestic production and about 1.5 percent of the total carrot supply (domestic and imported) in the United States. Assuming that a 1.5 percent increase in the total carrot supply will lead to a 1.5 percent decrease in domestic carrot prices (i.e., unitary price elasticity), there would be a price decrease of about $0.22 per hundredweight, or $0.0022 per pound, from an original price of $14.60 per hundredweight (USDA, NASS, ASB, "1992 Vegetable Summary"). As a result, again assuming unitary price elasticity, domestic carrot production would decrease by about 29.2 million pounds, resulting in a revenue decrease of $8.5 million (less than a 3 percent decrease in total revenue) for domestic producers. Therefore, we expect that allowing carrots to be imported into the United States from Peru will have a negligible economic impact on U.S. carrot producers.

Limes

From April 1990 to March 1991, 127.6 million pounds of limes, with an estimated value of $27.9 million, were harvested in the United States (USDA, "Agricultural Statistics, 1991," Table 277). Ninety percent of domestically produced limes are grown in Florida, with the remainder being grown in Arizona, California, and Hawaii. It is likely that most U.S. lime producers could be considered small entities using SBA size criteria of annual gross receipts of less than $0.5 million.

This rule allows limes from Chile to be imported into the United States under certain conditions. APHIS experts expect that Chile will export no more than 4.4 million pounds of limes to the United States, which is about 4.5 percent of total U.S. lime imports, about 3.4 percent of domestic production, and about 2.0 percent of the total lime supply. Assuming unitary price elasticity, a 2.0 percent increase in the total lime supply will lead to a 2.0 percent decrease in the domestic price of limes, or about $0.38 per box on an original price of $19.21 per box (USDA, "Agricultural Statistics, 1991," Table 277). The corresponding decrease in U.S. lime production would be 125 million pounds, resulting in a maximum revenue decrease of $1.1 million (less than 4 percent) for domestic producers. Therefore, we anticipate that allowing the importation of limes from Chile will not have a significant economic impact on U.S. lime producers.

Peppers

In 1992, 1.3 billion pounds of bell peppers, with an estimated value of $368 million, were produced domestically for the fresh market (USDA, NASS, ASB, "1992 Vegetable Summary"). In 1987, a total of 9,403 farms reported harvesting peppers on a total of 100,521 acres. It is likely that most U.S. pepper producers could be considered small entities using SBA size criteria of annual gross receipts of less than $0.5 million.

This rule allows peppers from Israel and Poland to be imported into the United States under certain conditions. In 1991, Israel reported producing approximately 116.8 million pounds of green chilies and peppers (FAO, "FAO Production Yearbook, 1991"), which is roughly 8.7 percent of U.S. production. We anticipate that Israel will export no more than 400,000 pounds of peppers, which equals approximately 0.14 percent of current U.S. pepper imports, about 0.03 percent of current U.S. production, and about 0.02 percent of the total pepper supply in the United States (USDA, Economic Research Service [ERS], "Foreign Agricultural Trade of the United States [FATUS], Calendar Year 1991 Supplement"). Assuming that a 0.02 percent increase in the pepper supply will lead to corresponding 0.02 percent decreases in domestic price and production, there would be a $0.0068 per hundredweight price decrease (from an original price of $27.41 per hundredweight) and a production drop of about 330,000 pounds, which equals a revenue decrease of $180,000 or 0.05 percent. Therefore, we anticipate that allowing the importation of peppers from Israel will not have a significant economic impact on U.S. pepper producers.

Data regarding Polish pepper production and exports are not available. We anticipate, however, that Poland will not export significantly more peppers than are expected from Israel, so it is likely that allowing peppers to be imported into the United States from Poland will have only a negligible economic impact on U.S. pepper producers.

Tomatoes

In 1987, a total of 14,542 U.S. farms harvested tomatoes (U.S. Department of Commerce, "1987 Census of Agriculture"). The number of domestic tomato producers that meet SBA criteria for small entities—annual gross receipts of less than $0.5 million—is not known, but it is likely that most tomato producers could be classified as small entities. In 1991, domestic producers of tomatoes harvested approximately 3.4 billion pounds of tomatoes for sale as fresh, which makes up about 13 percent of total domestic tomato production. (The remaining 87 percent of tomatoes were sold for processing.) The total value of the fresh tomato production was estimated at $1.1 billion, about 57 percent of the total value of domestic tomato production (USDA, NASS, ASB, "1992 Vegetable Summary").

This rule allows tomatoes from Poland to be imported into the United States under certain conditions. According to FAO data, Poland produced approximately 913 million pounds of tomatoes in 1991, which is about 26.9 percent of U.S. fresh production (FAO, "FAO Production Yearbook, 1991"). The United States imported approximately 795.5 million pounds of fresh tomatoes in 1991, with about 98 percent coming from Mexico (USDA, ERS, "FATUS, Calendar Year 1991 Supplement"). Poland exported 3.3 million pounds of tomatoes in 1990, which is roughly 0.36 percent of its total production (FAO, "FAO Trade Yearbook, 1990"). We do not expect the volume of tomatoes imported into the United States from Poland to exceed 3.3 million pounds, which is about 0.42 percent of total U.S. tomato imports, about 0.10 percent of domestic production, and about 0.08 percent of the total tomato supply. Assuming that a 0.08 percent increase in the total tomato supply will lead to a 0.08 percent decrease in domestic tomato prices, there would be a price decrease of about $0.025 per hundredweight, or

$0.00025 per pound, from an original price of $31.80 per hundredweight (USDA, NASS, ASB, "1992 Vegetable Summary"). As a result, again assuming unitary price elasticity, there would be a decrease in domestic tomato production of about 2.7 million pounds, which would result in a revenue decrease of $1.7 million (less than a 0.16 percent decrease in total revenue) for domestic producers. Therefore, it is expected that allowing tomatoes to be imported into the United States from Poland will have a negligible economic impact on U.S. tomato producers.

Watermelon

In 1992, 3.5 billion pounds of watermelon, with an estimated value of $198.9 million, were produced domestically for the fresh market (USDA, NASS, ASB, "1992 Vegetable Summary"). In 1987, a total of 10,324 farms reported harvesting watermelon (U.S. Department of Commerce, "1987 Census of Agriculture"). It is likely that most U.S. watermelon producers could be considered small entities using SBA size criteria of annual gross receipts of less than $0.5 million.

This rule allows watermelon from Ecuador to be imported into the United States under certain conditions. According to FAO data, Ecuador produced approximately 132.3 million pounds of watermelon in 1990, which is about 3.8 percent of U.S. production (FAO, "FAO Production Yearbook, 1991"). The United States imported approximately 230.9 million pounds of fresh watermelon in 1991 (USDA, ERS, "FATUS, Calendar Year 1990 Supplement"). We do not expect the volume of watermelon imported into the United States from Ecuador will exceed 4.0 million pounds, which is about 1.73 percent of total U.S. watermelon imports, about 0.11 percent of domestic production, and about 0.11 percent of the total watermelon supply. Assuming a 0.11 percent increase in the total watermelon supply will lead to a 0.11 percent decrease in domestic watermelon prices, there would be a price decrease of about $0.0061 per hundredweight from an original price of $5.70 per hundredweight. As a result, again assuming unitary price elasticity, there would be a decrease in domestic watermelon production of about 3.8 million pounds, which would result in a revenue decrease of about $430,000 (less than 0.22 percent of total revenue) for domestic producers. Additionally, we expect that imports of watermelon from Ecuador will not occur during the domestic watermelon growing season, thus lessening the impact even more. Therefore, it is expected that allowing watermelon to be imported into the United States from Ecuador will have a negligible economic impact on U.S. watermelon producers.

The aggregate economic impact of this rule is expected to be positive. U.S. consumers will benefit from greater availability of fruits and vegetables. It is not likely that any U.S. producers, large or small, of fruits and vegetables will be affected in a significant way by the easing of importation restrictions on these particular commodities.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12778

This rule allows certain fruits and vegetables to be imported into the United States from certain parts of the world. State and local laws and regulations regarding the importation of fruits and vegetables under this rule will be preempted while the fruits and vegetables are in foreign commerce. Fresh fruits and vegetables are generally imported for immediate distribution and sale to the consuming public, and will remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. No retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

National Environmental Policy Act

An environmental assessment and finding of no significant impact have been prepared for this rule. The assessment provides a basis for the conclusion that the importation of fruits and vegetables under the conditions specified in this rule will not present a risk of introducing or disseminating plant pests and will not have a significant impact on the quality of the human environment. Based on the finding of no significant impact, the Administrator of the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

The environmental assessment and finding of no significant impact were prepared in accordance with:

(1) The National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*),

(2) Regulations of the Council on Environmental Quality for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508),

(3) USDA Regulations Implementing NEPA (7 CFR part 1b), and

(4) APHIS Guidelines Implementing NEPA (44 FR 50381–50384, August 28, 1979, and 44 FR 51272–51274, August 31, 1979).

Copies of the environmental assessment and finding of no significant impact may be obtained by writing to the individual listed under "**FOR FURTHER INFORMATION CONTACT.**"

Paperwork Reduction Act

This rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 319

Bees, Coffee, Cotton, Fruits, Honey, Imports, Incorporation by reference, Nursery Stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, 7 CFR part 319 is amended as follows:

PART 319—FOREIGN QUARANTINE NOTICES

3. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 150dd, 150ee, 150ff, 151–167, 450; 21 U.S.C. 136 and 136a; 7 CFR 2.17, 2.51, and 371.2(c).

4. In § 319.56–2, paragraph (j), the second and third sentences are removed and a new second sentence is added to read as follows:

§ 319.56–2 Restrictions on entry of fruits and vegetables.

* * * * *

(j) * * * Fruits and vegetables from Chile otherwise eligible for importation under this subpart may be imported from these areas without treatment for Medfly.

* * * * *

§ 319.56–2m [Amended]

5. In § 319.56–2m, in the section heading, the introductory text of the section, and paragraphs (a)(2), (c), and (e), the word "plumcot," is added immediately after the word "peaches," each time it appears.

§ 319.56–2s [Amended]

6. In § 319.56–2s, in the section heading; paragraphs (a), (b), (c)(1), and (c)(2); the introductory text of paragraph (d); paragraphs (d)(1)(ii), (e), and (f)(1); the introductory text of paragraph (g); and paragraph (g)(3), the word "plumcot," is added immediately after the word "peaches," each time it appears.

7. In § 319.56–2t, the table is amended by revising the heading in the first column to read "Country/locality"; revising the entry for "Korea" in the first column to read "South Korea" and moving that entry to the appropriate alphabetical order; revising the entry for "Trinidad" in the first column to read "Trinidad and Tobago"; and by adding, in alphabetical order, the following:

§ 319.56–2t Administrative instructions: conditions governing the entry of certain fruits and vegetables.

* * * * *

Country/locality	Common name	Botanical name	Plant part(s)
* *	*	* *	* *
Belize	Bay leaf	*Laurus nobilis*	leaf and stem
	Tarragon	*Artemisia dracunculus*	above ground parts
* *	*	* *	* *
Chile	Basil	*Ocimum* spp.	above ground parts
	Lucuma	*Manilkara sapota (=Lucuma mammosa)*	fruit (From Medfly-free areas only—see § 319.56–2[j].)
	Mountain papaya	*Carica pubescens (=C. candamarcensis).*	fruit (From Medfly-free areas—see § 319.56–2[j]. Fruit from outside Medfly-free areas must be treated in accordance with § 319.56–2x.)
	Oregano	*Origanum* spp.	leaf and stem
	Sandpear	*Pyrus pyrifolia*	fruit (From Medfly-free areas—see § 319.56–2[j]. Fruit from outside Medfly-free areas must be treated in accordance with § 319.56–2x.)
	Tarragon	*Artemisia dracunculus*	above ground parts
Colombia			
* *	*	* *	*
	Tarragon	*Artemisia dracunculus*	above ground parts
* *	*	* *	* *
Ecuador	Banana	*Musa* spp.	flower
	Chervil	*Anthriscus* spp.	leaf and stem
* *	*	* *	* *
Mexico			
* *	*	* *	*
	Bay leaf	*Laurus nobilis*	leaf and stem
	Blueberry	*Vaccinium* spp.	fruit
* *	*	* *	* *
	Lambsquarters	*Chenopodium* spp.	above ground parts
* *	*	* *	* *
Peru			
* *	*	* *	* *
	Carrot	*Daucus carota*	root
* *	*	* *	*
Philippines	Yam bean	*Pachyrhizus tuberosus* or *P. erosus*	root
Poland	Pepper	*Capsicum* spp.	fruit
	Tomato	*Lycopersicon esculentum*	fruit
* *	*	* *	* *
South Korea			
* *	*	* *	* *
	Chinese bellflower	*Platycodon grandiflorum*	root
* *	*	* *	* *
Thailand			
* *	*	* *	* *
	Turmeric	*Curcuma domestica*	leaf and stem

Country/locality	Common name	Botanical name	Plant part(s)
* *	*	* *	* *
Trinidad and Tobago	Lemongrass	*Cymbopogon citratus*	leaf and stem
* *	*	* *	* *
	Shield leaf	*Cecropia peltata*	leaf and stem
* *	*	* *	* *

8. Section 319.56–2u is amended as follows:

a. The section heading is revised as set forth below.

b. The text is designated as paragraph (a).

c. A new paragraph (b) is added to read as set forth below.

§ 319.56–2u Conditions governing the entry of pummelo and peppers from Israel.

* * * * *

(b) Peppers (fruit) (*Capsicum* spp.) from Israel may be imported into the United States only under the following conditions:

(1) The peppers have been grown in the Paran region of the Arava Valley by growers registered with the Israeli Department of Plant Protection and Inspection (DPPI).

(2) Malathion bait sprays shall be applied in the residential areas of Paran at 6- to 10-day intervals beginning not less than 30 days before the harvest of backyard host material in residential areas and shall continue through harvest.

(3) The peppers have been grown in insect-proof plastic screenhouses approved by the DPPI and APHIS. Houses shall be examined periodically by DPPI or APHIS personnel for tears in either plastic or screening.

(4) Trapping for Mediterranean fruit fly (Medfly) shall be conducted by DPPI throughout the year in the agricultural region along Arava Highway 90 and in the residential area of Paran. The capture of a single Medfly in a screenhouse will immediately cancel export from that house until the source of the infestation is delimited, trap density is increased, pesticide sprays are applied, or other measures acceptable to APHIS are taken to prevent further occurrences.

(5) Signs in English and Hebrew shall be posted along Arava Highway 90 stating that it is prohibited to throw out/discard fruits and vegetables from passing vehicles.

(6) The cartons in which the peppers are packaged must be stamped "Peppers not to be distributed outside of the following States: CT, DC, DE, IA, IL, IN, MA, MD, ME, MI, MN, NH, NJ, NY, OH, PA, RI, VT, WI, and WV."

(7) Sorting and packing of peppers shall be done in the insect-proof screenhouses in Paran.

(8) Transportation of the peppers from Paran to Tel Aviv Airport for export shall be in fruit fly-proof containers.

(9) The peppers shall be exported directly from Tel Aviv, by air, to the United States.

9. In § 319.56–2x, paragraph (a) is revised to read as follows:

§ 319.56–2x Administrative instructions; conditions governing the entry of certain fruits and vegetables for which treatment is required.

(a) The following fruits and vegetables may be imported into the United States only if they have been treated in accordance with the Plant Protection and Quarantine Treatment Manual, which is incorporated by reference at § 300.1 of this chapter:

Country/locality	*Common name*	*Botanical name*	*Plant part(s)*
Bolivia	Blueberry	*Vaccinium* spp.	fruit
Chile	Lime	*Citrus aurantifolia* and *C. latifolia*	fruit
	Mountain papaya	*Carica pubescens* (=*C. candamarcensis*).	fruit (Treatment for Mediterranean fruit fly [Medfly] not required if fruit is grown in Medfly free area [see § 319.56–2(j)].)
	Sandpear	*Pyrus pyrifolia*	fruit (Treatment for Mediterranean fruit fly [Medfly] not required if fruit is grown in Medfly free area [see § 319.56–2(j)].)
Greece	Kiwi	*Actinidia deliciosa*	fruit
	Tangerine	*Citrus reticulata*	fruit
Guatemala	Tuna	*Opuntia* spp.	fruit
Guyana	Apple	*Malus domestica*	fruit
Israel	Litchi	*Litchi chinensis*	fruit
	Loquat	*Eriobotrya japonica*	fruit
Jordan	Apple	*Malus domestica*	fruit
	Grape	*Vitis* spp.	fruit
	Persimmon	*Diospyros* spp.	fruit
Lebanon	Apple	*Malus domestica*	fruit
Panama	Bean, green and lima	*Phaseolus vulgaris* and *P. lunatus*	pod
Taiwan	Mango	*Mangifera indica*	fruit
Zimbabwe	Apple	*Malus domestica*	fruit
	Kiwi	*Actinidia deliciosa*	fruit
	Pear	*Pyrus communis*	fruit

* * * * *

10. Section 319.56–2y is amended as follows:

a. The section heading is revised as set forth below.

b. In the introductory text of paragraph (a), the words "and watermelon (fruit) (*Citrullus lanatus*)" are added immediately after the words "(*Cucumis melo*)".

c. In paragraphs (a)(1) and (a)(2), and in the first sentence of paragraph (a)(4), the words "or watermelon" are added immediately after the word "cantaloupe".

d. The second sentence of paragraph (a)(4) is revised to read as set forth below.

§ 319.56–2y Administrative instructions; conditions governing the entry of cantaloupe and watermelon from Ecuador.

(a) * * *

(4) * * * The boxes in which the cantaloupe or watermelon is packed must be stamped with the name of the commodity followed by the words "Not to be distributed in the following States or territories: AL, AS, AZ, CA, FL, GA, GU, HI, LA, MS, NM, PR, SC, TX, VI."

Done in Washington, DC, this 22nd day of December 1993.

Patricia Jensen,

Deputy Assistant Secretary, Marketing and Inspection Services.

[FR Doc. 93–31676 Filed 12–29–93; 8:45 am]

BILLING CODE 3410–34–P

Agricultural Marketing Service

7 CFR Part 944

[Docket No. FV93–944–3IFR]

Exemptions From Import Regulations for Specified Fruit Commodities

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule exempts imported avocados, grapefruit, kiwifruit, limes, olives, oranges, table grapes, and Tokay grapes from grade, size, quality, and maturity requirements if those commodities are to be used in certain specified outlets. These exemptions correspond to exemptions in effect for the same commodities under Federal marketing orders. Safeguards are specified to assure that such imports are utilized in a specified exempt outlet. This rule is being implemented in accordance with the North American Free Trade Agreement and under section 8e of the Agricultural Marketing Agreement Act of 1937, and makes the import regulations more consistent with applicable domestic marketing order regulations. Exempt uses include, but are not limited to, processing, livestock feed and donations to charity.

DATES: This interim final rule is effective January 1, 1994. Comments received by February 28, 1994, will be considered prior to finalization of the rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this rule to: Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523–S, Washington, DC 20090–6456 or by FAX at (202) 720–5698. Three copies of all written material shall be submitted. Copies will be made available for public inspection at the Office of the Docket Clerk during regular business hours. All comments should reference the docket number and the date and page number of this issue of the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Mark A. Hessel, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523–S, Washington, DC 20090–6456, telephone (202) 720–5127.

SUPPLEMENTARY INFORMATION: This action is being taken under Annex 703.2(23) of the North American Free Trade Agreement (NAFTA). This provision states that when domestic agricultural commodities have to meet quality requirements and processed forms are exempted from those requirements, the same treatment is to be provided to imports destined for processing as provided for domestic product destined for processing.

This action is also being taken under section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the Act, which provides that whenever certain specified commodities, including avocados, grapefruit, kiwifruit, limes, olives, oranges, table grapes, and Tokay grapes, are regulated under a Federal marketing order, imports of those commodities must meet the same or comparable grade, size, quality, and maturity requirements as those in effect for the domestically produced commodities.

The Act further provides that when two or more marketing orders for the same commodity produced in different areas are in effect, the imported commodity must meet the same grade, size, quality, and maturity requirements as the commodity produced in the area which the imported commodity is in most direct competition.

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility. Import regulations issued under the Act are based on those established under Federal marketing orders.

The following are the approximate number of importers of the listed commodities who will be affected by this action: avocados—20, grapefruit—20, kiwifruit—75, limes—25, olives—25, oranges—20, table grapes—70, Tokay grapes—none. Small agricultural service firms, which include importers, have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $3,500,000. The majority of these importers may be classified as small entities.

This interim final rule has been reviewed under Executive Order 12778, Civil Justice Reform. This action is not intended to have retroactive effect. This action will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this interim final rule.

The Department is taking this action primarily because NAFTA provides that imported goods destined for processing must be given no less favorable treatment than that afforded to domestic goods destined for processing. Under the Federal marketing orders covering avocados, grapefruit, kiwifruit, limes, olives, oranges, table grapes, and Tokay grapes, these commodities are exempt from established quality and size requirements if they are to be used in certain processing outlets. This rule provides similar exemptions for imported product destined for processing, consistent with NAFTA.

This rule also provides exemptions for these imported commodities to be

utilized in other exempt outlets. These additional exemptions are consistent with section 8e of the Act which requires imported avocados, grapefruit, kiwifruit, limes, olives, oranges, table grapes, and Tokay grapes to meet the same or comparable requirements established under domestic marketing orders for these commodities.

Some marketing orders provide additional exemptions for commodities sold at roadside stands, shipped directly to consumers, or exported. However, such exemptions are not issued for commodities offered for importation because such handling is impracticable for, or not applicable to, the importation process.

This rule revises the following 7 CFR sections:

944.28 Avocado Import Grade Regulation.
944.106 Grapefruit Regulation 6.
944.209 Lime Import Regulation 10.
944.312 Orange Import Regulation.
944.401 Olive Regulation 1.
944.503 Table Grape Import Regulation 4.
944.550 Kiwifruit Import Regulation.
944.605 Tokay Grape Import Regulation.

The avocado import grade regulation (7 CFR 944.28) is based on those in effect for avocados grown in Florida under Marketing Order No. 915 throughout the year. Under Marketing Order No. 915 any person may handle avocados without regard to established grade, size, quality, or maturity requirements provided that such avocados are handled for (1) consumption by charitable institutions; (2) distribution by relief agencies; (3) commercial processing into products; (4) seed; or (5) individual shipments of up to 55 pounds. Prior to issuance of this rule, the only exemption allowed under the avocado import regulation was that for individual shipments of up to 55 pounds. Thus, this action adds consumption by charitable institutions, distribution by relief agencies, seed, and commercial processing into products to the list of exemptions allowed under the avocado import regulation.

The grapefruit import regulation (7 CFR 944.106) is based on those in effect for grapefruit grown in Florida under Marketing Order No. 905 throughout the year. Under Marketing Order No. 905, any person may handle grapefruit without regard to established grade, size, quality, or maturity requirements provided that such grapefruit are handled for (1) consumption by charitable institutions; (2) distribution by relief agencies; (3) commercial processing into canned or frozen products or into a beverage base; (4) animal feed; or (5) individual shipments of up to 15 standard packed cartons (12 bushels). Prior to issuance of this rule, the only exemption allowed under the grapefruit import regulation was that for individual shipments of up to 15 standard packed cartons (12 bushels). Thus, this action adds consumption by charitable institutions, distribution by relief agencies, commercial processing into canned or frozen products or into a beverage base, and animal feed to the list of exemptions allowed under the grapefruit import regulation.

The lime import regulation (7 CFR 944.209) is based on those in effect for limes grown in Florida under Marketing Order No. 911 throughout the year. Under Marketing Order No. 911 any person may handle limes without regard to established grade, size, quality, or maturity requirements provided that such limes are handled for (1) consumption by charitable institutions; (2) distribution by relief agencies; (3) commercial processing into products; or (4) individual shipments of up to 55 pounds. Prior to issuance of this rule, the only exemption allowed under the lime import regulation was that for individual shipments of up to 250 pounds. Thus, this action adds consumption by charitable institutions, distribution by relief agencies, and commercial processing into products to the list of exemptions allowed under the lime import regulation.

The orange import regulation (7 CFR 944.312) is based on those in effect for oranges grown in Texas under Marketing Order No. 906 throughout the year. Under Marketing Order No. 906 any person may handle oranges without regard to established grade, size, quality, or maturity requirements provided that such oranges are handled for (1) consumption by charitable institutions; (2) distribution by relief agencies; (3) commercial processing into products; or (4) individual shipments of up to 400 pounds. Prior to issuance of this rule, the only exemption allowed under the orange import regulation was that for individual shipments of up to ten 7/10 bushels (400 pounds). Thus, this action adds consumption by charitable institutions, distribution by relief agencies, and commercial processing into products to the list of exemptions allowed under the orange import regulation.

The olive import regulation (7 CFR 944.401) is based on those in effect for olives grown in California under Marketing Order No. 932 throughout the year. Under Marketing Order No. 932 any person may handle olives without regard to established grade, size, quality, or maturity requirements provided that such olives are handled for processing into oil or donations to charitable institutions. Although there is no minimum quantity exemption for olives regulated under Marketing Order No. 932, an exemption is allowed under the olive import regulation for individual shipments up to 100 pounds. This action adds processing into oil and donations to charitable institutions to the list of exemptions allowed under the olive import regulation.

The table grape import regulation (7 CFR 944.506) is based on those in effect for table grapes grown in southeastern California under Marketing Order No. 925 from April 20 through August 15. Under Marketing Order No. 925 any person may handle table grapes without regard to established grade, size, quality, or maturity requirements provided that such table grapes are handled for processing into products. Currently, no imported shipments of table grapes are exempt from the import regulations. Thus, this action adds processing into products as an exemption allowed under the table grape import regulation.

The kiwifruit import regulation (7 CFR 944.550) is based on those in effect for kiwifruit grown in California under Marketing Order No. 920 throughout the year. Under Marketing Order No. 920 any person may handle kiwifruit without regard to established grade, size, quality, or maturity requirements provided that such kiwifruit is handled for (1) consumption by charitable institutions; (2) distribution by relief agencies; (3) commercial processing into products; or (4) individual shipments of up to 200 pounds. Prior to issuance of this rule, the only exemption allowed under the kiwifruit import regulation was that for individual shipments of up to 200 pounds. Thus, this action adds consumption by charitable institutions, distribution by relief agencies, and commercial processing into products to the list of exemptions allowed under the kiwifruit import regulation.

The Tokay grape import regulation (7 CFR 944.605) is based on those in effect for Tokay grapes grown in San Joaquin County, California under Marketing Order No. 926 from August 12 through November 15. Under Marketing Order No. 926 any person may handle Tokay grapes without regard to established grade, size, quality, or maturity requirements provided that such Tokay grapes are handled for (1) consumption by charitable institutions; (2) distribution by relief agencies; (3) conversion into by-products, including wine and juice; or (4) individual shipments of five standard packages or less. Prior to issuance of this rule, the only exemption allowed under the Tokay grape import regulation was that for individual shipments of up to 250 pounds. Thus, this action adds

consumption by charitable institutions, distribution by relief agencies, and conversion into by-products to the list of exemptions allowed under the Tokay grape import regulation.

The respective marketing order committees have developed methods to monitor the marketing of the domestically produced exempt commodities from handlers to points of final disposition. Safeguard procedures in the form of reporting requirements are used to ensure that domestic products are used for the intended exempt outlets.

Two such safeguard requirements are:

(1) A certificate of privilege, issued by a committee upon application by a handler, in which a handler notifies the appropriate marketing order committee of the handler's intent to ship that commodity to a processor, livestock feeder, charity, or other exempted outlet; and

(2) A special purpose shipment report, furnished by a handler and forwarded to a committee at the time of shipment, which provides information about the shipment necessary to determine compliance. The receiver or processor subsequently returns a signed copy of the special purpose shipment report to the respective committee office.

Because of the ease with which imported commodities can enter fresh market channels of trade, this rule establishes a process to monitor exempt, imported commodities from the port of importation to the point of final disposition. A safeguard procedure, in the form of importer and receiver reporting requirements, is established to ensure that imported products are shipped to intended exempt outlets. The safeguard procedures are similar to the certificates of privilege and special purpose shipment reports currently in effect under most domestic marketing orders.

To provide consistency and ease the reporting burden on importers that deal in several commodities, this rule establishes a single set of safeguard procedures and a standardized form that can be used for imported avocados, grapefruit, kiwifruit, limes, olives, oranges, table grapes and Tokay grapes. The procedure is added in § 944.350, and is referenced in individual commodity import regulations.

An importer wishing to import commodities covered herein for uses in other than regulated commercial channels, shall complete in triplicate, prior to importation, an Importer's Exempt Commodity form. One copy notifies the Marketing Order Administration Branch (MOAB) of the Fruit and Vegetable Division, AMS, and the second copy notifies the U.S. Customs Service of the importer's intent to import a commodity under an exemption. The third copy will accompany the exempt lot to the receiver.

The form may be obtained from either the inspection or customs offices serving the port of entry. The form may also be obtained from the MOAB in Washington, DC or from its Marketing Field Offices in Fresno, California; Portland, Oregon; McAllen, Texas; or Winter Haven, Florida.

The form must be completed at the time the commodity enters the United States. Copies must be returned to the U.S. Customs Service upon completion and to MOAB within 15 days after completion of the form. Information called for on the Importer's Exempt Commodity form includes:

(1) The commodity and the variety (if known) being imported,

(2) The date and place of inspection, if applicable,

(3) Identifying marks or numbers on the containers,

(4) Identifying numbers on the railroad car, truck or other transportation vehicle transporting product to the receiver,

(5) The name and address of the importer,

(6) The place and date of entry,

(7) The quantity imported,

(8) The name and address of the intended receiver (processor, feeder, charity, or other exempt receiver),

(9) Intended use of the exempt commodity,

(10) The U.S. Customs Service entry number and harmonized tariff code number, and

(11) Such other information as may be necessary to ensure compliance with this regulation.

For purposes of this regulation, a lot is considered to be imported when it is released by the Customs Service for entry into commercial markets or other channels. Lots that are exempt from grade, size, quality, and maturity requirements of the import regulations are not subject to the inspection and certification requirements in such regulations. An imported lot intended for normal commercial channels, or any portion of such a lot, that fails established grade, size, quality, and maturity requirements, may be disposed of in exempt outlets, as specified in the pertinent import requirements for the specific commodity.

The third copy of the form will accompany the exempt lot to its intended destination. The receiver will certify that the lot has been received and it will be utilized in an exempt outlet. After the certification is signed by the receiver, the form must be returned to MOAB by the receiver, within 15 days of receipt of the lot.

The burden on both importers and receiving entities is minimal and the reporting requirements are consistent with safeguard procedures imposed on the handling of domestically-produced, exempt commodities. In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35), these reporting requirements have been submitted to the Office of Management and Budget (OMB) for approval.

This rule will increase the reporting burden on approximately 235 importers of avocados, grapefruit, kiwifruit, limes, olives, oranges, table grapes, and Tokay grapes who will complete the Importer's Exempt Commodity Form. The estimated time to complete the form is 10 minutes. It will take receivers an estimated 5 minutes to sign the certification on the form.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this interim final rule.

Based on the above, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

This interim final rule reflects the Department's appraisal of the need to relax the import requirements, as hereinafter set forth, to comply with the terms of NAFTA and to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is found and determined upon good cause that it is impracticable, unnecessary and contrary to the public interest to give preliminary notice prior to putting this rule relaxing import requirements into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register**. This rule should become effective on January 1, 1994, to be consistent with the provision of NAFTA which states that imported goods destined for processing receive no less favorable treatment than that afforded domestic goods destined for processing. In addition, avocados, grapefruit, kiwifruit, limes, olives, oranges, table grapes and Tokay grapes that are currently being imported into the United States are now being marketed, subject to established grade, size, quality and maturity requirements. To be consistent with section 8e of the Act, which provides that domestic and imported avocados, grapefruit, kiwifruit, limes, olives, oranges, table grapes, and Tokay grapes be subject to comparable

requirements, this relaxation in the import requirements should become effective as soon as possible. A 60-day comment period is provided to allow interested persons to respond to this interim final rule. All written comments received within the comment period will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 944

Avocados, Food grades and standards, Grapefruit, Grapes, Imports, Kiwifruit, Limes, Olives, Oranges.

For the reasons set forth in the preamble, 7 CFR part 944 is amended as follows:

PART 944—FRUITS; IMPORT REGULATIONS

1. The authority citation for 7 CFR part 944 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 944.28 is amended by revising paragraphs (c) and (e) and adding paragraph (f) to read as follows:

§ 944.28 Avocado import grade regulation.

* * * * *

(c) The term *importation* means release from custody of the United States Customs Service. The term *commercial processing into products* means the manufacture of avocado product which is preserved by any recognized commercial process, including canning, freezing, dehydrating, drying, the addition of chemical substances, or by fermentation.

* * * * *

(e) Any lot or portion thereof which fails to meet the import requirements, and is not being imported for purposes of consumption by charitable institutions, distribution by relief agencies, seed, or commercial processing into products; prior to or after reconditioning may be exported or disposed of under the supervision of the Federal or Federal-State Inspection Service with the costs of certifying the disposal of such lot borne by the importer.

(f) The grade, size, and quality requirements of this section shall not be applicable to avocados imported for consumption by charitable institutions, distribution by relief agencies, seed, or commercial processing into products, but shall be subject to the safeguard provisions contained in § 944.350.

3. Section 944.106 is amended by revising paragraph (e) and adding paragraph (h) to read as follows:

§ 944.106 Grapefruit Regulation 6.

* * * * *

(e) Any lot or portion thereof which fails to meet the import requirements, and is not being imported for purposes of consumption by charitable institutions, distribution by relief agencies, animal feed, or commercial processing into canned or frozen products or into a beverage base; prior to or after reconditioning may be exported or disposed of under the supervision of the Federal or Federal-State Inspection Service with the costs of certifying the disposal of said lot borne by the importer.

* * * * *

(h) The grade, size, quality, and maturity requirements of this section shall not be applicable to grapefruit imported for consumption by charitable institutions, distribution by relief agencies, animal feed, or commercial processing into canned or frozen products or into a beverage base, but shall be subject to the safeguard provisions contained in § 944.350.

4. Section 944.209 is amended by revising paragraphs (c) and (d) and adding paragraph (f) to read as follows:

§ 944.209 Lime import regulation 10.

* * * * *

(c) The term *importation* means release from custody of the United States Customs Service. The term *commercial processing into products* means the manufacture of lime product which is preserved by any recognized commercial process, including canning, freezing, dehydrating, drying, the addition of chemical substances, or by fermentation. Limes handled for conversion into juice without further processing or preservative treatment, as herein described, shall be deemed fresh limes subject to all regulation under this section.

(d) Any lot or portion thereof which fails to meet the import requirements, and is not being imported for purposes of consumption by charitable institutions, distribution by relief agencies, or commercial processing into products; prior to or after reconditioning may be exported or disposed of under supervision of the Federal or Federal-State Inspection Service with the costs of certifying the disposal of said lot borne by the importer.

* * * * *

(f) The grade, size, quality and maturity requirements of this section shall not be applicable to limes imported for consumption by charitable institutions, distribution by relief agencies, or commercial processing into products, but shall be subject to the safeguard provisions contained in § 944.350.

5. Section 944.312 is amended by revising paragraph (f) and adding paragraph (h) to read as follows:

§ 944.312 Orange import regulation.

* * * * *

(f) Any oranges which fail too meet the import requirements, and is not being imported for purposes of consumption by charitable institutions, distribution by relief agencies, or processing into products; prior to or after reconditioning may be exported or disposed of under the supervision of the Federal or Federal-State Inspection Service with the costs of certifying the disposal of such oranges borne by the importer.

* * * * *

(h) The grade, size, quality, and maturity requirements of this section shall not be applicable to grapefruit imported for consumption by charitable institutions, distribution by relief agencies, or processing into products, but shall be subject to the safeguard provisions contained in § 944.350.

6. Section 944.350 is added to read as follows:

Note: This section will appear in the annual Code of Federal Regulations.

§ 944.350 Safeguard procedures for avocados, grapefruit, kiwifruit, limes, olives, oranges, table grapes, and Tokay grapes exempt from grade, size, quality, and maturity requirements.

(a) Each person who imports:

(1) Avocados, grapefruit, kiwifruit, limes, olives, oranges, and Tokay grapes for consumption by charitable institutions or distribution by relief agencies;

(2) Avocados, grapefruit, kiwifruit, limes, oranges, table grapes, and Tokay grapes for processing;

(3) Olives for processing into oil;

(4) Grapefruit for animal feed; or

(5) Avocados for seed shall obtain a copy of an "Importer's Exempt Commodity Form" from the Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, or from the Fresh Products Inspection Office, Customs Office, or Processed Products Inspection Office serving the intended port of entry, and shall present the completed "Importer's Exempt Commodity Form" to the U.S. Customs Service Regional Director or District Director, as applicable, at the port at which the customs entry is filed.

One additional copy shall accompany the lot and another copy shall be filed with the Marketing Order Administration Branch, Fruit and

Vegetable Division, AMS, USDA within 15 days of the date of importation.

(b) Each person who receives an exempt commodity for the purposes specified in paragraph (a) of this section shall obtain a copy of the Importer's Exempt Commodity form from the importer and shall certify by signing, and return to the Marketing Order Administration Branch within 15 days of the receipt of the exempt lot, that such lot has been received and will be utilized in the exempt outlet.

7. Section 944.401 is amended by revising paragraph (c) and adding paragraph (j) to read as follows:

§ 944.401 Olive Regulation 1.

* * * * *

(c) The Processed Products Branch, Fruit and Vegetable Division, Agricultural Marketing Service, U.S. Department of Agriculture, is hereby designated as the governmental inspection service for the purpose of certifying the grade and size of processed olives from imported bulk lots for use in canned ripe olives and the grade and size of imported canned ripe olives. Inspection by said inspection service with appropriate evidence thereof in the form of an official inspection certificate, issued by the service and applicable to the particular lot of olives is required. With respect to imported bulk olives, inspection and certification shall be completed prior to use as packaged ripe olives. With respect to canned ripe olives, inspection and certification shall be completed prior to importation. Any lot of olives which fails to meet the import requirements and is not being imported for purposes of contribution to a charitable organization or processing into oil may be exported or disposed of under the supervision of the Processed Products Branch, Fruit and Vegetable Division, AMS, USDA, with the cost of certifying the disposal borne by the importer.

* * * * *

(j) The grade, size, quality, and maturity requirements of this section shall not be applicable to olives imported for charitable organizations or processing for oil, but shall be subject to the safeguard provisions contained in § 944.350.

8. Section 944.503 is amended by revising paragraph (d) and adding paragraph (f) to read as follows:

§ 944.503 Table Grape Import Regulation 4.

* * * * *

(d) Any lot or portion thereof which fails to meet the import requirements, and is not being imported for purposes of processing, prior to or after reconditioning may be exported or disposed of under the supervision of the Federal or Federal-State Inspection Service with the costs of certifying the disposal of said lot borne by the importer.

* * * * *

(f) The grade, size, quality and maturity requirements of this section shall not be applicable to grapes imported for processing, but shall be subject to the safeguard provisions contained in § 944.350.

9. Section 944.550 is amended by revising paragraphs (c) and (d) and adding paragraph (f) to read as follows:

§ 944.550 Kiwifruit Import Regulation.

(c) The term *importation* means release from custody of the United States Customs Service. The term *commercial processing into products* means that the kiwifruit is physically altered in form or chemical composition through freezing, canning, dehydrating, pulping, juicing, or heating of the product. The act of slicing, dicing, or peeling shall not be considered commercial processing into products.

(d) Any lot or portion thereof which fails to meet the import requirements and is not being imported for purposes of consumption by charitable institutions, distribution by relief agencies, or commercial processing into products may be reconditioned or exported. Any failed lot which is not reconditioned or disposed of under supervision of the Federal or Federal-State Inspection Service with the costs of certifying the disposal of said lot borne by the importer.

* * * * *

(f) The grade, size, quality, and maturity requirements of this section shall not be applicable to kiwifruit imported for consumption by charitable institutions, distribution by relief agencies, or commercial processing into products, but shall be subject to the safeguard provisions contained in § 944.350.

10. Section 944.605 is amended by revising paragraph (d) and adding paragraph (g) to read as follows:

§ 944.605 Tokay Grape Import Regulation 5.

* * * * *

(d) Any lot or portion thereof which fails to meet the import requirements and is not being imported for purposes of consumption by charitable institutions, distribution by relief agencies, or conversion into by-products, including wine and juice may be reconditioned or exported. Any failed lot which is not reconditioned or exported shall be disposed of under supervision of the Federal or Federal-State Inspection Service with the costs of certifying the disposal of said lots borne by the importer.

* * * * *

(g) The grade, size, quality, and maturity requirements of this section shall not be applicable to Tokay grapes imported for consumption by charitable institutions, distribution by relief agencies, or conversion into by-products, including wine and juice, but shall be subject to the safeguard provisions contained in § 944.350.

Dated: December 23, 1993.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 93-31878 Filed 12-29-93; 8:45 am]

BILLING CODE 3410-02-P

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7 CFR Parts 980 and 999

[Docket Nos. FV93-980-1 IFR and FV93-999-1 IFR]

Exemptions From Import Regulations for Specified Vegetable and Specialty Crop Commodities

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule exempts imported potatoes, onions, tomatoes, dates and walnuts from grade, size, quality, and maturity requirements if those commodities are to be used in certain specified outlets. These exemptions correspond to exemptions in effect for the same commodities under Federal marketing orders. Safeguard provisions are added to assure that such imports are utilized in a specified exempt outlet. This rule is being implemented in accordance with the North American Free Trade Agreement and under section 8e of the Agricultural Marketing Agreement Act of 1937, and makes the import regulations more consistent with applicable domestic marketing order exemptions. Exempt uses include, but are not limited to, processing, livestock feed, and donation to charity.

DATES: This interim final rule is effective on January 1, 1994. Comments received by February 28, 1994, will be considered prior to finalization of the rule.

ADDRESSES: Interested persons are invited to submit written comments concerning this interim rule. Comments must be sent in triplicate to the Docket Clerk, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523-S, Washington, DC 20090-6456,

Fax (202) 720–5698. Comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection at the Office of the Docket Clerk during regular business hours.

FOR FURTHER INFORMATION CONTACT: Tom Tichenor, Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, P.O. Box 96456, room 2523–S, Washington, DC 20090–6456, telephone (202) 720–6862, or Fax (202) 720–5698.

SUPPLEMENTARY INFORMATION: This action is being taken under Annex 703.2(23) of the North American Free Trade Agreement (NAFTA). This provision states that when domestic agriculture commodities have to meet quality requirements, and processed forms are exempt from those requirements, the same treatment is to be provided to imports destined for processing as provided for domestic product destined for processing.

This action is also being issued under section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674) (Act), which provides that whenever certain specified commodities, including potatoes, onions, tomatoes, dates and walnuts, are regulated under a Federal marketing order, imports of those commodities must meet the same or comparable grade, size, quality, and maturity requirements as those in effect for the domestically produced commodities.

The Act further provides that when two or more marketing orders for the same commodity produced in different areas are in effect, the imported commodity must meet the same grade, size, quality, and maturity requirements as the commodity produced in the area which the imported commodity is in most direct competition. Some marketing orders provide exemptions for commodities sold at roadside stands, shipped directly to consumers, or exported. However, such exemptions are not issued for commodities offered for importation because such handling is impracticable for, or not applicable, to the importation process.

The Department of Agriculture (Department) is issuing this rule in conformance with Executive Order 12866.

Pursuant to the requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility. Import regulations issued under the Act are based on those established under Federal marketing orders.

The following are the approximate number of importers who may be affected by this interim rule: potatoes—20, onions—40, tomatoes—70, dates—25, and walnuts—15. Small agricultural service firms, which include importers of these commodities, have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $3,500,000. The majority of these importers may be classified as small entities.

This interim rule has been reviewed under Executive Order 12778, Civil Justice Reform. This rule is not intended to have retroactive effect. This rule would not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

The Department is taking this action primarily because NAFTA provides that imported goods destined for processing must be given no less favorable treatment than that afforded to domestic goods destined for processing. Under the Federal marketing orders covering potatoes, onions and tomatoes, these commodities are exempt from established quality and size requirements if they are to be used in processing outlets. This rule provides similar exemptions for imported product destined for processing, consistent with NAFTA.

This rule also provides exemptions for these imported commodities to be utilized in other exempt outlets. These exemptions are consistent with section 8e of the Act which requires imported commodities to meet the same or comparable requirements established under the domestic marketing orders for the commodities. This rule amends the following 7 CFR sections:

980.1 Import regulations; Irish potatoes,
980.117 Import regulations; onions,
980.212 Import regulations; tomatoes,
999.1 Regulation governing the importation of dates, and
999.100 Regulation governing imports of walnuts.

Safeguard provisions are added as sections 980.501 and 999.500 to assure that such imports are utilized in a specified exempt outlet.

Potatoes

The import grade regulation for potatoes (7 CFR 980.1) is based on marketing orders in effect for potatoes grown in five different potato production areas in Idaho and Oregon (MO 945), Washington (MO 946), Oregon-California (MO 947), Colorado (MO 948), and the Southeastern United States (MO 953). Under one or more of these orders, any person may handle potatoes exempt from established grade, size, quality, and maturity requirements, provided that such potatoes are used for (1) processing, (2) livestock feed, (3) charity or relief, (4) certified seed, (5) export, or (6) limited quantity shipments ranging from 500 to 1,000 pounds, depending on the individual order. Processing includes canning, freezing, dehydration, chips, shoestrings, starch and flour. Processing does not include potatoes that are only peeled, or cooled, sliced, diced, or treated to prevent oxidation. Prior to the issuance of this rule, the potato import regulation provided exemptions only for certified seed and minimum quantity shipments of 500 pounds. Thus, this interim rule adds year-round exemptions, subject to certain safeguard provisions, for potatoes that are used for: (1) Canning, freezing, or other processing, (2) livestock feed, and (3) charity or relief. The safeguard provisions are specified in section 980.501.

Onions

The import grade regulation for onions (7 CFR 980.117) is based on marketing orders in effect for onions grown in two different onion production areas in Idaho and Oregon (MO 958), and Texas (MO 959). Under one or both of these orders, any person may handle onions exempt from established grade, size, quality, and maturity requirements, provided that such onions are used for (1) processing, (2) livestock feed, (3) charity and relief, (4) plantings, (5) limited quantity shipments ranging from 110 to 2,000 pounds, depending on the individual order, or (6) pearl onions not exceeding a maximum size. Processing includes canning, freezing, dehydration, extraction (juice) and pickling in brine. Prior to the issuance of this interim rule, the onion import regulation provided exemptions for processed onions (dehydrated, canned, frozen and pickled in brine), green onions, onion sets (plantings), braided red onions, and for minimum quantity shipments of 110

pounds. Thus, this rule adds year-round exemptions, subject to certain safeguard provisions, for onions used for livestock feed, charity or relief, processing, and pearl onions. Marketing Order 958 exempts pearl onions which are smaller sized onions produced using specific cultural practices and are not larger than 1–3/4 inches in diameter. The safeguard provisions are specified in section 980.501.

Tomatoes

The import grade regulation for tomatoes (7 CFR 980.212) is based on the marketing order in effect for tomatoes grown in Florida (MO 966). Under that order, any person may handle tomatoes exempt from established grade, size, and maturity requirements, provided that such tomatoes are used for (1) processing, (2) charity, (3) relief, (4) export, (5) experimental purposes, (6) pear shaped (elongated), cherry, green house or hydroponic tomatoes, or (7) limited quantity shipments of 50 pounds per day. Prior to issuance of this interim rule, the tomato import regulation provided exemptions for experimental purposes, shipments of 60 pounds, and pear shaped, cherry, hydroponic, and greenhouse tomatoes. Thus, this rule adds exemptions, subject to certain safeguard provisions, for tomatoes used for processing (canning and pickling), charity and relief. The safeguard provisions are specified in section 980.501.

Dates

The import regulation for dates (7 CFR 999.1) is based on the marketing order in effect for dates produced or packed in Riverside County, California (MO 987). Under that order, any person may handle dates exempt from established grade requirements, if such dates are donated to "needy persons, prisoners, or Indians on reservations." Prior to issuance of this interim rule, the date import regulation provided exemptions for: (1) Processing (preparing and preserving dates into confection, coating to alter color, chopping, slicing or other processing which alters the form), (2) denatured dates unfit for human consumption, and (3) minimum quantity shipments of 70 pounds. Thus, this rule adds exemptions, subject to certain safeguard provisions, for dates donated to charity, prisoners, and Native Americans on reservations. The safeguard provisions are specified in section 999.500.

Walnuts

The import grade regulation for walnuts (7 CFR 999.100) is based on the marketing order in effect for walnuts grown in California (MO 984). Under that order, any person may handle walnuts exempt from established grade and size requirements, if such walnuts are: (1) Green (immature), (2) used by charitable institutions, relief agencies or government agencies for school lunch programs, or diverted for animal feed, or oil manufacture, or other noncompetitive outlets. Prior to issuance of this interim rule, the walnut import regulation provided exemptions from grade and size requirements for minimum quantity shipments of 60 pounds shelled or 115 pounds inshell. Thus, this rule adds exemptions, subject to certain safeguard provisions, for green walnuts, and walnuts for charity, relief, school lunch programs, animal feed or oil. The safeguard provisions are specified in section 999.500.

Exemptions for raisin imports specified under current import regulations for raisins (7 CFR Part 999.300) are consistent with exemptions under the raisin marketing order and are not affected by this interim rule.

Exemptions for filbert imports specified under current import regulations for filberts (7 CFR Part 999.400) are consistent with exemptions under the filbert/hazelnut marketing order and are not affected by this interim rule.

Exemptions for dried prune imports specified under current import regulations for prunes (7 CFR Part 999.200) are consistent with exemptions under the dried prune marketing order and are not affected by this interim rule.

The respective marketing order committees have developed methods to monitor the marketing of the domestically produced exempt commodities from handlers to points of final disposition. Safeguard procedures in the form of reporting requirements are used to ensure that domestic products are used for the intended exempt outlets.

Two such safeguard requirements are:

(1) A certificate of privilege, issued by a committee upon application by a handler, in which a handler notifies the appropriate marketing order committee of the handler's intent to ship that commodity to a processor, livestock feeder, charity, or other exempted outlet; and

(2) A special purpose shipment report, furnished by a handler and forwarded to a committee at the time of shipment, which provides information about the shipment necessary to determine compliance. The receiver or processor subsequently returns a signed copy of the special purpose shipment report to the respective committee office.

Because of the ease with which imported commodities can enter fresh market channels of trade, this rule establishes a process to monitor exempt, imported commodities from the port of importation to the point of final disposition. A safeguard procedure, in the form of importer and receiver reporting requirements, is established to ensure that imported products are shipped to intended exempt outlets. The safeguard procedures are similar to the certificates of privilege and special purpose shipment reports currently in effect under most domestic marketing orders.

To provide consistency and ease the reporting burden on importers that deal in several commodities, this rule establishes a single set of safeguard procedures and a standardized form that can be used for imported potatoes, onions, tomatoes, dates and walnuts. The procedure is added in §§ 980.501 and 999.500, and is referenced in individual commodity import regulations.

An importer wishing to import commodities covered herein for uses in other than regulated commercial channels shall complete, in triplicate, prior to importation, an Importer's Exempt Commodity form. One copy notifies the Marketing Order Administration Branch (MOAB) of the Fruit and Vegetable Division, AMS, and the second copy notifies the U.S. Customs Service of the importer's intent to import a commodity under an exemption. The third copy will accompany the exempt lot to the receiver.

The form may be obtained from either the inspection or customs offices serving the port of entry. The form may also be obtained from the MOAB in Washington, DC or from its Marketing Field Offices in Fresno, California; Portland, Oregon; McAllen, Texas; or Winter Haven, Florida.

The form must be completed at the time the commodity enters the United States. Copies must be returned to the U.S. Customs Service upon completion and to MOAB within 15 days after completion of the form. Information called for on the Importer's Exempt Commodity form includes:

(1) The commodity and the variety (if known) being imported,

(2) The date and place of inspection, if applicable,

(3) Identifying marks or numbers on the containers,

(4) Identifying numbers on the railroad car, truck or other

transportation vehicle transporting product to the receiver,

(5) The name and address of the importer,

(6) The place and date of entry,

(7) The quantity imported,

(8) The name and address of the intended receiver (processor, feeder, charity, or other exempt receiver),

(9) Intended use of the exempt commodity,

(10) The U.S. Customs Service entry number and harmonized tariff code number, and

(11) Such other information as may be necessary to ensure compliance with this regulation.

For purposes of this regulation, a lot is considered to be imported when it is released by the Customs Service for entry into commercial markets or other channels. Lots that are exempt from grade, size, quality, and maturity requirements of the import regulations are not subject to the inspection and certification requirements in such regulations. An imported lot intended for normal commercial channels, or any portion of such a lot, that fails established grade, size, quality, and maturity requirements, may be disposed of in exempt outlets, as specified in the pertinent import requirements for the specific commodity.

The third copy of the form will accompany the exempt lot to its intended destination. The receiver will certify that the lot has been received and it will be utilized in an exempt outlet. After the certification is signed by the receiver, the form must be returned to MOAB by the receiver, within 15 days of receipt of the lot.

The burden on both importers and receiving entities is minimal and consistent with safeguard procedures imposed on the handling of domestically-produced exempt commodities. In accordance with the Paperwork Reduction Act of 1980 [44 U.S.C. chapter 35], this additional burden has been submitted to the Office of Management and Budget (OMB) for approval.

This rule increases the reporting burden on approximately 170 importers of potatoes, onions, tomatoes, dates and walnuts who will complete the Importer's Exempt Commodity form. The estimated time for importers to complete the form is 10 minutes. The estimated time for receivers to sign the certification is 5 minutes.

In accordance with section 8e of the Act, the United States Trade Representative has concurred with the issuance of this interim rule.

Based on the above, the Administrator of the AMS has determined that this interim rule will not have a significant economic impact on a substantial number of small entities.

This interim rule reflects the Department's appraisal of the need to relax the import requirements, as hereinafter set forth, to comply with the terms of NAFTA and to effectuate the declared policy of the Act.

Pursuant to 5 U.S.C. 553, it is found and determined upon good cause that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice prior to putting this rule relaxing import requirements into effect and that good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register**. This rule should become effective on January 1, 1994, to be consistent with the provision of NAFTA, which states that imported goods destined for processing receive no less favorable treatment than that afforded domestic goods destined for processing. In addition, potatoes, onions, tomatoes, dates and walnuts currently being imported into the U.S. are now being marketed, subject to established grade, size, quality, and maturity requirements. To be consistent with section 8e of the Act, which provides that such domestic and imported commodities be subject to comparable requirements, this relaxation in the import requirements should become effective as soon as possible.

A 60-day period is provided to allow interested persons an opportunity to comment on this interim rule. All written comments timely received, will be considered before a finalization of this rule.

List of Subjects

7 CFR Part 980

Import regulations, Onions, Potatoes, Tomatoes.

List of Subjects

7 CFR Part 999

Import regulations, Dates, Filberts, Prunes, Raisins, Walnuts.

For the reasons set forth in the preamble, 7 CFR parts 980 and 999 are amended as follows:

PART 980—VEGETABLES; IMPORT REGULATIONS

PART 999—SPECIALTY CROPS; IMPORT REGULATIONS

1. The authority citation for 7 CFR parts 980 and 999 are revised to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 980.1 is amended by adding a new paragraph (i) to read as follows:

§ 980.1 Import regulations, Irish potatoes.

* * * * *

(i) *Exemptions.* The grade, size, quality and maturity requirements of this section shall not be applicable to potatoes imported for canning, freezing, other processing, livestock feed, charity, or relief, but such potatoes shall be subject to the safeguard provisions contained in § 980.501.

3. Section 980.117 is amended by adding a definition for pearl onions at the end of paragraph (h) and adding a new paragraph (i) to read as follows:

§ 980.117 Import regulations; onions.

* * * * *

(h) *Definitions.* * * * The term *pearl onions* means onions produced using specific cultural practices that limit growth to 1¾ inches in diameter or less.

(i) *Exemptions.* The grade, size, quality and maturity requirements of this section shall not be applicable to pearl onions, or onions imported for processing, livestock feed, charity, or relief, but such onions shall be subject to the safeguard provisions in § 980.501.

4. Section 980.212 is amended by adding a new paragraph (i) to read as follows:

§ 980.212 Import regulations; tomatoes.

* * * * *

(i) *Exemptions.* The grade, size, quality and maturity requirements of this section shall not apply to tomatoes for charity, relief, canning or pickling, but such tomatoes shall be subject to the safeguard provisions contained in § 980.501.

5. A new § 980.501 is added to read as follows:

§ 980.501 Safeguard procedures for potatoes, onions, and tomatoes exempt from grade, size, quality, and maturity requirements.

(a) Each person who imports (1) potatoes, onions or tomatoes for consumption by charitable institutions or distribution by relief agencies; (2) potatoes, onions, or tomatoes for processing; (3) potatoes or onions for livestock feed; or (4) pearl onions, shall obtain a copy of Importer's Exempt Commodity form from the Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, or from the Fresh Products Inspection Office, the Processed Products Inspection Office, or the U.S. Customs Service serving the intended port of entry, and shall present, the completed Importer's Exempt Commodity form to the U.S. Customs Service Regional

Director or District Director, as applicable, at the port at which the customs entry is filed. One additional copy shall accompany the lot and another copy shall be filed with the Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, within 15 days of the date of importation.

(b) Each person who receives an exempt commodity for the purposes specified in paragraph (a) of this section shall obtain a copy of the Importer's Exempt Commodity form from the importer and shall certify by signing, and return to the Marketing Order Administration Branch within 15 days of receipt of the exempt lot, that such lot has been received and will be utilized in the exempt outlet.

6. Section 999.1 is amended by removing paragraph (d), "Reconditioning prior to importation;" redesignating paragraph (d), as an untitled "Exemptions" paragraph (d)(1); and by adding a new paragraph (d)(2) to read as follows:

§ 999.1 Regulation governing the importation of dates.

* * * * *

(d)(1) * * *

(2) *Exemptions.* The grade, size, quality and maturity requirements of this section shall not apply to dates which are donated to needy persons, prisoners or Native Americans on reservations, but such dates shall be subject to the safeguard provisions contained in § 999.500.

* * * * *

7. Section 999.100 is amended by redesignating paragraph (e) as paragraph (e)(1) and by adding a new paragraph (e)(2) to read as follows:

§ 999.100 Regulation governing imports of walnuts.

* * * * *

(e)(1) * * *

(2) *Exemptions.* The grade, size, quality and maturity requirements of this section shall not apply to walnuts which are: green walnuts (so immature that they cannot be used for drying and sale as dried walnuts); walnuts used in non-competitive outlets such as use by charitable institutions, relief agencies, governmental agencies for school lunch programs, and diversion to animal feed or oil manufacture, but such walnuts shall be subject to the safeguard provisions contained in § 999.500.

* * * * *

8. Section 999.500 is added to read as follows:

§ 999.500 Safeguard procedures for walnuts and certain dates exempt from grade, size, quality, and maturity requirements.

(a) Each person who imports: (1) Dates which are donated to needy persons, prisoners or Native Americans on reservations; or (2) walnuts which are: green walnuts (so immature that they cannot be used for drying and sale as dried walnuts); walnuts used in non-competitive outlets such as use by charitable institutions, relief agencies, governmental agencies for school lunch programs, and diversion to animal feed or oil manufacture, shall obtain a copy of an "Importer's Exempt Commodity Form" from the Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA, or from the Fresh Products Inspection Office, Customs Office, or Processed Products Inspection Office serving the intended port of entry, and shall present the completed "Importer's Exempt Commodity Form" to the U.S. Customs Service Regional Director or District Director, as applicable, at the port at which the customs entry is filed. One additional copy shall accompany the lot and another copy shall be filed with the Marketing Order Administration Branch, Fruit and Vegetable Division, AMS, USDA within 15 days of the date of importation.

(b) Each person who receives an exempt commodity for the purposes specified in paragraph (a) of this section shall obtain a copy of the Importer's Exempt Commodity form from the importer and shall certify by signing, and return to the Marketing Order Administration Branch within 15 days of the receipt of the exempt lot, that such lot has been received and will be utilized in the exempt outlet.

Dated: December 23, 1993.

Robert C. Keeney,

Deputy Director, Fruit and Vegetable Division.

[FR Doc. 93-31879 Filed 12-29-93; 8:45 am]

BILLING CODE 3410-02-P

Farmers Home Administration

7 CFR Parts 1910, 1924, 1941, 1943, 1945, 1951, and 1980

RIN 0575-AB13

Borrower Training

AGENCY: Farmers Home Administration, USDA.

ACTION: Interim rule with request for comments.

SUMMARY: The Farmers Home Administration (FmHA) amends its regulations to require certain guaranteed and direct Farmer Programs loan applicants and borrowers to obtain training in production and financial management concepts. This action is necessary due to provisions in the Food, Agriculture, Conservation, and Trade Act of 1990, dated November 28, 1990 (hereinafter referred to as "the 1990 FACT Act"), that require the Agency to enter into contracts to provide educational training in financial and farm management concepts associated with commercial farming to all borrowers with Farmer Programs direct and guaranteed loans. The intended effect is to improve the borrowers' production and financial management ability, thereby increasing the number of borrowers who become successful and thus able to move to commercial credit sources.

DATES: Effective February 28, 1994. Written comments must be submitted on or before April 29, 1994.

ADDRESSES: Submit written comments, in duplicate, to the Chief, Regulations Analysis and Control Branch, Farmers Home Administration, USDA, room 6348, South Agriculture Building, 14th and Independence Avenue, SW., Washington, DC 20250. All written comments will be available for public inspection during regular working hours at the above address.

FOR FURTHER INFORMATION CONTACT: Kay M. Callin, Loan Officer, Farmer Programs Loan Making Division, Farmers Home Administration, USDA, South Building, 14th and Independence Avenue SW., Washington, DC 20250, telephone (202) 720-1186.

SUPPLEMENTARY INFORMATION:

Classification

We are issuing this interim rule in conformance with Executive Order 12866, and we have determined that it is not a "significant regulatory action." Based on information compiled by the Department, we have determined that this interim rule:

(1) Will have an effect on the economy of less than $100 million;

(2) Will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(3) Will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(4) Will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or rights and obligations of recipients thereof; and

(5) Will not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in Executive Order 12866.

Intergovernmental Consultation

1. For the reasons set forth in the final rule related to 7 CFR part #3015, subpart V (48 FR 29115, June 24, 1983) and FmHA Instruction 1940–J, "Intergovernmental Review of Farmers Home Administration Programs and Activities" (December 24, 1983), Farm Operating Loans and Farm Ownership Loans are excluded with the exception of nonfarm enterprise activity from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

2. The Soil and Water Loan Program is subject to the provisions of Executive Order 12372 and FmHA Instruction 1940–J.

Programs Affected

These changes affect the following FmHA programs as listed in the Catalog of Federal Domestic Assistance:

10.404 Emergency Loans
10.406 Farm Operating Loans
10.407 Farm Ownership Loans
10.416 Soil and Water Loans

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, "Environmental Program." It is the determination of FmHA that this interim action does not constitute a major Federal action significantly affecting the quality of the human environment and in accordance with the National Environmental Policy Act of 1969, Public Law 91–190, an Environmental Impact Statement is not required.

Civil Justice Reform

This document has been reviewed in accordance with Executive Order (E.O.) 12778. FmHA has determined that this action does not unduly burden the Federal Court System since it meets all applicable standards provided in section 2 of the E.O.

Paperwork Reduction Act

The information collection requirements contained in these regulations have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. chapter 35 and have been assigned OMB control numbers 0575–0134, 0575–0141, 0575–0085, 0575–0083, 0575–0090, 0575–0133, and 0575–0086 in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3507). The revised information collection contained in 0575–0061 and 0575–0079 will not become effective until approved by OMB. Please send written comments to the Office of Information Regulatory Affairs, OMB, Attention: Desk Officer for USDA, Washington, DC 20503. Please send a copy of your comments to Jack Holston, Agency Clearance Officer, USDA, FmHA, AG Box 0743, Washington, DC 20250.

Discussion of the Interim Rule

On November 25, 1992, FmHA published a proposed rule in the **Federal Register** (57 FR 55473–55483) with a comment period ending December 28, 1992. The purpose of this interim rule is to provide a way for FmHA to assist borrowers in obtaining the financial and production management skills necessary to successfully operate a farm, gain equity in the farm operation, and graduate from FmHA programs and enable them to obtain private credit. The 1990 FACT Act (Pub.L. 101–624) amended the Consolidated Farm and Rural Development Act (CONACT) by adding Section 359. This section established the requirement that a borrower must obtain training in farm and financial management concepts appropriate to the borrower's management ability, as determined by the County Committee, to obtain a direct or guaranteed Farmer Programs loan. This interim rule defines the borrower training program and establishes procedures for implementing and administering the program.

The Agency is delaying implementation of this interim rule for 60 days after the date of publication. In addition, because of the large number of comments received and the wide range of views expressed in those comments, the Agency is requesting further comments to provide the opportunity for interested parties to suggest additional alternate courses of action in implementing the program.

Discussion of Comments

In response to the proposed rule, 224 individual written comments were received from 48 respondents. In some cases, multiple employees sent in copies of the same comments. The comments were divided into seven major categories as follows: Reduce the scope of borrowers for whom training will be required; provide clearer guidance to the County Committee on implementation of borrower training; eliminate training requirement for guaranteed borrowers; revise extent, content, and format of training; revise scoring system; make decision to require training appealable; and general comments. Several comments were general in nature and not specifically related to the proposed regulation.

Comments were received from ten FmHA employees, three lenders and one from a farm advocacy group regarding farmers who have experience that would exceed the degree of training to be provided. They suggested that these should be excepted from the training requirement. In response to these comments, a revision is being made to allow the County Committee to waive the production training requirement for applicants who demonstrate the abilities of a successful and efficient producer based on past management performance. To receive such a waiver, applicants must provide documentation which, at a minimum, includes the applicant's production records for the past five years and a statement explaining how the records demonstrate production ability. Five years of production history is already a requirement for a Farmer Programs loan application, so no new burden is created. Even if these applicants receive a waiver for production training, they still must meet the financial training requirement.

Three lenders and 11 FmHA employees submitted comments that new guaranteed borrowers and borrowers requesting subordinations should not automatically be required to receive training. The statute requires that guaranteed borrowers complete training unless a waiver is granted; therefore, no change is being made in this regard. However, a revision is being made to eliminate the training requirement for borrowers requesting subordinations. In light of the comments, the Agency believes that requiring training at the point of loan making and loan servicing is sufficient. While those borrowers in loan servicing are most needy, those requesting subordinations to other lenders are often progressing towards graduation to commercial credit. The Agency does not want to interfere with this progress by unnecessarily requiring borrower training.

Three commenters requested that training be required for guaranteed borrowers. This provision was included in the proposed rule and is not being changed in the interim rule.

Comments were received from four FmHA employees that the training requirement should be restricted to limited resource and 1951–S borrowers. As stated above, the statute applies to all direct and guaranteed Farmer Programs borrowers. Therefore, no changes are being made as a result of these comments.

Two commenters expressed concern that FmHA does not have the authority to require training for borrowers requesting loan servicing. The statute authorizes the Secretary to issue regulations establishing guidelines for the borrower training program. CONACT section 359 specifically directs the Secretary to enter into contracts to provide training to all borrowers of Farmer Programs loans made under the CONACT. The legislative history of the provision further indicates Congressional intent that FmHA assist financially troubled borrowers in obtaining the financial and farm management skills necessary to successfully operate a farm, gain equity in the operation, and graduate to private credit. Therefore, requiring an existing borrower to obtain training in order to receive debt restructuring under 1951–S is allowable and consistent with legislative intent. Consequently, no changes have been made in response to these comments.

Six respondents suggested that the County Committee should be authorized to waive borrower training for any case as they determine appropriate. However, this degree of discretion is inconsistent with the statute which permits waiver only if the County Committee has determined that the borrower demonstrates adequate knowledge in financial and farm management concepts. The proposed rule provided for a waiver of the training requirement if the applicant had completed an approved course or a similar course. Revisions have been made by this interim rule to also include a provision to allow a waiver to be granted by the County Committee based on the applicant's production experience.

Comments were received from nine individuals stating that the process for granting waivers is too subjective and may place the County Committee in an awkward position. By statute, the County Committee has the responsibility of reviewing documentation provided by the applicant to determine if a waiver should be granted. Because the County Committee serves as a representative sample of the farmers in the area, they are assumed to be qualified to make determinations based on local conditions. County Committees already must make subjective eligibility determinations in accordance with statutory and regulatory authority. Therefore, no changes are being made in response to these comments.

Four comments were received requesting clarification of the County Committee guidelines to encourage consistency when granting waivers. The guidelines for granting a waiver were written to provide flexibility for the County Committee to use their knowledge of the conditions in the area and the documentation submitted by the applicant to determine if a waiver should be granted. Therefore, no changes are being made to the regulation in response to these comments.

Comments were received from three individuals stating that the County Committee should not be provided the authority to modify the evaluation score determined by the course instructor. Revisions have been made to eliminate the County Committee's review of the instructor's evaluation. It was determined that this review was not necessary if a qualified instructor provided the evaluation. In addition, a revision was made to require the County Supervisor to review the evaluation to determine if the borrower has satisfied the training requirements or if further training should be recommended or special servicing actions required based on the borrower's score.

Three lenders expressed concern that a borrower with impeccable history who failed to attend training would be denied future credit because of the failure to attend training. If the borrower's history and past performance are outstanding, it is possible he/she would be eligible for a waiver. If a waiver is not granted, however, the borrower would be required to attend training. This is required by the statute and, therefore, no changes were made based on these comments.

Comments were received from three respondents who felt that at least one County Committee member should be required to attend the training session, at FmHA's expense, so they would be knowledgeable of the training requirements. FmHA will make the County Committee aware of the availability of training sessions. County Committee members will have the option of attending the courses at their own expense. However, a change was made based on these comments that requires the vendor to submit information regarding the policy for allowing individuals to audit the course.

One commenter suggested that the County Committee should be authorized to give partial waivers. The Agency agrees and has revised the interim rule to provide the opportunity for the applicant/borrower to receive a waiver for either production management training or financial management training or for both. For example, the Agency has found that many of its borrowers are good producers but need help in the area of financial management. A partial waiver system will be fairer and less costly to such applicants and borrowers.

Comments were received from 13 lenders and eight FmHA employees expressing concern that lenders will not participate in the guaranteed program because of added servicing requirements and additional FmHA interference. Because the statute specifically includes guaranteed borrowers in the training requirements, no changes have been made to the regulation based on these comments.

Twelve respondents felt that the training should be offered, but not required for loans because they felt borrowers must be self-motivated to improve and enhance their abilities. No changes have been made to the regulation based on these comments because training is required by statute. To be eligible for FmHA assistance, training must be completed unless a waiver is granted.

Five commenters suggested that training should be required before assistance is provided. The statutory language and legislative history indicate that Congress did not intend the training requirement to change FmHA's current consideration of a borrower's eligibility for direct or guaranteed loans. Furthermore, loan eligibility and the need for training are independent determinations made by the County Committee. If the borrower is required to complete training prior to assistance being provided, this independent determination is lost. Therefore, no changes are being made based on these comments.

Nine lenders expressed concern that guaranteed lenders would be responsible for monitoring borrower training. Respondents felt the training should be monitored by FmHA. FmHA, however, wants to limit its direct dealing with the loan applicant since the lender is responsible for servicing the account. The Agency agrees, however, that FmHA needs to be involved in the process. The regulations, therefore, are being revised to require lenders to monitor the borrowers' progress and periodically report back to FmHA. This procedure for FmHA and lender involvement is consistent with the procedure for requiring the vendor to provide the lender and FmHA with periodic progress reports.

One comment was received from a lender concerned that the Guaranteed Overview Task Force did not have input on development of borrower training for guaranteed borrowers. All interested individuals were encouraged to provide

written comments on the proposed rule. This provided all members of the task force a chance to express any opinions on the development of the training program. No changes were made to the regulation based on this comment.

One lender suggested that FmHA should provide a list of vendors and courses available in each location. Because this list was provided for in the proposed rule, no changes need to be made to incorporate this recommendation.

Five comments were received regarding the length of time allowed for borrowers to complete the training program. Two commenters felt the time allowed (2 years) was too long and three felt it was not long enough. The Agency originally determined that training should be completed within two years after the agreement to complete training is signed. However, the borrower will still have the option to request a 1-year extension if the training could not be completed as anticipated. This policy was adopted in the proposed rule after consulting with experts in agricultural education and several farm advocates on training curriculum. It was determined that two years was a reasonable amount of time allowing for the usual one year training program with some leeway for late starters, longer training courses, etc. Therefore, no revisions were made based on these comments.

Two respondents felt that borrowers should be required to attend future training sessions to keep up with changes in technology and production methods. Training will be available for those borrowers who would like to attend additional courses, but the courses will be entirely optional. No changes are being made to the regulations based on these comments.

Comments from five FmHA employees suggested that the Extension Service should be given all of the vendor training responsibility. The statute lists the Extension Service as one option among several to provide training. The statute specifically says that State or private providers of farm management and counseling services may be utilized to provide training. Therefore, no changes are being made based on these comments.

Comments from two FmHA employees suggested that training should be based on FmHA forms and procedures. The ultimate goal of supervised credit is to assist borrowers in graduating from FmHA programs to private credit. Restricting training to FmHA credit situations would be a great disservice to the borrower. For that reason, no changes are being made in response to these comments.

Five commenters suggested that the curriculum should be established in terms of "hours" rather than "years" for consistency in implementation and monitoring. The curriculum was not established based on hours to allow flexibility in the training program to meet the needs of borrowers in specific areas. Therefore, no changes are being made based on these comments.

One FmHA employee stated the regulations should be written to include various methods of delivery of training, such as telenet and satellite, as acceptable methods of providing and receiving training. The proposed rule provides the opportunity for States to review the proposed vendor's methods of training prior to approval of the vendor. If the State Director feels the vendor's method of delivery of the training is acceptable for the area, the vendor may be approved. No change to the regulation is necessary to respond to this comment.

Four respondents expressed concern that it would be extremely difficult to provide production training for many different enterprises in relatively small locales, particularly if the borrower had several different enterprises. However, the proposed rule only required that borrowers complete production management courses in crop or livestock enterprises which constituted 20% or more of the projected cash farm operating costs for the coming production cycle as determined by the County Committee. The interim rule nonetheless revises this policy to require such courses only in those crop or livestock enterprises which constitute 20% or more of the total projected cash farm income. Income is a better indicator than costs of which crop or livestock production will significantly affect the overall operation. The interim rule also provides for a 1-year extension of the 2-year period in which training must be completed for circumstances beyond the control of the borrower, such as discontinuance of the necessary approved courses. This extension, therefore, would be appropriate if needed courses are unavailable. Under the interim rule, vendors' proposed sites for training should be within a reasonable commuting distance to meet approval by State Directors.

Comments were received from four individuals who suggested that the course requirements should be outlined in segments for consistency between vendors in a specific area. The proposed rule provided the opportunity for the State Director to review the vendor's proposed course outline prior to approval. The State Director can determine if the vendor's outline will allow for consistency between vendors. Flexibility is important at the State level. Therefore, no changes are being made based on these comments.

Two individuals suggested that the requirements for instructors should be more flexible. The regulations, therefore, are being revised to allow instructors and vendors with three years experience in conducting training courses or teaching to be eligible to conduct borrower training. The proposed rule required instructors and vendors to have a minimum of three years experience in training and working specifically with farmers. The requirement that the instructor have a bachelor's degree or comparable experience will remain in effect.

Three commenters requested that the training language include production training. This requirement was implied in the proposed rule although it was not mentioned specifically. Revisions are made to specifically mention production management training in the interim rule.

Comments were received from two individuals who felt that production training should be excluded from the requirement. The intent of the law was to provide borrowers training in farm management concepts as well as financial management. Therefore, production training is also required.

However, the interim regulations do provide the option of a waiver from production training.

One commenter suggested that training sources should be limited to non-profit entities only. The statute specifically allows State or private providers of farm management and counseling services to be utilized to provide training. This would include vendors who are in business to make a profit. Because Congress intended to provide as many options for training vendors as possible, no revisions are being made based on this comment.

One commenter requested clarification of who would be required to attend training in the case of a husband/wife operation. The proposed regulations required the individual who holds a majority interest or who operates the farm to complete the training. If these are different individuals, both would have to meet the training requirements in financial and production management. The intent of the regulations, however, was to allow the individual who has full responsibility for the various functions of the farm operation, particularly financial and production management, to either be granted a waiver or to be required to complete training in the specific area of responsibility. Thus, in

a husband and wife operation, if the wife solely attended to the farm's financial management and the husband solely attended to production, she would be required to receive training in financial management for the entity, and he for production management, if they did not qualify separately for partial waivers. If the husband and wife shared responsibility for financial and production management, their experience would be considered in the aggregate to determine whether a waiver or training was appropriate. The regulations are being revised to clarify this issue in response to this comment.

One comment was received regarding the determination of separate enterprises. The State Director has the opportunity to determine which enterprises will be covered by the course when approval for the course is granted. No changes are being made to the regulations in response to this comment.

One commenter suggested that the vendor should not be required to specify the training location until after approval has been granted to allow the vendor to locate training in the areas of greatest need. The regulations are being revised to require that vendors specify proposed locations for training when an application for approval is submitted, rather than the specific training sites.

Three individuals commented that training should be provided within a reasonable commuting distance for borrowers. The Agency has accepted this recommendation and the regulation is being revised.

Comments were received from two individuals who stated that the regulations needed a provision to decertify training vendors. The regulations are being revised to allow the State Director or the vendor to revoke the agreement to conduct training in writing giving 30 days notice. The State Director may revoke the agreement if the vendor fails to comply with responsibilities listed in the agreement. Such revocation is nonappealable under FmHA appeal regulations.

One commenter suggested that the final rule should require the State Director to obtain input from a committee comprised of individuals listed in the proposed rule (Chief Executive Officer of a State, State Department of Agriculture, State Extension Service, community college, and non-profit organization) to tailor the training agenda to the needs of the State. The State Director has the option of consulting with individuals from the various organizations, but is not required to do so. No change is being made in response to this comment.

One FmHA employee suggested that the system used to assign scores to the borrower should be reversed. A score of 1 would be given to borrowers who have met the training requirements and a 3 would be given to those borrowers who have not met the training requirements. The Agency has accepted this recommendation and the regulation is being revised.

One commenter requested that the notification to trainees include a description of the scoring system to be used. The Agency has accepted this recommendation and the change is being made in the interim rule.

Comments were received from four individuals suggesting that Form FmHA 440–2, "County Committee Certification or Recommendation," be revised to include an appropriate section for training and/or waivers. The Agency is adopting this recommendation.

One commenter suggested that FmHA pay for the cost of training rather than the borrower. The statute requires that the borrower pay the cost of the training. However, operating loan funds may be used to pay this expense as it is considered a farm operating expense. Therefore, no changes are being made based on this comment.

Two FmHA employees expressed concern that the extra cash cost of the training may make the borrower's plan unfeasible and requested that the County Committee have the latitude to waive the requirement in these situations. According to the statute, the County Committee may grant waivers only if the borrower demonstrates the knowledge and experience to warrant a waiver. No revision is necessary based on this comment.

Four respondents indicated that the comment period should be extended. It should be noted that written comments were accepted after the closing date of the comment period and were considered when drafting the interim rule. However, the comment period was not officially extended. A 120-day comment period is being provided with this interim rule.

Two individuals suggested that vendors would need money to prepare to provide training to FmHA borrowers. The commenters did not indicate who should provide these funds. Therefore, no response is necessary.

Thirty-four commenters felt that requiring borrower training was not going to be beneficial. Comments ranged from the training being an imprudent requirement and a waste of taxpayer money to being an additional burden imposed on borrowers, lenders, FmHA and taxpayers. Because borrower training was mandated by Congress, no revisions are being made based on these comments.

Eight individuals felt the concept was commendable but did not feel it was realistic. In developing the proposed regulations, the Agency consulted with experts in agricultural education to develop an effective training program. As previously discussed, the regulations are being revised based on comments from various individuals to make the program as efficient and realistic as possible.

Three respondents expressed strong opposition to the section of the proposed regulation dealing with appeals. Respondents felt that denial of a waiver should be considered an adverse decision and therefore appealable. Because loans will be made or serviced upon the condition that training is obtained, no adverse decision has been made which "directly and adversely affects" the borrower. Under FmHA appeal regulations, 7 CFR part 1900, subpart B, one is "directly and adversely affected" when a request for assistance is denied, or assistance is reduced, cancelled, or not reviewed. The nonappealable matter, however, would be reviewable under the appeal regulations. If a loan or loan guarantee is ultimately denied, then appeal rights will be given. Therefore, no change is being made to the regulations based on this comment.

In addition to changes made in response to public comments, other administrative changes have been made. References to "insured loans" in the regulation text are changed to read "direct loans" to reflect changes in terminology required by the Credit Reform Act of 1990. Regulation exhibits also have been revised in order to reflect changes made to the regulation text.

The regulations also are revised to exempt applicants for youth operating loans from the borrower training requirements. Though the statute states that the Secretary shall enter into contracts to provide training to all Farmer Programs borrowers, it also states that the need of a borrower who satisfies the training or farm experience requirement of CONACT section 302(a)(2) or section 312(a)(2) for borrower training will not be cause for denial of a loan or guarantee. Borrowers with Youth Loans are specifically excepted from the training or farm experience requirement by CONACT section 302(b); therefore, it appears that Congress did not intend the borrower training requirement to apply to youth loan applicants. Furthermore, application of the borrower training

requirement to youth applicants would yield ludicrous results. Youth applicants already are in training through their participation in 4–H Clubs, Future Farmers of America, and similar organizations as required by CONACT section 302(B).

List of Subjects

7 CFR Part 1910

Applications, Credit, Loan programs—Agriculture, Loan programs—Housing and community development, Low and moderate income housing, Marital status discrimination, Sex discrimination.

7 CFR Part 1924

Agriculture, Construction management, Construction and repair, Energy conservation, Housing, Loan programs—Agriculture, Loan programs—Housing and community development, Low and moderate income housing.

7 CFR Part 1941

Crops, Livestock, Loan programs—Agriculture, Rural areas, Youth.

7 CFR Part 1943

Credit, Loan programs—Agriculture, Recreation, Water resources.

7 CFR Part 1945

Agriculture, Disaster assistance, Loan programs—Agriculture.

7 CFR Part 1951

Account servicing, Credit, Loan programs—Agriculture, Loan programs—Housing and community development, Low and moderate income housing loans—Servicing, Debt restructuring.

7 CFR Part 1980

Agriculture, Loan programs—Agriculture.

Therefore, Chapter XVIII, Title 7, Code of Federal Regulations is amended as follows:

PART 1910—GENERAL

1. The authority citation for part 1910 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart A—Receiving and Processing Applications

2. Section 1910.4 is amended by revising paragraph (b)(3) to read as follows:

§ 1910.4 Processing Applications.

* * * * *

(b) * * *

(3) A brief written description as to the farm training and/or experience of the applicant and the individual members of an entity applicant (new applicants only). If a waiver from the training required in § 1924.74 of subpart B of part 1924 of this chapter is requested, provide verification of any courses taken which covered production and/or financial management concepts, and/or a statement explaining how the applicant's proven performance based on 5-year production records demonstrates production ability.

* * * * *

PART 1924—CONSTRUCTION AND REPAIR

3. The authority citation for part 1924 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23; 7 CFR 2.70.

Subpart B—Management Advice to Individual Borrowers and Applicants

4. Section 1924.59 is amended by adding paragraph (e)(7) to read as follows:

§ 1924.59 Supervision.

* * * * *

(e) * * *

(7) Complete any training required by § 1924.74 of this subpart.

* * * * *

§ 1924.73 [Amended]

5. Section 1924.73 is amended in paragraphs (a), (b)(2), and (b)(3) by revising the reference "§ 1924.60(d)" to read "§ 1924.60(c)."

6. Section 1924.74 is added to read as follows:

§ 1924.74 Borrower Training program.

(a) *Introduction.* (1) Supervised credit includes helping borrowers to develop the skills necessary for successful, efficient production and financial management of a farm business. An effective, formal training program provides a solid foundation on which borrowers can build the skills which will enable them to become efficient, financially sound producers who can obtain commercial financing. The goal of this training is for borrowers to develop and improve the financial and production management skills necessary to successfully operate a farm, build equity in the farm business, and become financially successful to graduate from FmHA programs to commercial sources of credit.

(2) The authorities contained in this section require certain Farmer Programs borrowers to obtain training in production and financial management concepts. Unless waived, this training will be an eligibility requirement for all Farmer Programs direct and guaranteed loans. The training requirement will also apply to all direct borrowers who receive Primary Loan Servicing actions approved under subpart S of part 1951 of this chapter, with the exception of net recovery buyout offers. Borrowers who do not request new loans or servicing actions will be notified during farm visits and annual analyses of approved courses in their area. Also, a current list of approved courses will be posted in the County Office.

(3) The training will be carried out by public and/or private sector providers of farm management and credit counseling services (including, but not limited to, community colleges, the Extension Service, State Departments of Agriculture, farm management firms, lenders, and similar qualified organizations).

(4) State Directors will enter into agreements with one or more qualified providers in each State to conduct the training.

(b) *Processing*—(1) *County Committee review.* The determination of an applicant/borrower's need for enhanced training in production and financial management concepts will be made by the County Committee. To make this determination, the Committee will review the case file (in the case of borrowers) and the complete application package for the assistance requested. A decision that the applicant/borrower needs such training cannot be used as a basis for rejecting the request for assistance. In the case of a cooperative, corporation, partnership, or joint operation, any individual member, stockholder, partner, or joint operator holding a majority interest in the entity or who is operating the farm must agree to complete the training on behalf of the entity. However, if one entity member is solely responsible for financial or production management, then only that entity member will be required to complete the training in that area for the entity or qualify for a partial waiver. If the financial and production functions of the farming operation are shared, the knowledge and skills of the individual(s) with the responsibility of production and/or financial management of the operation will be considered in the aggregate for granting a waiver or requiring that training be completed. If a waiver is not granted, these individuals will be required to complete the training in accordance with their responsibilities for production and/or financial management. This training must be completed within 2 years after Form FmHA 1924–23, "Agreement to Complete Training," is signed if a

waiver is not granted. The Committee's decision as to the requirement of training will be documented on Form FmHA 440–2, "County Committee Certification or Recommendation." When production training is required, a borrower must complete course work covering production management in crop or livestock enterprises which constitute twenty percent of the projected cash farm income for the coming production cycle, as determined by the County Committee. Borrowers who are adding a new enterprise must agree to complete any required production training in that enterprise unless a waiver is granted by the County Committee. The areas of production training will be specified on Form FmHA 440–2. Borrowers must also complete financial management training unless a waiver has been granted by the County Committee.

(i) *Loan applicants.* After the County Committee has determined that the applicant meets all eligibility criteria for the type of assistance requested, the Committee will consider the applicant's need for enhanced training in production and financial management concepts. Eligibility determinations and borrower training determinations should be made during the same Committee meeting. If the Committee determines the applicant is ineligible for assistance, the training requirement will not be considered.

(ii) *Requests for Primary Loan Servicing.* Prior to FmHA's offer of any Primary Loan Servicing action, the County Committee must determine whether the borrower must complete a training program or qualifies for a waiver. This determination should be made after a feasible plan has been developed using consolidation, rescheduling, reamortization, deferral, softwood timber, and/or writedown, but prior to FmHA's actual offer to restructure the borrower's accounts. This training requirement does not apply to those borrowers offered net recovery buyout or preservation loan servicing. If the borrower must complete a training program, fees will be included in the plan as an operating expense.

(2) *Waivers.* Applicants for loans and Primary Loan Servicing programs may request a waiver from the training requirement by submitting Form FmHA 1924–27, "Request for Waiver of Borrower Training Requirements," with the application for assistance. The waiver request must include the required documentation and records as specified in paragraphs (b)(2)(i) and (b)(2)(ii) of this section. A waiver is not required for those applicants who have previously received a waiver, or who have previously satisfied the training requirements. The applicant/borrower must meet all training requirements for both production and financial management if no waiver is granted. If the borrower receives a waiver for production training, the requirements for financial management training must still be met. Conversely, if the borrower receives a waiver for financial management training, the requirements for production training must still be met. In the case of entity applicants, only those entity members who hold a majority interest in the operation or who operate the farm must meet the waiver conditions for the entity to qualify for a waiver. However, if one entity member is solely responsible for financial or production management, then only that entity member will be required to complete the training in that area for the entity or qualify for a partial waiver. If the financial and production functions of the farming operation are shared, the knowledge and skills of the individual(s) with the responsibility of production and/or financial management of the operation will be considered in the aggregate for granting a waiver or requiring that training be completed. If a waiver is not granted, these individuals will be required to complete the training in accordance with their responsibilities for production and/or financial management. The County Committee may waive the financial and/or production training requirements under the following conditions:

(i) The applicant has successfully completed an equivalent training program. To meet this requirement, the applicant must submit evidence of completion of a production and/or financial management course similar to a course approved under this section. The submission must include a description of the content and subjects covered in the course(s) completed by the applicant or entity members. The submission must also include evidence of completion, such as a grade report, certificate of completion, or written certification by the course instructor. The program must have covered subject areas in paragraph (d)(3)(iii) of this section. The County Committee will review the documentation submitted by the applicant(s) for assistance to determine whether the training completed satisfies the training requirements of this section; or

(ii) The applicant has the experience and/or training which demonstrates the abilities necessary for successful, efficient production as determined by the County Committee based on documentation provided by the applicant with the request for the waiver. This documentation must include, at a minimum, the applicant's production records for the past 5 years and a statement explaining how the records demonstrate production ability.

(3) *Notifying applicants/borrowers of the County Committee's decision regarding training.* The applicant/borrower will be informed of the County Committee's decision as follows:

(i) Loan applicants receiving a waiver from the training will be notified in the letter of eligibility, required under § 1910.6 of subpart A of part 1910 of this chapter. Applicants for Primary Loan Servicing actions who are receiving a waiver will be notified through exhibit B or exhibit F to subpart S of part 1951 of this chapter, as appropriate.

(ii) Loan applicants required to complete the training will be notified in the letter of eligibility. Applicants for Primary Loan Servicing actions who are required to complete the training will be notified through exhibit B or exhibit F to subpart S of part 1951 of this chapter, as appropriate. The notification will include the name(s) of the approved vendor(s) in the applicant/borrower's area and the specific courses required. The notification to the applicant/borrower will also include a description of the scoring system to be used to determine if the applicant/borrower has successfully met the training requirements. In both loan making and servicing cases, the decision to require certain training is not appealable. However, the decision is reviewable.

(4) *Notification of applicants determined ineligible for assistance.* In the letter informing them of the County Committee's decision, applicants determined ineligible for assistance due to lack of management training and experience will be notified, for their information, of training programs approved under this section. If the ineligible applicant chooses to enroll in a training program, eligibility for future assistance will not be automatic upon completion of the course. Applicants who complete an approved course and later apply for a new loan must still demonstrate that they possess sufficient training and experience to assure reasonable prospects of success and meet other eligibility requirements for the assistance requested.

(5) *Contacting vendor and payment.* Upon receiving the notification of the training requirement, the borrower is responsible for selecting and contacting a vendor(s), and making all arrangements to begin the training. FmHA is not a party to fee or other agreements between the borrower and the vendor. Training fees must be

included in the plan of operation as a farm operating expense. Payment of training fees is an authorized use of operating loan funds.

(6) *Training agreement.* Prior to closing the loan or Primary Loan Servicing action, the applicant/borrower must sign Form FmHA 1924–23. This agreement will be placed in position 2 of the borrower case file.

(7) *Automated tracking system.* Field offices will process certain data to the automated Finance Office records in order to properly track borrower training-related information. Reference the automated system user manuals for more specific information on this automated tracking system.

(8) *County Office monitoring.* Required training will be included in Table C of Form FmHA 431–2. FmHA personnel will monitor borrower progress during farm visits and analyses in accordance with this subpart. The County Supervisor will also contact the borrower to follow up on unsatisfactory training progress reports. All contacts with the borrower will be noted in the running case record, together with the topics discussed and agreements reached.

(c) *Vendor's evaluation of borrower progress*—(1) All required training must be completed within 2 years after the borrower signs Form FmHA 1924–23. The County Supervisor may grant a 1-year written extension to the agreement in cases where the borrower demonstrates he/she was unable to complete the training due to circumstances beyond his/her control, such as poor health or discontinuance of the necessary approved courses. Refusal to grant a 1-year extension is not an appealable decision.

(2) The vendor will provide FmHA with periodic progress reports. The frequency of these reports will be determined by the State Director. These reports are not intended to reflect a grade or score, but to indicate whether the borrower is attending sessions and honestly endeavoring to complete the training program. Upon completion of the training, the vendor will provide the County Office with an evaluation of the borrower's knowledge of the course material. This evaluation shall specifically address the borrower's improvement toward meeting the goals outlined in this section. The instructor will also assign the borrower a score according to the following criteria:

Score

1 The borrower attended classroom sessions as agreed, satisfactorily completed all assignments, and demonstrated an understanding of the course material.

2 The borrower attended classroom sessions as agreed and attempted to complete all assignments; however, the borrower does not demonstrate an understanding of the course material.

3 The borrower did not attend classroom sessions as agreed and/or did not attempt to complete assignments. In general, the borrower did not make a good faith effort to complete the training.

(i) Borrowers receiving a score of 1 will have met the requirements of the agreement. The accounts of these borrowers will be serviced in accordance with existing regulations.

(ii) Borrowers receiving a score of 2 will have met the requirements of the agreement. However, since these borrowers do not adequately demonstrate an understanding of the course material, the County Supervisor will develop a plan outlining the additional supervision the borrower will require to accomplish the objectives of FmHA assistance, such as recommending further training, more frequent farm visits, or retaining professional services of an accountant, farm management consultant, or similar expert based upon the borrower's abilities.

(iii) Borrowers receiving a score of 3 will not have met the requirements of the agreement for training. Failure to complete the training as agreed will cause the borrower to be ineligible for future FmHA benefits including future direct and guaranteed loans, Primary Loan Servicing, Interest Assistance renewals, and restructuring of guaranteed loans.

(d) *Selection and approval of organizations and courses*—(1) *Identification of potential vendors.* Prior to the initial approval of vendors and prior to renewal of approved vendor's training agreements, the State Director or designee shall solicit applications from all interested organizations, keeping in mind its cultural diversity responsibilities. The State Director shall contact the Chief Executive Officer of the State and appropriate officials from the State Department of Agriculture, the State Extension Service, community colleges, and other private or nonprofit organizations which may be interested in conducting this training.

(2) *Application.* The vendor must submit the following items prior to consideration for approval:

(i) A sample of the course materials and a description of the method(s) of training to be used.

(ii) Specific training objectives for each section of the course. These objectives should relate to the general objectives outlined in paragraph (d)(3)(i) of this section.

(iii) A detailed course agenda specifying the topics to be covered, the time to be devoted to each topic, and the number of sessions to be attended.

(iv) A list of instructors and their qualifications, and the criteria by which additional instructors will be selected.

(v) The proposed locations where training will take place. These sites should be within a reasonable commuting distance for borrowers to be served by the vendor.

(vi) Cost per participant and/or cost per organization, *i.e.*, cost for husband/wife joint operation; father/son partnership; or multiple members of a corporation.

(vii) Minimum and/or maximum class size.

(viii) A description of the organization's experience in developing and administering training to farmers.

(ix) A description of the monitoring and/or quality control methods the organization intends to use.

(x) A description of the policy on allowing FmHA employees to attend the course for monitoring purposes, *i.e.*, the number of employees authorized to attend; the cost (if any); and the number of classes each employee can attend.

(xi) A description of how the needs of borrowers with physical and/or mental handicaps or learning disabilities will be met.

(xii) A plan of how the needs of borrowers for whom English is not their primary language will be met.

(3) *State Office review and recommendation.* Upon receipt of the application packages from the potential vendors, the State Director will review the material to assure the vendor's proposal meets the following minimum criteria for accomplishment of educational objectives, instructor qualifications, curriculum content, and vendor qualification:

(i) *Educational objectives.* Upon completion of the course, the borrower shall be able to:

(A) Describe the specific goals of the business, describe what changes are required to attain the business goals, and outline how these changes will occur using present and projected enterprise budgets.

(B) Maintain and utilize a financial management information system which includes financial and production records, a household budget, a statement of financial condition, and an accrual adjusted income statement. The borrower shall also be able to use this system when making financial and production decisions.

(C) Understand and utilize an income statement. Specifically, the borrower must understand the structure and

major components of an income statement and its role in analyzing the performance of a business, be familiar with the cash and accrual methods of determining net farm income, and understand the relationship between a balance sheet and an income statement.

(D) Understand and utilize a balance sheet. Specifically, the borrower must understand the major components of a balance sheet and its role in analyzing the business, be familiar with the categories of assets and liabilities and be able to provide examples of entries under each, and be familiar with the cost and market methods of valuing assets and liabilities and the advantages of each method.

(E) Understand and utilize a cash flow budget. Specifically, the applicant must be able to explain and justify estimates for production and expenses, and analyze the cash flow to identify potential problems.

(F) Using production records and other production information, be able to identify problems, evaluate alternatives, and make needed corrections to current production practices to achieve greater efficiency and profitability.

(ii) *Instructor qualifications.* Instructor qualifications will be reviewed to assure sufficient knowledge of the material and sufficient experience in adult education. The instructors must have a bachelor's degree or comparable experience in the subject area they will teach and a minimum of three years experience in conducting training courses or teaching. Also, the instructors must successfully complete any instructor training which may be associated with the FmHA-approved course.

(iii) *Curriculum.* The curriculum shall be reviewed to assure that the following subject matter is sufficiently addressed. A single vendor is not required to provide all the courses necessary to cover the entire curriculum; however, to the extent practicable, all topics must be available for all FmHA districts. The State Director shall identify the specific crop or livestock enterprises for which training must be available in a given area or district, and any additional subject matter to be covered for each.

(A) *Business Planning.* The course(s) shall cover the general areas of goal setting, risk management, and planning. Goal setting will include identification of personal and family goals, business goals, and short- and long-term goals. Risk management concepts will include the sources, magnitude and frequency of risk, risk tolerance, risk-taking ability of the business, and strategies for managing risk such as use of credit, marketing, production practices, and insurance. Finally, the course(s) will guide the borrower through the formulation of a long-term business plan for the farm and presentation of this plan to a lender.

(B) *Financial Management Systems.* The course(s) shall cover all aspects of farm accounting, specifically: Instruction in financial record keeping, preparation of a household budget, development and analysis of accrual adjusted income statements, balance sheets, and cash flow budgets. The course(s) shall focus on integrating these elements into a financial management system which enables the borrower to make business decisions based on his/her analysis of financial information.

(C) *Crop Production.* The course(s) shall focus on improving the profitability of the borrower's crop enterprises. Specifically, the course shall address keeping and analyzing production records, identifying problems in current production practices, identifying sources of production information and assistance, and using production information to analyze alternatives and identify the most profitable solution.

(D) *Livestock Production.* The course(s) shall focus on improving the profitability of the borrower's livestock enterprises. Specifically, the course shall address keeping and analyzing production records, identifying problems in current production practices, identifying sources of production information and assistance, and using production information to analyze alternatives and identify the most profitable solution.

(iv) *Vendor.* The proposed vendor of the training must have demonstrated a minimum of three years experience in conducting training courses or teaching the proposed subject matter.

(4) *Approval.* After review of the applications, the State Director shall determine which vendors should be recommended for final approval. Complete application packages from the selected vendors should be submitted to the National Office for concurrence prior to final approval. Applications from accredited colleges (including community colleges) or universities, however, do not require National Office concurrence prior to final approval. If all of the instructors have not been selected at the time of request for approval of the vendor, the vendor may be approved with the condition that instructors will meet the criteria set out in paragraph (d)(3)(ii) of this section. After approval, the State Director and the vendor(s) will sign Form FmHA 1924–24, "Agreement to Conduct Production and Financial Management Training for Farmers Home Administration Borrowers." This agreement will be valid for three years, unless revoked in writing and giving 30 days notice by the State Director or the vendor. The State Director may revoke the agreement if the vendor does not comply with the responsibilities listed in the agreement. Such revocation is nonappealable. The State Director will issue a State supplement to this subpart listing the approved vendor(s), the contact person for the vendor, the terms of the vendor agreements, and the subject matter in which each vendor is approved to conduct training.

(5) *Renewals.* Renewal of agreements to conduct training will not be automatic. The vendor must request renewal in writing, provide updates to any changes in curricula, and provide information which indicates the training provided by the vendor is effective. Such information may include course evaluations, test scores, or statistics on the improvement of borrowers who have completed the course. The State Director must obtain National Office concurrence on any decisions to deny renewal of a vendor's agreement. A decision to deny renewal of a vendor's agreement is nonappealable.

(e) *Vendor monitoring.* An operational file will be maintained in the State Office for each approved vendor. This file will include the application, National Office concurrence (if required), the signed Form FmHA 1924–24, documentation of FmHA's monitoring of the vendor, and any further documentation to determine the success of the vendor's program. To assure the training organization is correctly and effectively implementing the training as proposed, the State Director or designee will be responsible for monitoring the vendor. This monitoring shall, as a minimum, consist of:

(1) Attendance at selected training sessions for each vendor to verify that the agreed-upon subject matter is being covered in sufficient detail and to assess the effectiveness of the training provided by the instructors.

(2) Review of course and instructor evaluations. Course and instructor evaluations will be completed by the borrowers on Form FmHA 1924–22, "Borrower Training Course Evaluation." This form will be provided to the borrowers by the instructor as they complete the course. The evaluations will be forwarded to the State Director for review. The results will be summarized and made part of the operational file on each vendor.

(3) Monitoring of borrowers' improvement upon completion of a

course. The State Director will analyze statistics regarding borrower performance, such as the graduation and delinquency of borrowers who have completed the required training course.

PART 1941—OPERATING LOANS

7. The authority citation for part 1941 continues to read as follows:

Authority: 7 U.S.C. 1989; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart A—Operating Loan Policies, Procedures, and Authorizations

8. Section 1941.12 is amended by adding paragraph (c) to read as follows:

§ 1941.12 Eligibility requirements.

* * * * *

(c) *Borrower training.* Except for applicants for youth loans, all applicants must agree to meet the training requirements of § 1924.74 of subpart B of part 1924 of this chapter unless a waiver is granted in accordance with that section. In the case of a cooperative, corporation, partnership, or joint operation, any individual member, stockholder, partner, or joint operator holding a majority interest in the operation or who is operating the farm must agree to complete the training or qualify for the waiver on behalf of the entity. However, if one entity member is solely responsible for financial or production management, then only that entity member will be required to complete the training in that area for the entity or qualify for a partial waiver. If the financial and production functions of the farming operation are shared, the knowledge and skills of the individual(s) with the responsibility of production and/or financial management of the operation will be considered in the aggregate for granting a waiver or requiring that training be completed. If a waiver is not granted, these individuals will be required to complete the training in accordance with their responsibilities. If the applicant has previously been required to obtain training, the applicant must be enrolled in and attending, or have satisfactorily completed, the training required.

§ 1941.14 [Amended]

9. Section 1941.14 is amended by revising in paragraph (a)(3) the words "Item D" to read "Table C."

PART 1943—FARM OWNERSHIP, SOIL AND WATER AND RECREATION

10. The authority citation for part 1943 continues to read as follows:

Authority: 7 U.S.C. 1989; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart A—Insured Farm Ownership Loan Policies, Procedures, and Authorizations

11. Section 1943.12 is amended by adding paragraph (c) to read as follows:

§ 1943.12 Farm ownership loan eligibility requirements.

* * * * *

(c) *Borrower training.* The applicant must agree to meet the training requirements of § 1924.74 of subpart B of part 1924 of this chapter unless a waiver is granted in accordance with that section. In the case of a cooperative, corporation, partnership, or joint operation, any individual member, stockholder, partner, or joint operator holding a majority interest in the operation or who is operating the farm must agree to complete the training or qualify for the waiver on behalf of the entity. However, if one entity member is solely responsible for financial or production management, then only that entity member will be required to complete the training in that area for the entity or qualify for a partial waiver. If the financial and production functions of the farming operation are shared, the knowledge and skills of the individual(s) with the responsibility of production and/or financial management of the operation will be considered in the aggregate for granting a waiver or requiring that training be completed. If a waiver is not granted, these individuals will be required to complete the training in accordance with their responsibilities. If the applicant has previously been required to obtain training, the applicant must be enrolled in and attending, or have satisfactorily completed, the training required.

Subpart B—Insured Soil and Water Loan Policies, Procedures and Authorizations

12. Section 1943.62 is amended by adding paragraph (c) to read as follows:

§ 1943.62 Soil and water loan eligibility requirements.

* * * * *

(c) *Borrower training.* The applicant must agree to meet the training requirements of § 1924.74 of subpart B of part 1924 of this chapter unless a waiver is granted in accordance with that section. In the case of a cooperative, corporation, partnership, or joint operation, any individual member, stockholder, partner, or joint operator holding a majority interest in the operation or who is operating the farm must agree to complete the training or qualify for the waiver on behalf of the entity. However, if one entity member is solely responsible for financial or production management, then only that entity member will be required to complete the training in that area for the entity or qualify for a partial waiver. If the financial and production functions of the farming operation are shared, the knowledge and skills of the individual(s) with the responsibility of production and/or financial management of the operation will be considered in the aggregate for granting a waiver or requiring that training be completed. If a waiver is not granted, these individuals will be required to complete the training in accordance with their responsibilities. If the applicant has previously been required to obtain training, the applicant must be enrolled in and attending, or have satisfactorily completed, the training required.

PART 1945—EMERGENCY

13. The authority citation for part 1945 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart D—Emergency Loan Policies, Procedures, and Authorizations

14. Section 1945.162 is amended by adding paragraph (m) to read as follows:

§ 1945.162 Eligibility requirements.

* * * * *

(m) *Borrower training.* The applicant must agree to meet the training requirements of § 1924.74 of subpart B of part 1924 of this chapter unless a waiver is granted in accordance with that section. In the case of a cooperative, corporation, partnership, or joint operation, any individual member, stockholder, partner, or joint operator holding a majority interest in the operation or who is operating the farm must agree to complete the training or qualify for the waiver on behalf of the entity. However, if one entity member is solely responsible for financial or production management, then only that entity member will be required to complete the training in that area for the entity or qualify for a partial waiver. If the financial and production functions of the farming operation are shared, the knowledge and skills of the individual(s) with the responsibility of production and/or financial management of the operation will be considered in the aggregate for granting a waiver or requiring that training be completed. If a waiver is not granted, these individuals will be required to complete the training in accordance with their responsibilities. If the

applicant has previously been required to obtain training, the applicant must be enrolled in and attending, or have satisfactorily completed, the training required.

PART 1951—SERVICING AND COLLECTIONS

15. The authority citation for part 1951 is revised to read as follows:

Authority: 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart S—Farmer Program Account Servicing Policies

16. Section 1951.909 is amended by adding paragraphs (a)(3) and (c)(5) to read as follows:

§ 1951.909 Processing Primary Loan Service Programs requests.

(a) * * *

(3) If the borrower's completed application for Primary Loan Servicing includes a request for a waiver from the training required in paragraph (c)(5) of this section, the County Committee will, prior to the County Supervisor's offer of any Primary Loan Servicing, evaluate the borrower's knowledge and ability in production and financial management and determine the need for additional training as set forth in § 1924.74 of subpart B of part 1924 of this chapter.

* * * * *

(c) * * *

(5) The borrower must agree to meet the training requirements of § 1924.74 of subpart B of part 1924 of this chapter unless a waiver is granted in accordance with that section. The training requirement applies to all primary loan servicing programs, except for net recovery buyout offers. In the case of a cooperative, corporation, partnership, or joint operation, any individual member, stockholder, partner, or joint operator holding a majority interest in the operation or who is operating the farm must agree to complete the training or qualify for the waiver on behalf of the entity. However, if one entity member is solely responsible for financial or production management, then only that entity member will be required to complete the training in that area for the entity or qualify for a partial waiver. If the financial and production functions of the farming operation are shared, the knowledge and skills of the individual(s) with the responsibility of production and/or financial management of the operation will be considered in the aggregate for granting a waiver or requiring that training be completed. If a waiver is not granted, these individuals will be required to complete the training in accordance with their responsibilities. If the borrower has previously been required to obtain training, the borrower must be enrolled in and attending, or have satisfactorily completed, the training required to be considered eligible.

* * * * *

17. Attachment 1 of exhibit A of subpart S is amended by adding paragraph II (4) to read as follows:

Attachment 1 of Exhibit A of Subpart S—Primary and Preservation Loan Service and Debt Settlement Programs Purpose

* * * * *

II. * * *

(4) You must agree to meet, at your own cost, FmHA's training requirements in production and financial management. The cost will be included in your farm plan as an operating expense. The training must be completed within 2 years from the date of restructuring. The County Committee may waive this requirement if you are able to demonstrate that you have adequate training in this area. To request a waiver of this training requirement, complete Form FmHA 1924–27, "Request for Waiver of Borrower Training Requirements," and submit with your request for FmHA servicing. This training requirement is not applicable if you have previously received a waiver or you have successfully completed the required FmHA Borrower Training program.

* * * * *

18. Exhibit B of subpart S is amended by adding four paragraphs between the paragraphs beginning with the words "The attached computer printout * * *" and "If you want * * *" to read as follows:

Exhibit B of Subpart S—Notification of Offer To Restructure Debt for Financially Distressed Borrowers Current on Their Loan Payments

* * * * *

(If production and/or financial management training is to be required, insert the following paragraphs and attach a list of the courses the borrower is required to complete and a list of approved vendors in the borrower's area for these courses:)

As a condition of this restructuring, you must agree to meet, at your own cost, FmHA's training requirements which provide instruction in production and financial management within 2 years of the date your loans are restructured. The cost will be included in your farm plan as an operating expense. Upon completion of the training course(s), the instructor will assign a score according to the following criteria:

Score

1 The borrower attended classroom sessions as agreed, satisfactorily completed all assignments, and demonstrated an understanding of the course material.

2 The borrower attended classroom sessions as agreed and attempted to complete all assignments; however, the borrower does not demonstrate an understanding of the course material.

3 The borrower did not attend classroom sessions as agreed and/or did not attempt to complete assignments. In general, the borrower did not make a good faith effort to complete the training.

Attached is a list of courses you will be required to complete to fulfill the training requirement. A list of approved vendors in your area for these courses is also attached. Any denial of a request for a waiver of the training requirement is not appealable. If you fail to complete the training as agreed, you will be ineligible for future FmHA benefits including future Farmer Programs direct and guaranteed loans, Primary Loan Servicing, Interest Assistance renewals, and restructuring of guaranteed loans.

(If production and/or financial management training is being waived, insert the following sentence:)

The County Committee has waived the training requirement for the restructuring offered in this notice.

* * * * *

19. Exhibit F of Subpart S is amended by adding, in the section titled "Offer", four paragraphs between the paragraphs beginning with the words "The attached computer * * *" and "If you want * * *" to read as follows:

Exhibit F of Subpart S—Notification of Offer to Restructure Debt

* * * * *

Offer

* * * * *

(If production and/or financial management training is to be required, insert the following paragraphs and attach a list of the courses the borrower is required to complete and a list of approved vendors in the borrower's area for these courses:)

As a condition of this restructuring, you must agree to meet, at your own cost, FmHA's training requirements which provide instruction in production and financial management within 2 years of the date your loans are restructured. The cost will be included in your farm plan as an operating expense. Upon completion of the training course(s), the instructor will assign a score according to the following criteria:

Score

1 The borrower attended classroom sessions as agreed, satisfactorily completed all assignments, and demonstrated an understanding of the course material.

2 The borrower attended classroom sessions as agreed and attempted to complete all assignments; however, the borrower does not demonstrate an understanding of the course material.

3 The borrower did not attend classroom sessions as agreed and/or did not attempt to complete assignments. In general, the borrower did not make a good faith effort to complete the training.

Attached is a list of courses you will be required to complete to fulfill the training requirement. A list of approved vendors in your area for these courses is also attached.

Any denial of a request for a waiver of the training requirement is not appealable. If you fail to complete the training as agreed, you will be ineligible for future FmHA benefits including future Farmer Programs direct and guaranteed loans, Primary Loan Servicing, Interest Assistance renewals, and restructuring of guaranteed loans.

(If production and/or financial management training is being waived, insert the following sentence:)

The County Committee has waived the training requirement for the restructuring offered in this notice.

* * * * *

PART 1980—GENERAL

20. The authority citation for part 1980 is revised to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23; 7 CFR 2.70.

Subpart B—Farmer Program Loans

21. Section 1980.115 is amended by adding Administrative paragraph B. 3. d. to read as follows:

§ 1980.115 County Committee Review.

* * * * *

ADMINISTRATIVE

* * * * *

B. * * *

3. * * *

d. If training is required under § 1980.191 of this subpart, the lender will be required to have the borrower sign Form FmHA 1924–23, "Agreement to Complete Training." The lender will forward the signed form to the County Office.

* * * * *

22. Section 1980.124 is amended by revising paragraph (a)(4) to read as follows:

§ 1980.124 Consolidation, rescheduling, reamortizing and deferral.

(a) * * *

(4) The borrower has acted in good faith by demonstrating sincerity and honesty in meeting agreements with, and promises made to, the lender and/or FmHA. This includes cooperating in servicing the account, maintaining the security, and satisfactorily completing the Borrower Training program, if required.

* * * * *

23. Section 1980.175 is amended by reserving paragraph (b)(3) and by adding paragraph (b)(4) to read as follows:

§ 1980.175 Operating loans.

* * * * *

(b) * * *

(3) [Reserved]

(4) The loan applicant must agree to meet the training requirements of § 1980.191 of this subpart unless a waiver is granted as set forth in that section. In the case of a cooperative, corporation, partnership, or joint operation, any individual member, stockholder, partner, or joint operator holding a majority interest in the operation or who is operating the farm must agree to complete the training or qualify for the waiver on behalf of the entity. However, if one entity member is solely responsible for financial or production management, then only that entity member will be required to complete the training in that area for the entity or qualify for a partial waiver. If the financial and production functions of the farming operation are shared, the knowledge and skills of the individual(s) with the responsibility of production and/or financial management of the operation will be considered in the aggregate for granting a waiver or requiring that training be completed. If a waiver is not granted, these individuals will be required to complete the training in accordance with their responsibilities. If the loan applicant has previously been required to obtain training, the loan applicant must be enrolled in and attending, or have satisfactorily completed, the training required. Borrowers applying for restructuring of guaranteed loans will not be required to complete training; however, if training has been required as part of a previous loan making action, the borrower must be enrolled and attending, or have satisfactorily completed, the training required.

* * * * *

24. Section 1980.191 is added to read as follows:

§ 1980.191 Borrower Training program.

(a) *Introduction.* (1) Supervised credit includes helping borrowers to develop the skills necessary for successful, efficient production and financial management of a farm business. An effective, formal training program provides a solid foundation on which borrowers can build the skills which will enable them to become efficient, financially sound producers who can obtain commercial financing. The goal of this training is for borrowers to develop and improve the financial and production management skills necessary to successfully operate a farm, build equity in the farm business, and graduate from FmHA programs to commercial sources of credit.

(2) The authorities contained in this section require borrowers with Farmer Programs loans from lenders guaranteed by FmHA to obtain training in production and financial management concepts. Unless waived, this training will be an eligibility requirement for all Farmer Programs direct and guaranteed loans.

(3) The training will be carried out by public and/or private sector providers of farm management and credit counseling services (including, but not limited to, community colleges, the Extension Service, State Departments of Agriculture, farm management firms, lenders, and similar qualified organizations).

(4) State Directors will enter into agreements with one or more qualified providers in each State to conduct the training.

(b) *Processing.* (1) *County Committee review.* The determination of an applicant/borrower's need for enhanced training in production and financial management concepts will be made by the County Committee. To make this determination, the Committee will review the case file (in the case of borrowers) and the complete application package for the assistance requested. A decision that the applicant/borrower needs such training cannot be used as a basis for rejecting the request for assistance. In the case of a cooperative, corporation, partnership, or joint operation, any individual member, stockholder, partner, or joint operator holding a majority interest in the operation or who is operating the farm must agree to complete the training on behalf of the entity. However, if one entity member is solely responsible for financial or production management, then only that entity member will be required to complete the training in that area for the entity or qualify for a partial waiver. If the financial and production functions of the farming operation are shared, the knowledge and skills of the individual(s) with the responsibility of production and/or financial management of the operation will be considered in the aggregate for granting a waiver or requiring that training be completed. If a waiver is not granted, these individuals will be required to complete the training in accordance with their responsibilities for production and/or financial management. This training must be completed within 2 years after Form FmHA 1924–23 is signed if a waiver is not granted. The Committee's decision as to the requirement of training will be documented on Form FmHA 440–2. When production training is required, a borrower must complete course work covering production management in crop or livestock enterprises which constitute twenty percent of the cash farm income for the coming production cycle, as determined by the County Committee. Borrowers who are adding a new enterprise must agree to complete

any required production training in that enterprise unless a waiver is granted by the County Committee. The areas of production training will be specified on Form FmHA 440–2. Borrowers must also complete financial management training unless a waiver has been granted by the County Committee. In the case of loan applicants, the training requirement will be considered after the County Committee has determined that the applicant meets all eligibility criteria for the type of assistance requested. Eligibility determinations and borrower training determinations should be made during the same Committee meeting. If the Committee determines the applicant is ineligible for assistance, the training requirement will not be considered.

(2) *Waivers.* Lenders may request a waiver from the training requirement on behalf of the loan applicant by submitting Form FmHA 1980–83, "Request for Waiver of Borrower Training Requirements for Guaranteed Loan Applicants," or a written request which includes evidence that the loan applicant meets at least one of the waiver conditions listed in paragraphs (b)(2)(i) and (b)(2)(ii) of this section. The request should be submitted as part of a complete application for the assistance requested. However, lenders do not need to provide this information for loan applicants who have previously received a waiver or who have previously satisfied the training requirements. The loan applicant/borrower must meet all training requirements for both production and financial management if no waiver is granted. If the loan applicant/borrower receives a waiver for production training, the requirements for financial management training must still be met. Conversely, if the loan applicant/borrower receives a waiver for financial management training, the requirements for production training must still be met. In the case of entity applicants, only those entity members holding a majority interest in the entity or operating the farm must meet the waiver conditions for the entity to qualify for a waiver. However, if one entity member is solely responsible for financial or production management, then only that entity member will be required to complete the training in that area for the entity or qualify for a partial waiver. If the financial and production functions of the farming operation are shared, the knowledge and skills of the individual(s) with the responsibility of production and/or financial management of the operation will be considered in the aggregate for granting a waiver or requiring that training be completed. If a waiver is not granted, these individuals will be required to complete the training in accordance with their responsibilities for production and/or financial management. The County Committee may waive the financial and/or production training requirements under the following conditions:

(i) The loan applicant has successfully completed an equivalent training program. To meet this requirement, the loan applicant must submit via the lender evidence of completion of a program similar to a course approved under this section. The submission must include a description of the content and subjects covered in the program completed by the applicant or entity members. The submission must also include evidence of completion, such as a grade report, certificate of completion, or written certification by the course instructor. The program must have covered all subject areas in paragraph (d)(3)(iii) of this section, including the appropriate production management courses. If applicable, CLP lenders will certify that loan applicants have completed a program similar to a course approved under this section and will assemble the necessary documentation. However, CLP lenders will not be required to submit the documentation to FmHA with the request for assistance. The County Committee will review the documentation submitted by the lender for assistance to determine whether the training completed satisfies the training requirements of this section; or

(ii) The loan applicant has demonstrated adequate knowledge and ability in the subject areas covered under this training program by performing the tasks described under paragraph (d)(3)(i) of this section and the guaranteed lender has recommended a waiver. To recommend a waiver, the lender must prepare a brief narrative describing the loan applicant's past production and/or financial management performance specifically related to satisfaction of the course objectives. The County Committee will review the loan narrative and other available information to determine if the loan applicant has demonstrated adequate knowledge and ability in the subject areas covered by the training program.

(3) *Notifying lenders and loan applicants of the County Committee's decision regarding training.* The lender and loan applicant will be informed of the County Committee's decision as follows:

(i) Loan applicants receiving a waiver from the training and the lender requesting the guarantee will be notified in the letter of eligibility required under § 1980.115 of this subpart.

(ii) Loan applicants required to complete the training and their lenders will be notified in the letter of eligibility. The requirement will also be specified in Form FmHA 1980–15. The notification will include the name(s) of the approved vendor(s) in the loan applicant's area and the specific production courses required. The notification will also include a description of the scoring system to be used to determine if the loan applicant has successfully met the training requirements. The decision to require training is not appealable. However, the decision is reviewable.

(4) *Notification of loan applicants determined ineligible for assistance.* In the letter informing them of the County Committee's decision, applicants determined ineligible for assistance due to lack of management training and experience will be notified, for their information, of training programs approved under this section. If the ineligible applicant chooses to enroll in a training program, eligibility for future assistance will not be automatic upon completion of the course. Loan applicants who complete an approved course and later apply for a new loan must still demonstrate that they possess sufficient training and experience to assure reasonable prospects of success and meet other eligibility requirements for the assistance requested.

(5) *Contacting vendor and payment.* Upon receiving the notification of the training requirement, the loan applicant is responsible for selecting and contacting a vendor(s), and making all arrangements to begin the training. The lender may recommend an approved vendor. FmHA is not a party to any agreements between the loan applicant and the vendor. Training fees must be included in the plan of operation as a farm operating expense. Payment of training fees is an authorized use of operating loan funds.

(6) *Training agreement.* Before the lender closes the loan, the loan applicant must sign Form FmHA 1924–23. The lender will return the signed agreement to FmHA along with the other closing documents associated with the guaranteed loan. The agreement will be placed in position 2 of the case file.

(7) *Automated tracking system.* A training code for each borrower must be entered into the automated tracking system at the time the loan is obligated. This code is necessary in all cases, even if the County Committee granted the borrower a waiver from the

requirements of the Borrower Training program.

(8) *County Office Monitoring.* FmHA personnel will monitor borrower progress in the training program based on periodic progress reports from the lender. If an unsatisfactory progress report is received, FmHA will schedule a meeting with the lender. The meeting will be documented in the running case record and will include the topics discussed and agreements reached. Copies of this documentation will be provided to the lender and the borrower.

(c) *Vendor's evaluation of borrower progress.* (1) All required training must be completed within 2 years after the borrower signs Form FmHA 1924–23. The County Supervisor may grant a 1-year written extension to the agreement, upon recommendation by the lender, in cases where the borrower demonstrates he/she was unable to complete the training due to circumstances beyond his/her control, such as poor health, or discontinuance of the necessary approved courses. Refusal to grant a 1-year extension is not an appealable decision.

(2) The vendor will provide the lender and FmHA with periodic progress reports. The frequency of these reports will be determined by the State Director. These reports are not intended to reflect a grade or score, but to indicate whether the borrower is attending sessions and honestly endeavoring to complete the training program. Upon completion of the training, the vendor will provide the lender and FmHA with an evaluation which shall specifically address the borrower's improvement toward meeting the goals outlined in this section. The instructor will also assign the borrower a recommended score according to the following criteria:

Score

1 The borrower attended classroom sessions as agreed, satisfactorily completed all assignments, and demonstrated an understanding of the course material.

2 The borrower attended classroom sessions as agreed and attempted to complete all assignments; however, the borrower does not demonstrate an understanding of the course material.

3 The borrower did not attend classroom sessions as agreed and/or did not attempt to complete assignments. In general, the borrower did not make a good faith effort to complete the training.

(i) Borrowers receiving a score of 1 will have met the requirements of the agreement. The accounts of these borrowers will be serviced in accordance with existing regulations.

(ii) Borrowers receiving a score of 2 will have met the requirements of the agreement. However, since these borrowers do not adequately understand the course material, the lender and the County Supervisor will develop a plan outlining the additional supervision the borrower will require to accomplish the objectives of FmHA assistance.

(iii) Borrowers receiving a score of 3 will not have met the requirements of the agreement for training. Failure to complete the training as agreed will cause the borrower to be ineligible for future FmHA benefits including future direct and guaranteed loans, Primary Loan Servicing of direct Farmer Programs loans, Interest Assistance renewals, and restructuring of guaranteed loans.

(d) *Selection and approval of organizations and courses.* (1) *Identification of potential vendors.* Prior to the initial approval of vendors and prior to renewal of approved vendor's training agreements, the State Director or designee shall solicit applications from all interested organizations, keeping in mind its cultural diversity responsibilities. The State Director shall contact the Chief Executive Officer of the State and appropriate officials from the State Department of Agriculture, the State Extension Service, community colleges, and other private or nonprofit organizations which may be interested in conducting this training.

(2) *Application.* The vendor must submit the following items prior to consideration for approval:

(i) A sample of the course materials and a description of the method(s) of training to be used.

(ii) Specific training objectives for each section of the course. These objectives should relate to the general objectives outlined in paragraph (d)(3)(i) of this section.

(iii) A detailed course agenda specifying the topics to be covered, the time to be devoted to each topic, and the number of sessions to be attended.

(iv) A list of instructors and their qualifications, and the criteria by which additional instructors will be selected.

(v) The proposed locations where the training will take place. The sites should be within a reasonable commuting distance for borrowers to be served by the vendor.

(vi) Cost per participant and/or cost per organization, *i.e.* cost for husband/wife joint operation; father/son partnership; or multiple members of a corporation.

(vii) Minimum and/or maximum class size.

(viii) A description of the organization's experience in developing and administering training to farmers.

(ix) A description of the monitoring and/or quality control methods the organization intends to use.

(x) A description of the policy on allowing FmHA employees to attend the course for monitoring purposes, *i.e.*, the number of employees authorized to attend; the cost (if any); and the number of classes each employee can attend.

(xi) A description of how the needs of borrowers with physical and/or mental handicaps or learning disabilities will be met.

(xii) A plan of how the needs of borrowers for whom English is not their primary language will be met.

(3) *State Office review and recommendation.* Upon receipt of the application packages from the potential vendors, the State Director will review the material to assure the vendor's proposal meets the following minimum criteria for accomplishment of educational objectives, instructor qualifications, curriculum content, and vendor qualification:

(i) *Educational objectives.* Upon completion of the course, the borrower shall be able to:

(A) Describe the specific goals of the business, describe what changes are required to attain the business goals, and outline how these changes will occur using present and projected enterprise budgets.

(B) Maintain and utilize a financial management information system which includes financial and production records, a household budget, a statement of financial condition, and an accrual adjusted income statement. The borrower shall also be able to use this system when making financial and production decisions.

(C) Understand and utilize an income statement. Specifically, the borrower must understand the structure and major components of an income statement and its role in analyzing the performance of a business, be familiar with the cash and accrual methods of determining net farm income, and understand the relationship between a balance sheet and an income statement.

(D) Understand and utilize a balance sheet. Specifically, the borrower must understand the major components of a balance sheet and its role in analyzing the business, be familiar with the categories of assets and liabilities and be able to provide examples of entries under each, and be familiar with the cost and market methods of valuing assets and liabilities and the advantages of each method.

(E) Understand and utilize a cash flow budget. Specifically, the applicant must be able to explain and justify estimates for production and expenses, and

analyze the cash flow to identify potential problems.

(F) Using production records and other production information, be able to identify problems, evaluate alternatives, and make needed corrections to current production practices to achieve greater efficiency and profitability.

(ii) *Instructor qualifications.* Instructor qualifications will be reviewed to assure sufficient knowledge of the material and sufficient experience in adult education. The instructors must have a bachelor's degree or comparable experience in the subject area which they will teach and a minimum of three years experience in conducting training courses or teaching. Also, the instructors must successfully complete any instructor training which may be associated with the FmHA approved course.

(iii) *Curriculum.* The curriculum shall be reviewed to assure that the following subject matter is sufficiently addressed. A single vendor is not required to provide all the courses necessary to cover the entire curriculum; however, to the extent practicable, all topics must be available for all FmHA districts. The State Director shall identify the specific crop or livestock enterprises for which training must be available in a given area or district, and any additional subject matter to be covered for each.

(A) *Business Planning.* The course(s) shall cover the general areas of goal setting, risk management, and planning. Goal setting will include identification of personal and family goals, business goals, and short- and long-term goals. Risk management concepts will include the sources, magnitude and frequency of risk, risk tolerance, risk taking ability of the business, and strategies for managing risk such as use of credit, marketing, production practices, and insurance. Finally, the course(s) will guide the borrower through the formulation of a long term business plan for the farm and presentation of this plan to a lender.

(B) *Financial Management Systems.* The course(s) shall cover all aspects of farm accounting, specifically: instruction in financial record keeping, preparation of a household budget, development and analysis of accrual adjusted income statements, balance sheets, and cash flow budgets. The course(s) shall focus on integrating these elements into a financial management system which enables the borrower to make business decisions based on his/her analysis of financial information.

(C) *Crop Production.* The course(s) shall focus on improving the profitability of the borrower's crop enterprises. Specifically, the course shall address keeping and analyzing production records, identifying problems in current production practices, identifying sources of production information and assistance, and using production information to analyze alternatives and identify the most profitable solution.

(D) *Livestock Production.* The course(s) shall focus on improving the profitability of the borrower's livestock enterprises. Specifically, the course shall address keeping and analyzing production records, identifying problems in current production practices, identifying sources of production information and assistance, and using production information to analyze alternatives and identify the most profitable solution.

(iv) *Vendor.* The proposed vendor of the training must have demonstrated a minimum of 3 years experience in conducting training courses of similar scope or teaching in the proposed subject matter.

(4) *Approval.* After review of the applications, the State Director shall determine which vendors should be recommended for final approval. Complete application packages from the selected vendors should be submitted to the National Office for concurrence prior to final approval. Applications from accredited colleges (including community colleges) or universities, however, do not require National Office concurrence prior to final approval. If all of the instructors have not been selected at the time of request for approval of the vendor, the vendor may be approved with the condition that instructors will meet the criteria set out in paragraph (d)(3)(ii) of this section. After approval, the State Director and the vendor(s) will sign Form FmHA 1924-24, "Agreement to Conduct Production and Financial Management Training for Farmers Home Administration Borrowers." This agreement will be valid for three years, unless revoked in writing, giving 30 days notice by the State Director or the vendor. The State Director may revoke the agreement if the vendor does not comply with the responsibilities listed in the agreement. Such revocation is nonappealable. The State Director will issue a State supplement to this subpart listing the approved vendor(s), the contact person for the vendor, the terms of the vendor agreements, and the subject matter in which each vendor is approved to conduct training.

(5) *Renewals.* Renewal of agreements to conduct training will not be automatic. The vendor must request renewal in writing, provide updates to any changes in curricula, and provide information which indicates the training provided by the vendor is effective. Such information may include course evaluations, test scores, or statistics on the improvement of borrowers who have completed the course. The State Director must obtain National Office concurrence in any decisions to deny renewal of a vendor's agreement. A decision to deny renewal of a vendor's agreement is nonappealable.

(e) *Vendor monitoring.* An operational file will be maintained in the State Office for each approved vendor. This file will include the application, National Office concurrence (if required), the signed Form FmHA 1924-24, documentation of FmHA's monitoring of the vendor, and any further documentation to determine the success of the vendor's program. To assure the training organization is correctly and effectively implementing the training as proposed, the State Director or designee will be responsible for monitoring the vendor. This monitoring shall, as a minimum, consist of:

(1) Attendance at selected training sessions for each vendor to verify that the agreed-upon subject matter is being covered in sufficient detail and to assess the effectiveness of the training provided by the instructors.

(2) Review of course and instructor evaluations. Course and instructor evaluations will be completed by the borrowers on Form FmHA 1924-22, "Borrower Training Course Evaluation." This form will be provided to the borrowers by the instructor as they complete the course. The evaluations will be forwarded to the State Director for review. The results will be summarized and made part of the operational file on each vendor.

(3) Monitoring of borrowers' improvement upon completion of a course. The State Director will analyze statistics regarding borrower performance, such as the graduation and delinquency of borrowers who have completed the required training course.

25. Exhibit D to subpart B is amended by adding paragraph IV. J. to read as follows:

Exhibit D to Subpart B—Interest Assistance Program

* * * * *

IV. * * *

J. If the loan applicant has previously been required to obtain training in accordance with § 1980.191 of this subpart, the loan applicant must be enrolled in and attending, or have satisfactorily completed, the training required.

* * * * *

Dated: November 24, 1993.

Bob J. Nash,

Under Secretary for Small Community and Rural Development.

[FR Doc. 93-31295 Filed 12-29-93; 8:45 am]

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 103, 212, 214, 235, and 274a

[INS No. 1611-93]

RIN 1115-AB72

Temporary Entry of Business Persons Under the North American Free Trade Agreement (NAFTA)

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rule implements provisions of the North American Free Trade Agreement (NAFTA) by amending the Immigration and Naturalization Service (Service) regulations to establish procedures for the temporary entry of Canadian and Mexican citizen business persons into the United States. This rule will facilitate temporary entry on a reciprocal basis among the United States, Canada, and Mexico, while recognizing the continued need to ensure border security, and to protect indigenous labor and permanent employment in all three countries.

DATES: The effective date is January 1, 1994. Written comments must be submitted on or before February 28, 1994.

ADDRESSES: Please submit written comments, in triplicate, to the Records Systems Division, Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., room 5307, Washington, DC 20536. To ensure proper handling, please reference INS number 1611-93 on your correspondence.

FOR FURTHER INFORMATION CONTACT: Jacquelyn A. Bednarz, Chief, Nonimmigrant Branch, Immigration and Naturalization Service, 425 I Street, NW., room 7122, Washington, DC 20536, telephone (202) 514-5014.

SUPPLEMENTARY INFORMATION: On December 17, 1992, the Presidents of the United States and Mexico and the Prime Minister of Canada entered into the North American Free Trade Agreement (NAFTA). Implementation of this agreement has been provided for by the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Public Law 103-182. The NAFTA Implementation Act was signed into law by the President of the United States on December 8, 1993. The NAFTA is currently set to enter into force on January 1, 1994.

This rule pertains to Canadian and Mexican citizen temporary visitors for business seeking classification under section 101(a)(15)(B) of the Immigration and Nationality Act (Act), to Canadian and Mexican citizen treaty traders and investors seeking classification under section 101(a)(15)(E) of the Act, to Canadian and Mexican citizen temporary workers seeking classification under section 101(a)(15)(L) of the Act, and to Canadian and Mexican citizens seeking classification for engagement in activities at a professional level under section 214(e) of the Act, as amended by section 341(b) of the NAFTA Implementation Act.

This rule establishes procedures for the temporary entry of Canadian and Mexican citizen business persons as provided in chapter 16 of the NAFTA and subtitle D of title III of the NAFTA Implementation Act. Chapter 16, subtitle D of title III, and this rule reflect the special trading relationship now established between the United States, Canada, and Mexico, and recognize the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for such temporary entry. At the same time, full recognition is given to the continued need to ensure border security while protecting the domestic labor force and permanent employment in all three countries.

The immigration-related provisions of the NAFTA are similar to those contained within the United States-Canada Free Trade Agreement (CFTA), which has been in force since January 1, 1989. The CFTA will be suspended when the NAFTA enters into force. The NAFTA provisions relate to the same four nonimmigrant classifications which were impacted by the CFTA: B-1, E, L-1, and Professional (previously designated TC for Canadian citizens under CFTA and redesignated TN for Canadian and Mexican citizens under NAFTA).

Section D of Annex 1603 of the NAFTA, however, permits the United States to establish a numerical limit with respect to professionals from Mexico for a transition period of up to ten years. Under Appendix 1603.D.4 of the NAFTA, beginning on the date of entry into force of the NAFTA, the numerical limit is set at 5,500 for such Trade Professionals annually. The United States and Mexico may mutually agree to increase the numerical limit or eliminate it entirely prior to the end of the ten year period.

Along with the numerical limit, citizens of Mexico who seek classification as a professional must do so on the basis of a petition filed by a United States employer. Before the employer may file the petition, it will be required to meet the labor attestation requirements of section 212(m) of the Act in the case of a registered nurse, and the application requirement of section 212(n) of the Act in the case of all other professionals set out in Appendix 1603.D.1 of the NAFTA.

Additionally, Article 1603 of the NAFTA states that each party to the agreement may refuse to issue an immigration document to a NAFTA business person where the temporary entry of that person may affect adversely the settlement of any labor dispute in progress at the place or intended place of employment, or if temporary entry would affect adversely the employment of any person involved in such dispute. The regulations relating to classification and admission of citizens of Canada and Mexico in the E, L-1, and Professional categories have been amended to reflect this provision. These provisions are designed to protect the domestic labor force of each signatory country.

Specific changes to 8 CFR are as follows:

8 CFR 103.1(f)(2)

Paragraphs (f)(2)(X) and (f)(2)(xxiii) of § 103.1 have been amended to include within the appellate jurisdiction of the Associate Commissioner, Examinations, those petitions filed by United States employers in behalf of citizens of Mexico seeking classification as professionals under Appendix 1603.D.1 to Annex 1603 of the NAFTA.

8 CFR 103.7(b)

Section 103.7(b) is amended to allow for the entry of citizens of Canada to engage in business activities at a professional level pursuant to chapter 16 of the NAFTA, rather than pursuant to chapter 15 of the CFTA, which will be suspended with entry into force of the NAFTA. The processing fee to be remitted upon entry remains $50.00. It should be noted that no fee is to be remitted by a citizen of Canada who has been previously admitted in TC status and is seeking readmission to the United States in TN status for the remainder of the period authorized on Form I-94 (Arrival-Departure Record).

No fee is to be remitted by a citizen of Mexico who is entering to engage in business activities at a professional level.

8 CFR 212.1(1)

Section B to Annex 1603 of the NAFTA provides for the temporary entry of Canadian and Mexican citizens as treaty traders and investors. Section 341(a) of the NAFTA Implementation Act provides that such persons are considered to be classifiable as a nonimmigrant under section 101(a)(15)(E) of the Act. (Canadians were previously classifiable as treaty traders and investors under the CFTA.) Paragraph (1) is amended to replace the reference to the CFTA with a reference to the NAFTA. The requirement that an alien seeking admission as a treaty trader or investor be in possession of a nonimmigrant visa is maintained.

8 CFR 214.2(b)(1)

Section 214.2(b)(1) is amended to remove the language authorizing the admission in B–2 visitor status of the dependents of Canadian citizens admitted as TC professionals under the CFTA. A separate nonimmigrant visa classification has been established for the dependents of Professionals seeking entry under the NAFTA and has been designated TD (Trade Dependent).

8 CFR 214.2(b)(4)

Section 214.2(b)(4) is amended to provide for the entry in B–1 nonimmigrant classification of citizens of Mexico and Canada pursuant to Section A of Annex 1603 of the NAFTA. Additionally, Schedule 1 to Annex 1502.1 of the CFTA is replaced with Appendix 1603.A.1 to Annex 1603 of the NAFTA. Appendix 1603.A.1 is a list of business activities representative of a complete business cycle in which a B–1 business visitor seeking entry under the NAFTA may engage. Appendix 1603.A.1 is not an exhaustive list. Nothing precludes a citizen of Mexico or Canada from seeking entry to engage in traditional B–1 activities which are not included within Appendix 1603.A.1., provided they meet all requirements for entry in such status, including restrictions on sources or remuneration.

Appendix 1603.A.1 as it is contained within paragraph (b)(4)(i) of this section is almost identical with Schedule 1. The language has been amended to include citizens of Mexico. It should be noted that, during the course of negotiations relating to the NAFTA immigration provisions, Mexico decided not to be a Party to the language involving temporary entry of customs brokers into the signatory countries. Therefore, Mexican citizen customs brokers are not referenced in Appendix 1603.A.1 nor are they included in this regulatory amendment. A citizen of Mexico is not, however, precluded from seeking entry into the United States in B–1 status to perform the functions of a customs broker, provided that the individual meets all existing requirements for B–1 admission. Also, specific reference to the allowable activities of tour bus operators has been included at paragraph (b)(4)(i)(G)(*6*).

8 CFR 214.2(e)

A new paragraph (e)(3) sets in regulation the language regarding the denial of E treaty trader or investor classification to a citizen of Canada or Mexico in the case of certain labor disputes. Article 1603(2) of the NAFTA permits the United States to deny E classification where the temporary entry of the citizen of Canada or Mexico may affect adversely the settlement of a labor dispute or the employment of a person involved in such a dispute.

A strike or other work stoppage of workers must be first certified to or otherwise be made known to the Attorney General by the Secretary of Labor before a citizen of Canada or Mexico seeking E classification maybe denied entry under this paragraph.

Regulations pertaining to the denial of issuance of E visas will be provided by the Department of State.

The Service is not, at this time, amending section 248 of this chapter relating to change of nonimmigrant classification. Citizens of Canada and Mexico are, however, classifiable as treaty traders and investors under the NAFTA and may, therefore, seek to change status to E–1 or E–2 classification while in the United States. If such change of status is granted to a citizen of Canada or Mexico and he or she subsequently departs the United States, he or she must obtain a valid E–1 or E–2 visa from a consular officer in order to seek reentry into the United States in that status.

8 CFR 214.2(1)(17)

Paragraph (1)(17)(i) is revised to limit the ports of entry which will accept and adjudicate Form I–129 (Petition for a Nonimmigrant Worker) filed in behalf of a Canadian citizen beneficiary seeking classification as an L–1 intracompany transferee. In order to provide more efficient service, it was decided to limit port adjudication of Form I–129 to those ports of entry located along the U.S.-Canadian border and at pre-flight/pre-clearance stations located in Canada. It is at these ports of entry where, since entry into force of the CFTA, the vast majority of Forms I–129 have been filed, rather than at ports along the U.S.-Mexican border or at international airports within the U.S. Also, most ports of entry along the U.S.-Canadian border have Free Trade Examiners on staff who have expertise in the adjudication of such forms.

It was determined to be more beneficial to the public to concentrate such adjudication along the U.S.-Canadian land border and at pre-flight stations within Canada. Those few individuals who would have filed a Form I–129 at either a port of entry on the U.S.-Mexican border or at an international airport located within the U.S. may do so with the Director of the appropriate Service Center.

8 CFR 212.2(1)(18)

A new paragraph (1)(18) has been added to provide for denial of L–1 classification for a citizen of Mexico or Canada if there is a labor dispute in progress at the place of current or intended employment. If a strike or work stoppage of workers has been certified by or otherwise made known by the Secretary of Labor to the Attorney General, the Service may deny a petition for L–1 classification, suspend an approved petition, or deny entry to a citizen of Canada or Mexico seeking L–1 classification at a port of entry.

A citizen of Canada or Mexico who has been admitted for employment in L–1 classification at a location where a labor dispute has been certified by the Secretary of Labor shall not be deemed to be failing to maintain status solely on account of participation in the strike or other labor dispute. Additionally, participation in a strike or work stoppage does not extend or modify in any way the L–1's period of authorized stay in the United States.

8 CFR 214.6

Section 214.6 was added to 8 CFR when the CFTA entered into force on January 1, 1989 and provided for the classification and admission of Canadian citizens seeking temporary entry to engage in business activities at a professional level. The classification was designated TC (Trade Canada). Chapter Sixteen of the NAFTA allows citizens of Mexico to seek temporary entry to engage in business activities at a professional level as well as citizens of Canada. The nonimmigrant classification has been redesignated TN (Trade NAFTA), and specific requirements for citizens of Mexico have been set forth in this revision of § 214.6. As with the CFTA, admission as a TN under this section does not imply

that the citizen of Canada or Mexico would otherwise qualify as a professional under sections 101(a)(15)(H)(i) or 203(b)(3) of the Act.

Paragraph (a) is amended to replace the reference to the CFTA with reference to the NAFTA and include citizens of Mexico among those business persons who can seek entry to engage in business activities at a professional level.

Paragraph (b) contains definitions of terms used within § 214.6. Definitions of the terms "business person", "business activities at a professional level", and "temporary entry" were not substantively modified except to replace references to the CFTA with the NAFTA. A new definition of the term "engage in business activities at a professional level" has been included and does not allow for entry in TN status of those business persons who are seeking entry to engage in self-employment. Such self-employment was never specifically addressed under the regulations promulgated by the Service in response to the CFTA.

Annex 1603, Section B, establishes the appropriate category of temporary entry for a Party citizen seeking to develop and direct investment operations in another Party country, while Annex 1603, Section D, provides for the entry of a Party citizen seeking to render professional level services for an entity in another Party country. As stated in the NAFTA Implementation Act Statement of Administrative Action at page 178, "Section D of Annex 1603 does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed." Canadian or Mexican citizens seeking to engage in self-employment in trade or investment activities in this country must seek classification under section 101(a)(15)(E) of the Act.

Paragraph (c) sets in regulation Appendix 1603.D.1 to Annex 1603 of the NAFTA which is a listing of occupations agreed upon by the three signatory countries. Appendix 1603.D.1 replaces Schedule 2 to Annex 1502.1 of the CFTA at 8 CFR 214.6(d)(2)(ii). A baccalaureate or Licenciatura degree is the minimum requirement for these professions unless an alternative credential is otherwise specified. In the case of a Canadian or Mexican citizen whose occupation does not appear on Appendix 1603.D.1 or who does not meet the transparent criteria specified, nothing precludes the filing of a petition for classification under another existing nonimmigrant classification.

A footnote to Appendix 1603.D.1 allows for temporary entry to perform training functions relating to any of the cited occupations or professions, including conducting seminars. However, these training functions must be conducted in the manner of prearranged activities performed for a United States entity and the subject matter to be proffered must be at a professional level. The training function does not allow for the entry of a business person to conduct seminars which do not constitute the performance of prearranged activities for a United States entity.

Paragraph (d) sets forth procedures for the classification of a citizen of Mexico as a TN professional under the NAFTA. Paragraphs (4) and (5) of Annex 1603(D) and of the NAFTA permit the establishment of an annual numerical limit on the number of persons seeking entry to engage in Appendix 1603.D.1 professions in the United States, with consideration given to raising the limit each year thereafter. Appendix 1603.D.4 of Annex 1603 sets the limit for the first year following entry into force of the NAFTA at 5,500 initial petitions for citizens of Mexico seeking TN classification.

Additionally, Annex 1603(D)(5) states that a Part, after establishing a numerical limit, may require the business person subject to the numerical limit to comply with other procedures in place for the temporary entry of professionals. It should be noted that, under Appendix 1604.D.4(3), the provisions of paragraphs (4) and (5) of Annex 1603(D) shall apply no longer than ten years after the date of entry into force of the NAFTA.

Paragraph (d)(1) requires the prospective United States employer of a Mexican citizen seeking classification as a TN to file a petition on Form I–129 with the Northern Service Center. This is the only Service Center designated by Headquarters Service Center Operations to accept Form I–129 filed on behalf of a citizen of Mexico seeking such classification. This limitation on filing will allow for specialization at the Northern Service Center and will improve adjudication efficiency.

Supporting documentation requirements are contained in paragraph (d)(2). Section 341(b)(5) of the NAFTA Implementation Act provides that, while the numerical limit is in place for citizens of Mexico, entry of such persons shall be subject to the attestation requirements of section 212(m) of the Act, in the case of a registered nurse, or the application requirement of section 212(n) of the Act, in the case of all other professionals set out in Appendix 1603.D.1 of Annex 1603 of the NAFTA. Therefore, Form I–129 shall be filed in conjunction with evidence that the employer has filed with the Secretary of Labor either Form ETA 9029 in the case of a registered nurse, or Form ETA 9035 in the case of all other Appendix 1603.D.1 professionals.

Additionally, the employer must submit evidence that the beneficiary meets the minimum education requirements or alternative credentials requirements set forth in Appendix 1603.D.1. The regulation requires that degrees, diplomas, or certificates received by the beneficiary from an educational institution located outside of the United States, Canada, or Mexico must be accompanied by an evaluation by a reliable credentials evaluation service which specializes in such evaluations. Experiential evidence should be in the form of letters from former employers. If the beneficiary was formerly self-employed, business records should be submitted attesting to that self-employment.

Also, the petition must be accompanied by a separate statement from the United States employer specifically stating the Appendix 1603.D.1 profession in which the beneficiary will be engaging and giving a detailed description of the duties to be performed on a regular basis by the beneficiary. The Appendix 1603.D.1 profession is to be specifically set forth so that it may be noted for statistical purposes and to provide for more accurate adjudication of the petition in light of the proposed job duties.

Evidence of appropriate licensure must accompany the petition if the beneficiary will be engaging in an occupation or profession for which the particular state or locality has set forth licensing requirements.

The remainder of paragraph (d) contains Service procedural requirements relating to the approval, validity, denial, revocation and appeal of a petition. A petition classifying a citizen of Mexico as a TN professional may be approved for up to one year. Full appeal rights through the Administrative Appeals Unit are available to the petitioner in the case of a petition denial.

Finally, paragraph (d) sets forth the procedures for maintenance of the annual numerical limitation of 5,500 petition approvals for citizens of Mexico seeking TN classification.

Paragraph (e) sets forth the procedures for the classification of a citizen of Canada as a TN professional under the NAFTA. The requirements of this paragraph are substantially similar to those previously contained in § 214.6 (c) and (d). References to the CFTA have

been replaced with references to the NAFTA and the TC nonimmigrant classification has been replaced by the TN classification.

The documentary requirements at paragraph (e)(3)(ii) have been revised to more clearly state what is required to be included in the documentation provided to the TN applicant by the alien's United States employer or the alien's foreign employer, in the case of a Canadian citizen who is seeking entry in TN status to provide prearranged services to a United States entity. Specifically, the documentation must state the Appendix 1603.D.1 profession in which the applicant will be engaging and a description of his or her professional activities, including a brief summary of the daily job duties to be performed. As with the Mexican TN, educational credentials obtained outside of the United States, Canada, or Mexico shall be accompanied by an evaluation by a qualified credentials evaluator. Also, if state or local licensing requirements are in place for the professional activity in which the Canadian citizen will be engaging, evidence must be provided that those licensing requirements have been met prior to application for admission.

Paragraph (f) sets forth the procedures for admission of Canadian and Mexican citizens in TN classification. The Canadian citizen shall be required to remit the fee prescribed in 8 CFR 103.7 upon admission. That fee has been $50.00 (U.S) since implementation of the CFTA and will not be raised at this time. The applicant will be given a Service fee receipt and a Form I–94 showing admission in the classification TN for the period requested up to one year. The Form I–94 shall bear the legend "multiple entry". (Additional requirements relating to issuance of Form I–94 are contained in § 235.1(f), discussed below.)

Citizens of Mexico seeking admission in TN classification are required to present a valid TN visa issued by a United States consular officer. The maintenance of visa requirements by parties to the Agreement is authorized in Annex 1603(D)(3) of the NAFTA. In addition to the visa requirement, the Mexican citizen shall present at the time of application for initial admission a copy of the employer's statement described in this section at paragraph (d)(2)(iii). Presentation of this statement is required to facilitate the inspection procedure.

An applicant for admission as a TN professional shall be treated as if seeking classification as a nonimmigrant pursuant to section 101(a)(15) of the Act and, therefore, the presumption of immigrant intent applicable through section 214(b) of the Act shall apply to that citizen of Canada or Mexico seeking such classification. At the time of application for entry, the citizen of Canada or Mexico will be subject to inspection to determine the applicability of section 214(b) of the Act to that applicant.

Paragraph (g) provides for the readmission to the United States of Canadian and Mexican citizens in TN status. Readmission procedures for Canadian citizens have not been amended. The citizen of Mexico who is in possession of a valid Form I–94 may be readmitted for the remainder of the time authorized provided that the original intended professional activities and employer(s) have not changed and should retain possession of that original Form I–94. If no longer in possession of a valid Form I–94 (e.g., a citizen of Mexico seeking readmission upon return from a business trip to Europe), the citizen of Mexico may be readmitted upon presentation of a valid TN visa and evidence of prior admission. That evidence of prior admission may include, but is not limited to, a Service fee receipt from a prior entry or an admission stamp in the applicant's passport. Upon readmission, a new I–94 shall be issued bearing the legend "multiple entry".

Paragraph (h) contains the procedures to be followed if the citizen of Mexico or Canada wishes to apply for an extension of his or her stay in TN status. A citizen of Mexico seeking an extension of stay in the United States in TN status shall be applied for on Form I–129 to the Northern Service Center. Documentary requirements include evidence that Department of Labor certification requirements continue to be met by the employer. Provision is included for consular notification should the applicant leave the United States during the pendency of the application. A petition extension and extension of the applicant's stay may be granted for up to one year.

A citizen of Canada may seek an extension of stay through the filing of Form I–129 to the Northern Service Center. No Department of Labor certification requirements apply to a Canadian citizen in TN status who is seeking to extend that status. Provision is made for port of entry notification should the applicant depart the United States during the pendency of the application. An extension may be granted for up to one year.

Additionally, a citizen of Canada is not precluded from departing the United States and applying for admission with documentation from a United States employer or foreign employer, in the case of a Canadian citizen who is seeking to provide prearranged services at a profession level to a United States entity, which specifies that the applicant will be employed in the United States for an additional period of time. The evidentiary requirements set forth in paragraph (e)(3) shall be met by the applicant and the fee prescribed in 8 CFR 103.7 shall be remitted upon admission.

At the present time, there is no specified upper limit on the number of years a citizen of Mexico or Canada may remain in the United States in TN classification, as there is with most of the other nonimmigrant classes contained within section 101(a)(15) of the Act. However, section 214(b) of the Act is applicable to citizens of Canada or Mexico who seek an extension of stay in TN status and applications for extension or readmission must be examined in light of this statutory provision.

Paragraph (i) allows the Canadian or Mexican citizen to change or add employers while in the United States through the filing of a Form I–129 to the Northern Service Center. Also, the Canadian citizen may depart the United States and apply for reentry for the purpose of obtaining additional employment authorization with a new or an additional employer. Documentary requirements are prescribed in paragraph (e)(3)(ii) and the prescribed fee must be remitted upon admission.

Paragraph (j) provides for the admission of spouses and minor children who are accompanying or following to join TN professionals. They are to be accorded admission in TD (Trade Dependent) classification and are required to present a valid, unexpired nonimmigrant visa unless otherwise exempt under 8 CFR 212.1. For purposes of clarification, those persons who are normally exempt from nonimmigrant visa requirements include citizens of Canada and residents (Landed Immigrants) of Canada having a common nationality with Canadian citizens (British Commonwealth citizens).

No fee is required for the admission of dependents in TD status and they are to be issued a Form I–94 bearing the legend "multiple entry". Spouses and minor children are not authorized to accept employment while they are in the United States in TD status. If a TD dependent wishes to be employed, he or she must independently seek change of status to an employment-authorized nonimmigrant classification. Dependents in TD status may attend

school in the United States on a full-time basis, as such attendance is deemed to be incidental to their purpose for being in the United States, which is to accompany the TN alien.

Paragraph (k) provides for denial of TN classification of a citizen of Canada or Mexico if there is a labor dispute in progress at the place of current or intended employment. This provision is substantively identical to that which is applicable to the Canadian or Mexican L–1 applicant cited at 8 CFR 214.2(1)(18) and discussed above.

Paragraph (l) provides for automatic conversion from TC to TN classification for Canadian citizen professionals in TC classification as of January 1, 1994, as well as automatic conversion from B–2 to TD classification for the spouses and unmarried minor children of such TC nonimmigrants as of the effective date of the NAFTA Implementation Act. In addition, beginning on January 1, 1994, TC principal aliens and their B–2 spouses and unmarried minor children will be readmitted in TN or TD classification respectively, without being required to submit additional paperwork or payment of the normal application fee for the remainder of the period authorized on their Form I–94. TC or B–2 spouses and minor children seeking to extend their stay beyond this period are required to comply with the normal filing requirements of paragraph (h), including submission of appropriate paperwork and the prescribed application fee. This paragraph also provides that any applications for extension of stay in TC or B–2 classification as the spouse of a TC nonimmigrant which are pending on January 1, 1994 will be treated as if they were for TN or TD classification respectively.

Paragraph (l) specifically makes unavailable these transitional benefits to Canadian professionals who were admitted in TC classification in order to engage in self-employment in a business or practice in this country, and to their B–2 spouses and/or children. Although such self-employment was never specifically addressed in the regulations promulgated by the Service in response to the CFTA, the NAFTA Implementation Act Statement of Administrative Action at page 178 clarifies that, "It should be noted that while there are many similarities between this NAFTA category and the categories relating to professionals set out in INA section 101(a)(15), a determination of admissibility under the NAFTA neither forecloses nor establishes eligibility for entry under such other categories. Further, Section D of Annex 1603 does not authorize a professional to establish a business or practice in the United States in which the professional will be self-employed." Consistent with the intent of the signatories of the CFTA and NAFTA, the interim regulation specifically precludes readmitting Canadian professionals who were previously admitted in TC classification from engaging in self-employment and from extending their stay in TC or TN (or in the case of spouses and/or children, B–2 or TD) nonimmigrant classification. Canadian citizens seeking to engage in trade or investment activities in this country under the NAFTA Implementation Act must do so pursuant to section 101(a)(15)(E) of the Act.

235.1(d)

A new paragraph (d)(8) has been added to provide for the denial of entry in E, L–1, or TN status of any citizen of Canada if the Secretary of Labor has certified to or otherwise informed the Commissioner that a strike or work stoppage of workers is occurring at the place of current or intended employment and the temporary entry of the applicant would affect adversely either settlement of the labor dispute or the employment of any person involved in the dispute. Additionally, the paragraph requires notification in writing to the applicant of the reason(s) for the refusal. Also, a designated representative of the applicant's home country government must be promptly notified in writing of the reasons for the refusal.

Additional instructions will be forthcoming from the Service regarding the appropriate methods and channels for notification of Party governments.

8 CFR 235.1(f)

Paragraph (f)(1) has been amended to include specific requirements regarding the completion of Form I–94 issued to a citizen of Canada or Mexico in TN status. Specifically, item 18 on the reverse of Form I–94 must be completed and the occupation stated must be contained within Appendix 1603.D.1 of Annex 1603 of the NAFTA. This requirement reflects the need to collect and maintain accurate statistics for reporting purposes to both the United States Congress and signatory governments.

Also, the name of the TN nonimmigrant's employer must be endorsed on both the Arrival and Departure portions of Form I–94 in order to comport with the requirements of section 274A of the Act.

8 CFR 274a.12(b) (19) and (20)

Paragraph (b)(19) is amended to include citizens of Mexico and Canada engaged in business activities at a professional level pursuant to Chapter 16 or the NAFTA to the classes of aliens authorized employment with a specific employer incident to status. Paragraph (b)(20) is amended to provide employment authorization to a citizen of Canada or Mexico in TN status in whose behalf an application for extension of stay has been timely filed.

The Service's implementation of this rule as an interim rule, with provisions for post-promulgation public comment, is based upon the "good cause" exceptions found at 5 U.S.C. 553 (b)(B) and (d)(3). The reasons and the necessity for immediate implementation of this interim rule without prior notice and comment are as follows: The NAFTA Implementation Act was signed by the President on December 8, 1993 and the NAFTA goes into force on January 1, 1994. There is a clear necessity for immediate implementation of this provision so that the admission to the United States of Canadian and Mexican citizen business persons pursuant to Chapter 16 of the NAFTA may be facilitated by this Service on the date of entry into force of the Agreement. Under these circumstances, providing a notice and comment period in advance of publication of this interim rule would have been impracticable and contrary to Congressional intent. It is imperative that this interim rule become effective on January 1, 1994 so that those persons who are entitled to the benefits of the NAFTA Implementation Act may apply accordingly.

In accordance with 5 U.S.C. 605(b), the Commissioner of the Immigration and Naturalization Service certifies that this rule will not have a significant adverse economic impact on a substantial number of small entities. This certification is made in light of the fact that the regulation substantially retains current standards for the admission of Canadians formerly provided for under the CFTA, and that, under this regulation, only 5,500 petitions may initially be approved annually in behalf of citizens of Mexico seeking classification as TN professionals. Additionally, it is anticipated that only a limited number of citizens of Mexico will seek classification as treaty traders and investors pursuant to this regulation. For the same reasons, this is not considered a "significant regulatory action" under Executive Order 12866. Further, this rule does not have Federalism implications warranting the

preparation of a Federal Assessment in accordance with Executive Order 12612.

The information collection requirements contained in this rule have been cleared by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act and are cited under 8 CFR 299.5, Display of Control Numbers.

The additional instructions for Form I–129 are printed at the end of this regulation.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 235

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 552, 552(a); 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252b, 1304, 1356; 31 U.S.C. 9701; E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

2. In § 103.1, paragraph (f)(2) (x) and (xxiii) are revised to read as follows:

§ 103.1 Delegations of authority.

* * * * *

(f) * * *

(2) * * *

(x) Petitions for temporary workers or trainees and fiancees or fiances of U.S. citizens under §§ 214.2 and 214.6 of this chapter;

* * * * *

(xxiii) Revoking approval of certain petitions, as provided in §§ 214.2 and 214.6 of this chapter;

* * * * *

3. In § 103.7, paragraph (b)(1) is amended by revising the entry "Request", the third time it is listed, to read as follows:

§ 103.7 Fees.

* * * * *

(b) * * *

(1) * * *

Request. For classification of a citizen of Canada to be engaged in business activities at a professional level pursuant to section 214(e) of the Act (Chapter 16 of the North American Free Trade Agreement)—$50.00

* * * * *

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

4. The authority citation for part 212 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1225, 1226, 1228, 1252; 8 CFR part 2.

5. In § 212.1, paragraph (1) is revised to read as follows:

§ 212.1 Documentary requirements for nonimmigrants.

* * * * *

(1) *Treaty traders and investors.* Notwithstanding any of the provisions of this part, an alien seeking admission as a treaty trader or investor under the provisions of Chapter 16 of the North American Free Trade Agreement (NAFTA) pursuant to section 101(a)(15)(E) of the Act, shall be in possession of a nonimmigrant visa issued by an American consular officer classifying the alien under that section.

* * * * *

PART 214—NONIMMIGRANT CLASSES

6. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR part 2.

7. Section 214.2 is amended by:

a. Revising paragraphs (b)(1) and (b)(4);

b. Adding a new paragraph (e)(3);

c. Revising paragraph (l)(17) heading;

d. Revising paragraph (l)(17)(i); and by

e. Adding a new paragraph (l)(18), to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance status.

* * * * *

(b) *Visitors*—(1) *General.* any B–1 visitor for business or B–2 visitor for pleasure may be admitted for not more than one year and may be granted extensions of temporary stay in increments of not more than six months each, except that alien members of a religious denomination coming temporarily and solely to do missionary work in behalf of a religious denomination may be granted extensions of not more than one year each, provided that such work does not involve the selling of articles or the solicitation or acceptance of donations. Those B–1 and B–2 visitors admitted pursuant to the waiver provided at § 212.1(e) of this chapter may be admitted to and stay on Guam for period not to exceed fifteen days and are not eligible for extensions of stay.

* * * * *

(4) *Admission of aliens pursuant to the North American Fee Trade Agreement (NAFTA).* A citizen of Canada or Mexico seeking temporary entry for purposes set forth in paragraph (b)(4)(i) of this section, who otherwise meets existing requirements under section 101(a)(15)(B) of the Act, including but not limited to requirements regarding the source of remuneration, shall be admitted upon presentation of proof of such citizenship in the case of Canadian applicants, and valid entry documents such as a passport and visa or Mexican Border Crossing Card (Form I–186 or I–586) in the case of Mexican applicants, a description of the purpose of entry, and evidence demonstrating that he or she is engaged in one of the occupations or professions set forth in paragraph (b)(4)(i) of this section. Existing requirements, with respect to Canada, are those requirements which were in effect at the time of entry into force of the CFTA and, with respect to Mexico, are those requirements which are in effect at the time of entry into force of the NAFTA. Additionally, nothing shall preclude the admission of a citizen of Mexico or Canada who meets the requirements of paragraph (b)(4)(ii) of this section.

(i) *Occupations and professions set forth in Appendix 1603.A.1 to Annex 1603 of the NAFTA.*—(A) *Research and design.* Technical scientific and statistical researchers conducting independent research or research for an enterprise located in the territory of another Party.

(B) *Growth, manufacture and production* (*1*) Harvester owner

supervising a harvesting crew admitted under applicable law. (Applies only to harvesting of agricultural crops: Grain, fiber, fruit and vegetables.)

(2) Purchasing and production management personnel conducting commercial transactions for an enterprise located in the territory of another Party.

(C) *Marketing.* (1) Market researchers and analyst conducting independent research or analysis, or research or analysis for an enterprise located in the territory of another Party.

(2) Trade fair and promotional personnel attending a trade convention.

(D) *Sales.* (1) Sales representatives and agents taking orders or negotiating contracts for goods or services for an enterprise located in the territory of another Party but not delivering goods or providing services.

(2) Buyers purchasing for an enterprise located in the territory of another Party.

(E) *Distribution.* (1) Transportation operators transporting goods or passengers to the United States from the territory of another Party or loading and transporting goods or passengers from the United States to the territory of another Party, with no unloading in the United States, to the territory of another Party. (These operators may make deliveries in the United States if all goods or passengers to be delivered were loaded in the territory of another Party. Furthermore, they may load from locations in the United States if all goods or passengers to be loaded will be delivered in the territory of another Party. Purely domestic service or solicitation, in competition with the United States operators, is not permitted.)

(2) Customs brokers performing brokerage duties associated with the export of goods from the United States to or through Canada.

(F) *After-sales service.* Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to the seller's contractual obligation, performing services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside the United States, during the life of the warranty or service agreement. (For the purposes of this provision, the commercial or industrial equipment or machinery, including computer software, must have been manufactured outside the United States.)

(G) *General service.* (1) Professionals engaging in a business activity at a professional level in a profession set out in Appendix 1603.D.1 to Annex 1603 of the NAFTA, but receiving no salary or other remuneration from a United States source (other than an expense allowance or other reimbursement for expenses incidental to the temporary stay) and otherwise satisfying the requirements of Section A to Annex 1063 of the NAFTA.

(2) Management and supervisory personnel engaging in commercial transactions for an enterprise located in the territory of another Party.

(3) Financial services personnel (insurers, bankers or investment brokers) engaging in commercial transactions for an enterprise located in the territory of another Party.

(4) Public relations and advertising personnel consulting with business associates, or attending or participating in conventions.

(5) Tourism personnel (tour and travel agents, tour guides or tour operators) attending or participating in conventions or conducting a tour that has begun in the territory of another Party. (The tour may begin in the United States; but must terminate in foreign territory, and a significant portion of the tour must be conducted in foreign territory. In such a case, an operator may enter the United States with an empty conveyance and a tour guide may enter on his or her own and join the conveyance.)

(6) Tour bus operators entering the United States:

(*i*) With a group of passengers on a bus tour that has begun in, and will return to, the territory of another Party.

(*ii*) To meet a group of passengers on a bus tour that will end, and the predominant portion of which will take place, in the territory of another Party.

(*iii*) With a group of passengers on a bus tour to be unloaded in the United States and returning with no passengers or reloading with the group for transportation to the territory of another Party.

(7) Translators or interpreters performing services as employees of an enterprise located in the territory of another Party.

(ii) Occupations and professions not listed in Appendix 1603.A.1 to Annex 1603 of the NAFTA. Nothing in this paragraph shall preclude a business person engaged in an occupation or profession other than those listed in Appendix 1603.A.1 to Annex 1603 of the NAFTA from temporary entry under section 101(a)(15)(B) of the Act, if such person otherwise meets the existing requirements for admission as prescribed by the Attorney General.

* * * * *

(e) * * *

(3) *Denial of treaty trader or investor status to citizens of Canada or Mexico in the case of certain labor disputes.* A citizen of Canada or Mexico may be denied E treaty trader or investor status as described in section 101(a)(15)(E) of the Act and section B of Annex 1603 of the NAFTA if:

(i) The Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress at the place where the alien is or intends to be employed; and

(ii) Temporary entry of that alien may affect adversely either:

(A) The settlement of any labor dispute that is in progress at the place or intended place of employment, or

(B) The employment of any person who is involved in such dispute.

* * * * *

(l) * * *

(17) *Filing of individual petitions and certifications under blanket petitions for citizens of Canada under the North American Free Trade Agreement (NAFTA).* (i) *Individual petitions.* Except as provided in paragraph (1)(2)(ii) of this section (filing of blanket petitions), a United States or foreign employer seeking to classify a citizen of Canada as an intracompany transferee may file an individual petition in duplicate on Form I–129 in conjunction with an application for admission of the citizen of Canada. Such filing may be made with an immigration officer at a Class A port of entry located on the United States-Canada land border or at a United States pre-clearance/pre-flight station in Canada. The petitioning employer need not appear, but Form I–129 must bear the authorized signature of the petitioner.

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(18) *Denial of intracompany transferee status to citizens of Canada or Mexico in the case of certain labor disputes.* (i) If the Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress where the beneficiary is to be employed, and the temporary entry of the beneficiary may affect adversely the settlement of such labor dispute or the employment of any person who is involved in such dispute, a petition to classify a citizen of Mexico or Canada as an L–1 intracompany transferee may be denied. If a petition has already been approved, but the alien has not yet entered the United States, or

has entered the United States but not yet commenced employment, the approval of the petition may be suspended, and an application for admission on the basis of the petition may be denied.

(ii) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (l)(18)(i) of this section, or the Service has not otherwise been informed by the Secretary that such a strike or labor dispute is in progress, the Commissioner shall not deny a petition or suspend an approved petition.

(iii) If the alien has already commended employment in the United States under an approved petition and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Department of Labor, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions.

(A) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act, and regulations promulgated in the same manner as all other L nonimmigrants;

(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving work stoppage of workers; and

(C) Although participation by an L nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.

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8. Section 214.6 is revised to read as follows:

§ 214.6 Canadian and Mexican citizens seeking temporary entry to engage in business activities at a professional level.

(a) *General.* Under section 214(e) of the Act, a citizen of Canada or Mexico who seeks temporary entry as a business person to engage in business activities at a professional level may be admitted to the United States in accordance with the North American Free Trade Agreement (NAFTA).

(b) *Definitions.* As used in this section the terms:

Business activities at a professional level means those undertakings which require that, for successful completion, the individual has at least a baccalaureate degree or appropriate credentials demonstrating status as a professional.

Business person, as defined in the NAFTA, means a citizen of Canada or Mexico who is engaged in the trade of goods, the provision of services, or the conduct of investment activities.

Engage in business activities at a professional level means the performance of prearranged business activities for a United States entity, including an individual. It does not authorize the establishment of a business or practice in the United States in which the professional will be self-employed.

Temporary entry, as defined in the NAFTA, means entry without the intent to establish permanent residence.

(c) *Appendix 1603.D.1 to Annex 1603 of the NAFTA.* Pursuant to the NAFTA, an applicant seeking admission under this section shall demonstrate business activity at a professional level in one of the professions set forth in Appendix 1603.D.1 to Annex 1603. The professions in Appendix 1603.D.1 and the minimum requirements for qualification for each are as follows: [1]

Appendix 1603.D.1 (Annotated)

—Accountant—Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A., or C.M.A.

—Architect—Baccalaureate or Licenciatura Degree; or state/provincial license.[2]

—Computer Systems Analyst—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma [3] or Post Secondary Certificate [4] and three years' experience.

—Disaster relief insurance claims adjuster (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)—Baccalaureate or Licenciatura Degree and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims.

—Economist—Baccalaureate or Licenciatura Degree.

—Engineer—Baccalaureate or Licenciatura Degree; or state/provincial license.

—Forester—Baccalaureate or Licenciatura Degree; or state/provincial license.

—Graphic Designer—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate and three years experience.

—Hotel Manager—Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post Secondary Certificate in hotel/restaurant management and three years experience in hotel/restaurant management.

—Industrial Designer—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post Secondary Certificate, and three years experience.

—Interior Designer—Baccalaureate or Licenciatura Degree or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

—Land Surveyor—Baccalaureate or Licenciatura Degree or state/provincial/federal license.

—Landscape Architect—Baccalaureate or Licenciatura Degree.

—Lawyer (including Notary in the province of Quebec)—L.L.B., J.D., L.L.L., B.C.L., or Licenciatura degree (five years); or membership in a state/provincial bar.

—Librarian—M.L.S., or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite).

—Management Consultant—Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement.

—Mathematician (including Statistician)—Baccalaureate or Licenciatura Degree.

—Range Manager/Range Conservationist—Baccalaureate or Licenciatura Degree.

—Research Assistant (working in a post-secondary educational institution)—Baccalaureate or Licenciatura Degree.

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[1] A business person seeking temporary employment under this Appendix may also perform training functions relating to the profession, including conducting seminars.

[2] The terms "state/provincial license" and "state/provincial/federal license" mean any document issued by a state, provincial, or federal government, as the case may be, or under its authority, but not by a local government, that permits a person to engage in a regulated activity or profession.

[3] "Post Secondary Diploma" means a credential issued, on completion of two or more years of post secondary education, by an accredited academic institution in Canada or the United States.

[4] "Post Secondary Certificate" means a certificate issued, on completion of two or more years of post secondary education at an academic institution, by the federal government of Mexico or a state government in Mexico, an academic institution recognized by the federal government or a state government, or an academic institution created by federal or state law.

—Scientific Technician/Technologist[5]—Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research.
—Social Worker—Baccalaureate or Licenciatura Degree.
—Sylviculturist (including Forestry Specialist)—Baccalaureate or Licenciatura Degree.
—Technical Publications Writer—Baccalaureate or Licenciatura Degree, or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.
—Urban Planner (including Geographer)—Baccalaureate or Licenciatura Degree.
—Vocational Counselor—Baccalaureate or Licenciatura Degree.

Medical/Allied Professionals

—Dentist—D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental or state/provincial license.
—Dietitian—Baccalaureate or Licenciatura Degree; or state/provincial license.
—Medical Laboratory Technologist (Canada)/Medical Technologist (Mexico and the United States)[6]—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.
—Nutritionist—Baccalaureate or Licenciatura Degree.
—Occupational Therapist—Baccalaureate or Licenciatura Degree; or state/provincial license.
—Pharmacist—Baccalaureate or Licenciatura Degree; or state/provincial license.
—Physician (teaching or research only)—M.D. Doctor en Medicina; or state/provincial license.
—Physiotherapist/Physical Therapist—Baccalaureate or Licenciatura Degree; or state/provincial license.
—Psychologist—state/provincial license; or Licenciatura Degree.
—Recreational Therapist-Baccalaureate or Licenciatura Degree.
—Registered nurse—state/provincial license or Licenciatura Degree.
—Veterinarian—D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license.
—SCIENTIST
—Agriculturist (including Agronomist)—Baccalaureate or Licenciatura Degree.
—Animal Breeder—Baccalaureate or Licenciatura Degree.
—Animal Scientist—Baccalaureate or Licenciatura Degree.
—Apiculturist—Baccalaureate or Licenciatura Degree.
—Astronomer—Baccalaureate or Licenciatura Degree.
—Biochemist—Baccalaureate or Licenciatura Degree.
—Biologist—Baccalaureate or Licenciatura Degree.
—Chemist—Baccalaureate or Licenciatura Degree.
—Dairy Scientist—Baccalaureate or Licenciatura Degree.
—Entomologist—Baccalaureate or Licenciatura Degree.
—Epidemiologist—Baccalaureate or Licenciatura Degree.
—Geneticist—Baccalaureate or Licenciatura Degree.
—Geochemist—Baccalaureate or Licenciatura Degree.
—Geologist—Baccalaureate or Licenciatura Degree.
—Geophysicist (including Oceanographer in Mexico and the United States)—Baccalaureate or Licenciatura Degree.
—Horticulturist—Baccalaureate or Licenciatura Degree.
—Meteorologist—Baccalaureate or Licenciatura Degree.
—Pharmacologist—Baccalaureate or Licenciatura Degree.
—Physicist (including Oceanographer in Canada—Baccalaureate or Licenciatura Degree.
—Plant Breeder—Baccalaureate or Licenciatura Degree.
—Poultry Scientist—Baccalaureate or Licenciatura Degree.
—Soil Scientist—Baccalaureate or Licenciatura Degree.
—Zoologist—Baccalaureate or Licenciatura Degree.
—TEACHER
—College—Baccalaureate or Licenciatura Degree.
—Seminary—Baccalaureate or Licenciatura Degree.
—University—Baccalaureate or Licenciatura Degree.

(d) *Classification of citizens of Mexico as TN professionals under the NAFTA*—(1) *General.* A United States employer seeking to classify a citizen of Mexico as a TN professional temporary employee shall file a petition on Form I-129, Petition for Nonimmigrant Worker, with the Northern Service Center, even in emergent circumstances. The petitioner may submit a legible photocopy of a document in support of the visa petition in lieu of the original document. The original document shall be submitted if requested by the Service.

(2) *Supporting documents.* A petition in behalf of a citizen of Mexico seeking classification as a TN professional shall be accompanied by:

(i) A certification from the Secretary of Labor that the petitioner has filed the appropriate documentation with the Secretary in accordance with section (D)(5)(b) of Annex 1603 of the NAFTA.

(ii) Evidence that the beneficiary meets the minimum education requirements or alternative credentials requirements of Appendix 1603.D.1 of Annex 1603 of the NAFTA as set forth in § 214.6(c). This documentation may consist of licenses, degrees, diplomas, certificates, or evidence of membership in professional organizations. Degrees, diplomas, or certificates received by the beneficiary from an educational institution not located within Mexico, Canada, or the United States must be accompanied by an evaluation by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. Evidence of experience should consist of letters from former employers or, if formerly self-employed, business records attesting to such self-employment; and

(iii) A statement from the prospective employer in the United States specifically stating the Appendix 1603.D.1 profession in which the beneficiary will be engaging and a full description of the nature of the duties which the beneficiary will be performing. The statement must set forth licensure requirements for the state or locality of intended employment or, if no license is required, the non-existence of such requirements for the professional activity to be engaged in.

(iv) *Licensure for TN classification*—(A) *General.* If the profession requires a state or local license for an individual to fully perform the duties of that profession, the beneficiary for whom TN classification is sought must have that license prior to approval of the petition and evidence of such licensing must accompany the petition.

(B) *Temporary licensure.* If a temporary license is available and the beneficiary would be allowed to perform the duties of the profession without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations which would be placed upon the beneficiary. If an analysis of the facts demonstrates that the beneficiary, although under supervision, would be fully authorized to perform the duties of the profession, TN classification may be granted.

(C) *Duties without licensure.* In certain professions which generally require licensure, a state may allow an individual to fully practice a profession under the supervision of licensed senior or supervisory personnel in that profession. In such cases, the director shall examine the nature of the duties and the level at which they are to be performed. If the facts demonstrate that the beneficiary, although under

[5] A business person in this category must be seeking temporary entry for work in direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics.

[6] A business person in this category must be seeking temporary entry to perform in a laboratory chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment, or prevention of diseases.

supervision, would fully perform the duties of the profession, TN classification may be granted.

(D) *Registered nurses.* The prospective employer must submit evidence that the beneficiary has been granted a permanent state license, a temporary state license or other temporary authorization issued by a State Board of Nursing authorizing the beneficiary to work as a registered or graduate nurse in the state of intended employment in the United States.

(3) *Approval and validity of petition*—(i) *Approval.* The director shall notify the petitioner of the approval of the petition on Form I-797, Notice of Action. The approval notice shall include the beneficiary's name, classification, Appendix 1603.D.1 profession, and the petition's period of validity.

(ii) *Recording the validity of petitions.* Procedures for recording the validity period of petitions are:

(A) If the petition is approved before the date the petitioner indicates that employment will begin, the approved petition and approval notice shall show the actual dates requested by the petitioner as the validity period, not to exceed the limits specified by paragraph (d)(3)(iii) of this section.

(B) If the petition is approved after the date the petitioner indicates employment will begin, the approved petition and approval notice shall show a validity period commencing with the date of approval and ending with the date requested by the petitioner, as long as that date does not exceed the limits specified by paragraph (d)(3)(iii) of this section.

(C) If the period of employment requested by the petitioner exceeds the limit specified in paragraph (d)(3)(iii) of this section, the petition shall be approved only up to the limit specified in that paragraph.

(iii) *Validity.* An approved petition classifying a citizen of Mexico as a TN nonimmigrant shall be valid for a period of up to one year.

(4) *Denial of petition*—(i) *Notice of intent to deny.* When an adverse decision is proposed on the basis of derogatory information of which the petitioner is unaware, the director shall notify the petitioner of the intent to deny the petition and the basis for the denial. The petitioner may inspect and rebut the evidence and will be granted a period of thirty days in which to do so. All relevant rebuttal material will be considered in making a final decision.

(ii) *Notice of denial.* The petitioner shall be notified of the decision, the reasons for the denial, and the right to appeal the denial under part 103 of this chapter.

(5) *Revocation of approval of petition*—(i) *General.* (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may effect eligibility under section 214(e) of the Act or § 214.6. An amended petition should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition.

(B) The director may revoke a petition at any time, even after the validity of the petition has expired.

(ii) *Automatic revocation.* The approval of an unexpired petition is automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or notifies the Service that the beneficiary is no longer employed by the petitioner.

(iii) *Revocation on notice*—(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

(*1*) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;

(*2*) The statement of facts contained in the petition were not true and correct;

(*3*) The petitioner violated the terms or conditions of the approved petition;

(*4*) The petitioner violated requirements of section 214(e) of the Act or § 214.6; or

(*5*) The approval of the petition violated § 214.6 or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within thirty days of the date of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition.

(6) *Appeal of a denial or revocation of a petition*—(i) *Denial.* A denied petition may be appealed under part 103 of this chapter.

(ii) *Revocation.* A petition that has been revoked on notice may be appealed under part 103 of this chapter. Automatic revocations may not be appealed.

(7) *Numerical limit*—(i) *Limit on number of petitions to be approved in behalf of citizens of Mexico.* Beginning on the date of entry into force of the NAFTA, not more than 5,500 citizens of Mexico can be classified as TN nonimmigrants annually.

(ii) *Procedures.* (A) Each citizen of Mexico issued a visa or otherwise provided TN nonimmigrant status under section 214(e) of the Act shall be counted for purposes of the numerical limit. Requests for petition extension or extension of the alien's stay and submissions of amended petitions shall not be counted for purposes of the numerical limit. The spouse and children of principal aliens classified as TD nonimmigrants shall not be counted against the numerical limit.

(B) Numbers will be assigned temporarily to each Mexican citizen in whose behalf a petition for TN classification has been filed. If a petition is denied, the number originally assigned to the petition shall be returned to the system which maintains and assigns numbers.

(C) When an approved petition is not used because the beneficiary does not apply for admission to the United States, the petitioner shall notify the service center director who approved the petition that the number has not been used. The petition shall be revoked pursuant to paragraph (d)(5)(ii) of this section and the unused number shall be returned to the system which maintains and assigns numbers.

(D) If the total annual limit has been reached prior to the end of the year, new petitions and the accompanying fee shall be rejected and returned with a notice stating that numbers are unavailable for Mexican citizen TN nonimmigrants and the date when numbers will again become available.

(e) *Classification of citizens of Canada as TN professionals under the NAFTA*—(1) *General.* Under section 214(e) of the Act, a citizen of Canada who seeks temporary entry as a business person to engage in business activities at a professional level may be admitted to the United States in accordance with the NAFTA.

(2) *Application for admission.* A citizen of Canada seeking admission under this section shall make application for admission with an immigration officer at a United States Class A port of entry, at a United States airport handling international traffic, or at a United States pre-clearance/pre-flight station. No prior petition, labor certification, or prior approval shall be required.

(3) *Evidence.* A visa shall not be required of a Canadian citizen seeking admission as a TN nonimmigrant under section 214(e) of the Act. Upon application for admission at a United States port of entry, an applicant under this section shall present the following:

(i) Proof of Canadian citizenship. Unless travelling from outside the

Western hemisphere, no passport shall be required; however, an applicant for admission must establish Canadian citizenship.

(ii) Documentation demonstrating engagement in business activities at a professional level and demonstrating professional qualifications. The applicant must present documentation sufficient to satisfy the immigration officer at the time of application for admission, that the applicant is seeking entry to the United States to engage in business activities for a United States employer(s) or entity(ies) at a professional level, and that the applicant meets the criteria to perform at such a professional level. This documentation may be in the form of a letter from the prospective employer(s) in the United States or from the foreign employer, in the case of a Canadian citizen seeking entry to provide prearranged services to a United States entity, and may be required to be supported by licenses, diplomas, degrees, certificates, or membership in a professional organization. Degrees, diplomas, or certificates received by the applicant from an educational institution not located within Canada, Mexico, or the United States must be accompanied by an evaluation by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. The documentation shall fully affirm:

(A) The Appendix 1603.D.1 profession of the applicant;

(B) A description of the professional activities, including a brief summary of daily job duties, if appropriate, which the applicant will engage in for the United States employer/entity;

(C) The anticipated length of stay;

(D) The educational qualifications or appropriate credentials which demonstrate that the Canadian citizen has professional level status;

(E) The arrangements for remuneration for services to be rendered; and

(F) If required by state or local law, that the Canadian citizen complies with all applicable laws and/or licensing requirements for the professional activity in which they will be engaged.

(f) *Procedures for admission*—(1) *Canadian citizens.* A Canadian citizen who qualifies for admission under this section shall be provided confirming documentation (Service Form I–94) and shall be admitted under the classification symbol TN for a period not to exceed one year. Form I–94 shall bear the legend "multiple entry". The fee prescribed under § 103.7(b) of this chapter shall be remitted upon admission to the United States pursuant to the terms and conditions of the NAFTA. Upon remittance of the prescribed fee, the Canadian citizen applicant shall be provided a Service receipt (Form G–211, Form G–711, or Form I–797).

(2) *Mexican citizens.* The Mexican citizen beneficiary of an approved Form I–129 granting classification as a TN professional shall be admitted to the United States for the validity period of the approved petition upon presentation of a valid TN visa issued by a United States consular officer and a copy of the United States employer's statement as described in paragraph (d)(2)(iii) of this section. The Mexican citizen shall be provided Form I–94 bearing the legend "multiple entry".

(g) *Readmission*—(1) *Canadian citizens.* A Canadian citizen in this classification may be readmitted to the United States for the remainder of the period authorized on Form I–94, without presentation of the letter or supporting documentation described in paragraph (e)(3) of this section, and without remittance of the prescribed fee, provided that the original intended professional activities and employer(s) have not changed. If the Canadian citizen seeking readmission to the United States is no longer in possession of a valid, unexpired Form I–94, and the period of initial admission has not lapsed, he or she shall present alternate evidence in order to be readmitted in TN status. This alternate evidence may include, but is not limited to, a Service fee receipt for admission as a TN or a previously issued admission stamp as TN in a passport, and a confirming letter from the United States employer(s). A new Form I–94 shall be issued at the time of readmission bearing the legend "multiple entry".

(2) *Mexican citizens.* A Mexican citizen in this classification may be readmitted for the remainder of the period of time authorized on Form I–94 provided that the original intended professional activities and employer(s) have not changed. If the Mexican citizen seeking readmission to the United States is no longer in possession of a valid, unexpired Form I–94, he or she may be readmitted upon presentation of a valid TN visa and evidence of a previous admission. A new Form I–94 shall be issued at the time of readmission bearing the legend "multiple entry".

(h) *Extension of stay*—(1) *Mexican citizen.* The United States employer shall apply for extension of the Mexican citizen's stay in the United States by filing Form I–129 with the Northern Service Center. The applicant must also request a petition extension. The request for extension must be accompanied by either a new or a photocopy of the prior certification on Form ETA 9029, in the case of a registered nurse, or Form ETA 9035, in all other cases, that the petitioner continues to have on file with the Department of Labor for the period of time requested. The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each. If the citizen of Mexico is required to leave the United States for business or personal reasons during the pendency of the extension request, the petitioner may request the director to cable notification of the approval of the petition to the consular office abroad where the beneficiary will apply for a visa. An extension of stay may be authorized for up to one year. There is no specific limit on the total period of time a citizen of Mexico may remain in TN status.

(2) *Canadian citizen*—(i) *Filing at the service center.* The United States employer of a Canadian citizen in TN status or United States entity, in the case of a Canadian citizen in TN status who has a foreign employer, may request an extension of stay by filing Form I–129 with the prescribed fee, with the Northern Service Center. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. If the alien is required to leave the United States for business or personal reasons while the extension request is pending, the petitioner may request the director to cable notification of approval of the application to the port of entry where the Canadian citizen will apply for admission to the United States. An extension of stay may be authorized for up to one year. There is no specific limit on the total period of time a citizen of Canada may remain in TN status.

(ii) *Readmission at the border.* Nothing in paragraph (h)(2)(i) of this section shall preclude a citizen of Canada who has previously been in the United States in TN status from applying for admission for a period of time which extends beyond the date of his or her original term of admission at any United States port of entry. The application for admission shall be supported by a new letter from the United States employer or the foreign employer, in the case of a Canadian citizen who is providing prearranged services to a United States entity, which meets the requirements of paragraph

(e)(3)(ii) of this section. The fee prescribed under § 103.7(b) of this chapter shall be remitted upon admission to the United States pursuant to the terms and conditions of the NAFTA.

(i) *Request for change or addition of United States employer(s)*—(1) *Mexican citizen.* A citizen of Mexico admitted under this paragraph who seeks to change or add a United States employer must have the new employer file a Form I–129 petition with appropriate supporting documentation, including a letter from the new employer describing the services to be performed, the time needed to render such services, and the terms for remuneration for services and evidence of required filing with the Secretary of Labor. Employment with a different or with an additional employer is not authorized prior to Service approval of the petition.

(2) *Canadian citizen*—(i) *Filing at the service center.* A citizen of Canada admitted under this paragraph who seeks to change or add a United States employer during this period of admission must have the new employer file a Form I–129 petition with appropriate supporting documentation, including a letter from the new employer describing the services to be performed, the time needed to render such services, and the terms for remuneration for services. Employment with a different or with an additional employer is not authorized prior to Service approval of the petition.

(ii) *Readmission at the border.* Nothing in paragraph (i)(2)(i) of this section precludes a citizen of Canada from applying for readmission to the United States for the purpose of presenting documentation from a different or additional United States or foreign employer. Such documentation shall meet the requirements prescribed in paragraph (e)(3)(ii) of this section. The fee prescribed under § 103.7(b) of this chapter shall be remitted upon admission to the United States pursuant to the terms and conditions of the NAFTA.

(3) No action shall be required on the part of a Canadian or Mexican citizen who is transferred to another location by the United States employer to perform the same services. Such an acceptable transfer would be to a branch or office of the employer. In the case of a transfer to a separately incorporated subsidiary or affiliate, the requirements of paragraphs (i) (1) and (2) of this section would apply.

(j) *Spouse and unmarried minor children accompanying or following to join.* (1) The spouse of unmarried minor child of a citizen of Canada or Mexico admitted in TN nonimmigrant status shall be required to present a valid, unexpired nonimmigrant TD visa unless otherwise exempt under § 212.1 of this chapter.

(2) The spouse and dependent minor children shall be issued confirming documentation (Form I–94) bearing the legend "multiple entry". There shall be no fee required for admission of the spouse and dependent minor children.

(3) The spouse and dependent minor children shall not accept employment in the United States unless otherwise authorized under the Act.

(k) *Effect of a strike.* If the Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress, and the temporary entry of a citizen of Mexico or Canada in TN nonimmigrant status may affect adversely the settlement of any labor dispute or the employment of any person who is involved in such dispute:

(1) The United States may refuse to issue an immigration document authorizing entry or employment to such alien.

(2) A Form I–129 seeking to classify a citizen of Mexico as a TN nonimmigrant may be denied. If a petition has already been approved, but the alien has not yet entered the United States, or has entered the United States but not yet commenced employment, the approval of the petition may be suspended.

(3) If the alien has already commenced employment in the United States and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Department of Labor, or whether the Service has been otherwise informed that such a strike or labor dispute is in progress, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions:

(i) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act and regulations promulgated in the same manner as all other TN nonimmigrants;

(ii) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers; and

(iii) Although participation by a TN nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.

(4) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (k)(1) of this section, or the Service has not otherwise been informed by the Secretary that such a strike or labor dispute is in progress, the Commissioner shall not deny a petition, suspend an approved petition, or deny entry to an applicant for TN status.

(l) *Transition for Canadian Citizen Professionals in TC classification and their B–2 spouses and/or unmarried minor children*—(1) *Canadian citizen professionals in TC Classification*—(i) *General.* Canadian citizen professionals in TC classification as of the effective date of the NAFTA Implementation Act (January 1, 1994) will automatically be deemed to be in valid TN classification. Such persons may be readmitted to the United States in TN classification for the remainder of the period authorized on their Form I–94, without presentation of the letter or supporting documentation described in paragraph (e)(3) of this section, and without remittance of the prescribed fee, provided that the original intended professional activities and employer(s) have not changed. Properly filed applications for extension of stay in TC classification which are pending on January 1, 1994 will be deemed to be, and adjudicated as if they were applications for extension to stay in TN classification.

(ii) *Procedure for Canadian citizens admitted in TC classification in possession of Form I–94 indicating admission in TC classification.* At the time of readmission, such professionals shall be required to surrender their old Form I–94 indicating admission in TC classification. Upon surrender of the old Form I–94, such professional will be issued a new Form I–94 bearing the legend "multiple entry" and indicating that he or she has been readmitted in TN classification.

(iii) *Procedure for Canadian citizen admitted in TC classification who are no longer in possession of Form I–94 indicating admission in TC classification.* If the Canadian citizen seeking readmission to the United States is no longer in possession of an unexpired Form I–94, and the period of initial admission has not lapsed, he or she shall present alternate evidence described in paragraph (g)(1) of this

section in order to be readmitted in TN status. A Canadian professional seeking to extend his or her stay beyond the period indicated on the new Form I–94 shall be required to comply with the requirements of paragraph (h)(2) of this section, including remittance of the fee prescribed under § 103.7 of this chapter.

(iv) *Nonapplicability of this section to self-employed professionals in TC nonimmigrant classification.* The provisions in paragraphs (l)(1) (i), (ii), and (iii) of this section shall not apply to professionals in TC nonimmigrant classification who are self-employed in this country on January 1, 1994. Effective January 1, 1994, such professionals are not authorized to engage in self-employment in this country, and may not be admitted in TN or readmitted in TC classification.

(2) *Spouses and/or unmarried minor children of Canadian citizen professionals in TC classification*—(i) *General.* Effective January 1, 1994, the nonimmigrant classification of a spouse and/or unmarried minor child of a Canadian citizen professional in TC classification will automatically be converted from B–2 to TD nonimmigrant classification. Effective January 1, 1994, the spouse and/or unmarried minor child of a Canadian citizen professional whose TC status has been automatically converted to TN, or the spouse and/or unmarried minor child of such professional whose status has been changed to TN pursuant to paragraph (1) of this section, who is seeking admission or readmission to this country, may be readmitted in TD classification for the remainder of the period authorized on their Form I–94, without presentation of the letter or supporting documentation described in paragraph (e)(3) of this section, and without remittance of the prescribed fee, provided that the original intended professional activities and employer(s) of the Canadian citizen professional have not changed. Properly filed applications for extension of stay in B–2 classification as the spouse and/or unmarried minor children of a Canadian citizen professional in TC classification which are pending on January 1, 1994 will be deemed to be, and adjudicated as if they were applications for extension of stay in TD classification.

(ii) *Procedure for spouses and/or unmarried minor children of Canadian citizens admitted in TC classification who are in possession of Form I–94 indicating admission in B–2 classification.* Upon surrender of the Form I–94 indicating that the alien has been admitted as the B–2 spouse or unmarried minor child of a TC alien valid for "multiple entry," such alien shall be issued a new Form I–94 indicating that the alien has been readmitted in TD classification. The new Form I–94 shall bear the legend "multiple entry."

(iii) *Procedure for spouses and/or unmarried minor children of Canadian citizens admitted in TC classification who are no longer in possession of Form I–94 indicating admission in B–2 classification.* If the Canadian citizen seeking readmission to the United States is no longer in possession of an unexpired Form I–94, and the period of initial admission has not lapsed, he or she shall present alternate evidence described in paragraph (g)(1) of this section in order to be admitted in TN status. Spouses and/or children of Canadian citizen professionals seeking to extend their stay beyond the period indicated on the new Form I–94 shall be required to comply with the requirements of paragraph (h)(2) of this section, including remittance of the fee prescribed under § 103.7 of this chapter.

(iv) *Nonapplicability of this section to spouses and/or unmarried minor children of self-employed professionals admitted in TC nonimmigrant classification.* Paragraphs (l)(2) (i), (ii), and (iii) of this section shall not apply to the spouses and/or unmarried minor children of Canadian citizen professionals in TC nonimmigrant classification who are self-employed in this country on January 1, 1994. Effective January 1, 1994, such persons are not eligible for TD classification.

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

9. The authority citation for part 235 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1183, 1201, 1224, 1225, 1226, 1227, 1228, 1252.

10. Section 235.1 is amended by adding a new paragraph (d)(8), and by revising paragraph (f)(1) introductory text, to read as follows:

§ 235.1 Scope of examination.

* * * * *

(d) * * *

(8) Any citizen of Canada or Mexico seeking to enter the United States as a principal alien E–1 or E–2, or as an L–1 or TN, for the purpose of employment at a site where the Secretary of Labor has certified to or otherwise informed the Commissioner that there is a strike or other labor dispute involving a work stoppage of workers in progress, and the temporary entry of that citizen of Canada or Mexico may affect adversely either the settlement of any such labor dispute or the employment of any person who is involved in any such dispute, may be refused entry in the classification sought. The applicant shall be advised in writing of the reason(s) for the refusal. A designated representative of the government of Canada or Mexico shall be promptly notified in writing of the reason(s) for the refusal of entry.

* * * * *

(f) *Arrival/Departure Record, Form I–94*—(1) *Nonimmigrants.* Each nonimmigrant alien except as indicated below, who is admitted to the United States shall be issued a completely executed Form I–94 which must be endorsed to show: date and place of admission, period of admission, and nonimmigrant classification. A nonimmigrant alien who will be making frequent entries into the United States over its land borders may be issued a Form I–94 which is valid for any number of entries during the validity of the form. In the case of a nonimmigrant alien admitted as a TN under the NAFTA, the specific occupation of such alien as set forth in Appendix 1603.D.1 of the NAFTA shall be recorded in item number 18 on the reverse side of the arrival portion of Form I–94, and the name of the employer shall be notated on the reverse side of both the arrival and departure portions of Form I–94. The departure portion Form I–94 shall bear the legend "multiple entry". A Form I–94 is not required by: * * *

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

11. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

12. In § 274a.12, paragraphs (b) (19) and (20) are revised to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(19) A nonimmigrant pursuant to section 214(e) of the Act. An alien in this status must be engaged in business activities at a professional level in accordance with the provisions of Chapter 16 of the North American Free Trade Agreement (NAFTA); or

(20) A nonimmigrant alien within the class of aliens described in paragraphs (b)(2), (b)(5), (b)(8), (b)(9), (b)(10), (b)(11), (b)(12), (b)(13), (b)(14), (b)(16), and (b)(19) of this section whose status has expired but who has filed a timely application for an extension of such stay pursuant to §§ 214.2 or 214.6 of this chapter. These aliens are authorized to continue employment with the same

employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay. Such authorization shall be subject to any conditions and limitations noted on the initial authorization. However, if the district director or service center director adjudicates the application prior to the expiration of this 240 day period and denies the application for extension of stay, the employment authorization under this paragraph shall automatically terminate upon notification of the denial decision.

* * * * *

Dated: December 23, 1993.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

Note: This appendix will not appear in the Code of Federal Regulations.

Appendix to the Preamble—Additional Instructions for Form I–129.

U.S. Department of Justice

Immigration and Naturalization Service, OMB No. 1115–0168 Additional Instructions for Form I–129

Temporary Entry Under the North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) entered into force on January 1, 1994. Chapter 16, *Temporary Entry*, of the Agreement exclusively covers four nonimmigrant classifications:

(1) B–1, Visitor for Business;

(2) E–1/E–2, Treaty Trader and Investor;

(3) L–1, Intracompany Transferee; and

(4) TN, Business Professional.

This form is for an employer to petition for initial classification, change of status, or extension of stay of a Mexican or Canadian citizen as an L–1; for an employer to request an extension of stay or change of status of a Mexican or Canadian citizen to the E–1 or E–2 classification; for the employer to request an extension of stay or change of status of a Canadian citizen to the NAFTA Professional classification (TN) or the change/addition of employers for a Canadian TN; and for an employer to petition for classification of a Mexican citizen as a NAFTA Professional (TN).

Regular instructions for Form I–129 shall be followed to petition for L classification and E–1/E–2 classification. The following additional instructions are provided to file for a TN.

Filing for a Canadian TN

No Form I–129 is required for Canadian citizens applying for admission to the U.S. in TN status. Form I–129 is used by an employer to request an extension of stay for a Canadian to TN, a change of status for a Canadian to TN classification, or the change/addition of employers for a Canadian TN.

On Form I–129, Part 2, Item 1, insert the classification symbol TN–1.

A U.S. employer/entity must file the Form I–129 with the following:

(1) a statement of the activity listed in Appendix 1603.D.1 (see the back of this form) in which the beneficiary will be engaging and a full description of the nature of the duties the beneficiary will be performing, the anticipated length of stay, and the arrangements for remuneration;

(2) evidence that the beneficiary meets the educational and/or alternative credentials for the activity listed in Appendix 1603.D.1;

(3) evidence of Canadian citizenship; and

(4) evidence that all licensure requirements, where applicable to the activity, have been satisfied.

Filing for a Mexican TN

Form I–129 is required for Mexican citizens applying for initial TN classification, extension of TN stay, change/addition of employers and change of classification to TN.

On Form I–129, Part 2, Item 1, insert the classification symbol TN–2.

A U.S. employer must file the petition with the following:

(1) a statement of the activity listed in Appendix 1603.D.1 (see the back of this form) in which the beneficiary will be engaging, a full description of the nature of the duties the beneficiary will be performing, the anticipated length of stay, and the arrangements for remuneration;

(2) evidence that the beneficiary meets the educational and/or alternative credentials for the activity listed in Appendix 1603.D.1;

(3) evidence of Mexican citizenship;

(4) evidence that all licensure requirements where applicable to the activity, have been satisfied; and

(5) a certification from the Secretary of Labor that the petitioner has filed the appropriate labor condition application or labor attestation for the specified activity.

When To File

File Form I–129 as soon as possible, but no more than 4 months before the proposed employment will begin or the extension of stay is required. If you do not submit Form I–129 at least 45 days before the employment will begin, processing and subsequent visa issuance may not be completed before the alien's services are require or previous employment authorization ends.

Where To File

When filing for a Mexican or Canadian TN, Form I–129 shall be filed with the Director of the Northern Service Center. In all other instances, Form I–129 shall be filed with the appropriate Service center per the instructions to Form I–129.

Fee

See general instructions for Form I–129.

Listing of Professional Occupations in Appendix 1603.D.1 of North American Free Trade Agreement

(The minimum educational or alternative credentials requirements for each profession are found at 8 CFR 214.6(c)).

Accountant
Architect
Computer Systems Analyst
Disaster relief insurance claims adjuster (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)
Economist
Engineer
Forester
Graphic designer
Hotel manager
Industrial designer
Interior designer
Land surveyor
Landscape architect
Lawyer (including Notary in the province of Quebec)
Librarian
Management consultant
Mathematician (including statistician)
Range manager/Range conservationist
Research assistant (working in a post-secondary educational institution)
Scientific technician/technologist
Social worker
Sylviculturist (including forestry specialist)
Technical publications writer
Urban planner (including geographer)
Vocational counselor

Medical/Allied Professionals

Dentist
Dietitian
Medical laboratory technologist (Canada)/medical technologist (Mexico and the United States)
Nutritionist
Occupational therapist
Pharmacist
Physician (teaching or research only)
Physiotherapist/physical therapist
Psychologist
Recreational therapist
Registered nurse

Veterinarian

SCIENTIST

Agriculturist (agronomist)
Animal breeder
Animal scientist
Apiculturist
Astronomer
Biochemist
Biologist
Chemist
Dairy scientist
Entomologist
Epidemiologist
Geneticist
Geochemist
Geologist
Geophysicist (including oceanographer in Mexico and the United States)
Horticulturist
Meteorologist
Pharmacologist
Physicist (including Oceanographer in Canada)
Plant Breeder
Poultry scientist
Soil scientist
Zoologist

TEACHER

College
Seminary
University

For information regarding qualifications for the positions, additions or subtractions from Appendix 1603.D.1, and related information, you should contact your local Immigration and Naturalization Service office.

[FR Doc. 93-32008 Filed 12-28-93; 11:17 am]

BILLING CODE 4410-01-M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 20

RIN 3150-AE94

Standards for Protection Against Radiation; NRC Operations Center Telephone Number

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: This final rule amends the NRC's revised standards for protection against radiation to include the telephone number for the NRC Operations Center. The final rule is necessary to correct the inadvertent omission of this telephone number when the revised standards were issued.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 504-2741.

SUPPLEMENTARY INFORMATION: On May 21, 1991 (56 FR 23360), the Nuclear Regulatory Commission (NRC) published its revised standards for protection against radiation (10 CFR 20.1001-20.2401 and the associated appendices). The revised standards for protection against radiation incorporated scientific information and reflected changes in the basic philosophy of radiation protection that had occurred since the promulgation of the original regulations. The revisions conformed the Commission's regulations to the Presidential Radiation Protection Guidance to Federal Agencies for Occupational Exposure and to recommendations of national and international radiation protection organizations. The revised standards for protection against radiation became effective on June 20, 1991. However, NRC licensees were permitted to defer the mandatory implementation of these regulations until January 1, 1993. The deferred implementation date was later extended to January 1, 1994 (August 26, 1992; 57 FR 38588).

However, the May 21, 1991, final rule did not include the telephone number for the NRC Operations Center in the text of the revised standards for protection against radiation. When the superseded standards for protection against radiation are removed from the regulations on January 1, 1994, the phone number will not be contained in the regulatory text of part 20. This final rule will correct this inadvertent omission by inserting the NRC Operations Center telephone number in the text of §§ 20.2201 and 20.2202.

Because these amendments make a minor procedural change that adds a telephone number to an earlier rulemaking action for which public comment was solicited (May 21, 1991; 56 FR 23360), the NRC has determined that good cause exists to dispense with the notice and comment provisions of the Administrative Procedure Act (APA) pursuant to 5 U.S.C. 553(b)(B). For the same reason, the NRC has determined that good cause exists to waive the 30-day deferred effective date provisions of the APA (5 U.S.C. 553(d)).

Environmental Impact: Categorical Exclusion

The NRC has determined that this rule is the type of action described in categorical exclusion 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget, approval number 3150-0014.

Regulatory Analysis

This final rule is administrative in that it adds an inadvertently omitted telephone number to the text of an existing regulation. These amendments will not have a significant impact. Therefore, the NRC has not prepared a separate regulatory analysis for this final rule. The final regulatory analysis for the May 21, 1991, final rule examined the costs and benefits of the alternatives considered by the Commission in developing the revised standards for protection against radiation and is available for inspection in the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington DC.

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this final rule and, therefore, that a backfit analysis is not required for this final rule because these amendments do not involve any provision that would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 20

Byproduct material, Criminal penalties, Licensed material, Nuclear materials, Nuclear power plants and reactors, Occupational safety and health, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Special nuclear material, Source material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR part 20.

PART 20—STANDARDS FOR PROTECTION AGAINST RADIATION

1. The authority citation for part 20 is revised to read as follows:

Authority: Secs. 53, 63, 65, 81, 103, 104, 161, 182, 186, 68 Stat. 930, 933, 935, 936, 937, 948, 953, 955, as amended (2 U.S.C. 2073, 2093, 2095, 2111, 2133, 2134, 2201, 2232, 2236), secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846).

2. In § 20.2201, paragraph (a)(2)(ii) is revised to read as follows:

§ 20.2201 Reports of theft or loss of licensed material.

(a) * * *

(2) * * *

(ii) All other licensees shall make reports by telephone to the NRC Operations Center (301–951–0550).

* * * * *

3. In § 20.2202, paragraph (d)(2) is revised to read as follows:

§ 20.2202 Notification of incidents.

* * * * *

(d) * * *

(2) All other licensees shall make the reports required by paragraphs (a) and (b) of this section by telephone to the NRC Operations Center (301–951–0550) and by telegram, mailgram, or facsimile to the Administrator of the appropriate NRC Regional Office listed in appendix D to this part.

* * * * *

Dated at Rockville, Maryland, this 22nd day of December 1993.

For the Nuclear Regulatory Commission.

James M. Taylor,

Executive Director for Operations.

[FR Doc. 93–31844 Filed 12–29–93; 8:45 am]

BILLING CODE 7590–01–P

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10 CFR Part 52

RIN 3150–AE42

Combined Licenses; Conforming Amendments; Response to Post-Promulgation Comment

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule: comment response.

SUMMARY: The Nuclear Regulatory Commission (NRC or Commission) is addressing the one comment that was received after issuance of the final rule that amended the regulations concerning combined licenses to incorporate changes required by licensing reform legislation. This notice is necessary to inform the public of the NRC's response to this post-promulgation comment.

DATES: The final rule became effective January 22, 1993. Comments were due by February 22, 1993.

FOR FURTHER INFORMATION CONTACT: Grace H. Kim, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone 301–504–3605.

SUPPLEMENTARY INFORMATION:

Background

In 1992 Congress passed, and the President signed, the Energy Policy Act of 1992 (Pub. L. 102–486, 106 Stat. 2776). Title XXVIII of that Act amended (in part) the nuclear power plant licensing provisions of the Atomic Energy Act. The new legislation largely codified existing NRC regulations in 10 CFR part 52. It also made several changes in the part 52 licensing process.

Accordingly, on December 23, 1992 (57 FR 60975), the Commission issued a final rule amending part 52 to "incorporate[] all the changes to these provisions that are necessary because of the enactment of licensing reform legislation." The Commission found prior public comment on the new amendments unnecessary because the "changes are limited to incorporating the language of [the Energy Policy Act] into the regulations." *Id.* The Commission invited comment by "any interested member of the public who believes that the Commission has not accurately conformed part 52 to the Energy Policy Act." *Id.*

When the Commission issues a final rule without notice and comment it is required, under 10 CFR 2.804(f), to provide a 30-day "post-promulgation" comment period and to publish, in the **Federal Register**, an evaluation of the comments and any revisions of the rule made as a result of the comments and their evaluation.

Only one comment was received. It was submitted on February 22, 1993, by the Nuclear Management and Resources Council ("NUMARC"). The NUMARC comment, while "agree[ing]" that the part 52 amendments "incorporate the relevant language of title XXVIII of the Energy Policy Act," sought "clarification" of "certain ambiguities" created by the "literal transcription." The NRC is not revising 10 CFR part 52 as a result of the comment and its evaluation.

Analysis of Public Comment

The Commission sees no need to alter the amended part 52; but, pursuant to 10 CFR 2.804(f), offers the following response to the four points made in NUMARC's comment letter.

1. Section 52.99, Inspection During Construction

NUMARC is concerned that the amended language of 10 CFR 52.99, which incorporates section 2801 of title XXVIII of the Energy Policy Act of 1992, will require the Commission itself, rather than the NRC staff, to oversee the ITAAC process (*i.e.*, the inspections, tests, analyses and acceptance criteria required for plant operation under part 52). The statutory language and the amended regulation state that after issuance of a combined license, "the Commission shall ensure that the required inspections, tests and analyses are performed, as well as find, prior to operation of the facility, that the prescribed acceptance criteria are met." The original part 52 specified that the NRC staff would oversee the ITAAC process.

Statutory or regulatory references to the "Commission" are commonly understood to allow the Commission to act through its staff. Here, NUMARC is correct in its understanding that the change in the wording of § 52.99 to incorporate the language of the Energy Policy Act does not alter the role of the NRC staff. The NRC staff will have principal responsibility for overseeing the ITAAC process. Assigning this day-to-day role to the Commissioners themselves would be entirely unworkable. The Commission itself remains responsible under the amended § 52.99, as it was under the original part 52, for the ultimate finding that the acceptance criteria have been met. See 10 CFR 52.103(g).

2. Section 52.103, Operation Under Combined License

NUMARC requested that the Commission amend 10 CFR 52.103 to specifically incorporate 5 U.S.C. 554(a)(3), a section of the Administrative Procedure Act (APA) exempting certain agency decisions (those resting "solely on inspections, tests, or elections") from formal APA procedural requirements. That provision was cited in the original version of part 52.

In revising § 52.103, the Commission essentially tracked the language used by Congress in the Energy Policy Act. Congress did not cross-reference the APA in that Act, and neither does the revised § 52.103. No cross-reference is necessary to invoke the APA, which unquestionably applies to NRC licensing proceedings under part 52. See 42 U.S.C. 2231. Thus, § 52.103's failure to mention the APA's "inspections or tests" exemption does not prevent applying the exemption in appropriate situations.

3. Section 52.97, Issuance of Combined License

NUMARC agrees that the NRC properly interpreted section 2804 of the Energy Policy Act to make the so-called "Sholly" procedure applicable to combined licenses. The "Sholly" approach allows the Commission to

make an amendment to a combined license immediately effective (*i.e,* prior to a hearing) if it makes a finding that there are no significant hazards considerations. The Commission altered the language of 10 CFR 52.97 to reflect this express statutory authority. Because NUMARC's comment embraces § 52.97 as sound law, and suggests no change in it, no further response is necessary.

4. Statement of Considerations on § 52.97

NUMARC expresses reservations about language in the statement of considerations on the revised 10 CFR 52.97 stating that the Commission "will not look with favor upon license amendments to the combined license filed shortly before planned operation that could have the effect of undermining standardization or changing the scope of imminent or pending hearings on conformance issues." 57 FR at 60976. NUMARC agrees that the "Sholly provisions should not * * * be used as a subterfuge for eliminating contested issues in a pending § 52.103 hearing on acceptance criteria performance," but fears that the Commission's "overly broad" language may discourage a licensee from applying for a license amendment to permit "a late-occurring minor noncompliance" with an acceptance criterion. NUMARC indicates that reworking the project to avoid the minor noncompliance may be undesirable "from both a cost and safety standpoint."

The Commission finds the language in the statement of considerations appropriate. It merely reiterates the Commission's longstanding commitment to standardization evident throughout the statement of considerations on the original part 52. See 54 FR 15372 (1989). The language does not disfavor all license amendments, only those that would undermine standardization or change the scope of pending hearings. A license amendment to deal with a "minor noncompliance" likely would not fall in those categories.

List of Subjects in 10 CFR Part 52

Administrative practice and procedure, Antitrust, Backfitting, Combined license, Early site permit, Emergency planning, Fees, Inspection, Limited work authorization, Nuclear power plants and reactors, Probabilistic risk assessment, Prototype, Reactor siting criteria, Redress of site, Reporting and recordkeeping requirements, Standard design, Standard design certification.

Dated at Rockville, Maryland, this 22d day of December 1993.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

[FR Doc. 93–31768 Filed 12–29–93; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 93–NM–102–AD; Amendment 39–8772; AD 93–25–06]

Airworthiness Directives; Boeing Model 767 Series Airplanes Equipped With Over-Wing Escape Slides

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 767 series airplanes equipped with over-wing escape slides, that requires modification of the trailing edge panels and the aft flaps. This amendment is prompted by the results of functional tests of over-wing escape slides, which revealed that some slides were damaged when they were deployed across sharp corners on the trailing edge of the wing and the large gaps between the trailing edge panels of the wing. The actions specified by this AD are intended to prevent damage to the over-wing escape slide, which could hinder inflation of the slide to a usable configuration during an emergency evacuation.

DATES: Effective January 31, 1994.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of January 31, 1994.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Jayson Claar, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (206) 227–2784; fax (206) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations to include an airworthiness directive (AD) that is applicable to certain Boeing Model 767 series airplanes equipped with over-wing escape slides was published in the **Federal Register** on August 10, 1993 (58 FR 42513). That action proposed to require modification of the trailing edge panels and the aft flaps.

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

One commenter supports the proposed rule.

The manufacturer states that the proposed rule is unwarranted because, contrary to the statement of unsafe condition in the proposal, in all five instances in which sharp corners caused damage to the over-wing escape slides, none of the escape slides was rendered unusable. From that comment, the FAA infers that the commenter is requesting that the proposal be withdrawn. The FAA does not concur. Although there have been no reported cases of unusable escape slides, the potential for escape slides to deploy into an unusable configuration still exists until the sharp corners on the wing are eliminated. Furthermore, in the event of damage to either the lower or the upper inflation chamber, the effectiveness of the slide would be severely reduced since only the remaining chamber would be capable of full inflation. This AD action addresses that potential unsafe condition.

One commenter requests that the proposed 15-month compliance time to accomplish the modification of the trailing edge panels and the aft flaps be shortened to six months. This commenter suggests that the proposed compliance time may be too long to fly with a potential for damaged over-wing escape slides that may delay or impede passengers during an emergency evacuation. The FAA does not concur with the need for a shorter compliance time. In developing an appropriate compliance time, the FAA considered the safety implications, parts availability, and normal maintenance schedules for timely accomplishment of the modifications. The proposed compliance time of 15 months was determined to be appropriate in consideration of these factors.

Two commenters request that the 15-month proposed compliance time be extended to coincide with operators'

regularly scheduled maintenance, which ranged from 18 months to 24 months. The FAA does not concur with these commenters' requests to extend the compliance time. In developing an appropriate compliance time for this action, the FAA considered the degree of urgency associated with addressing the subject unsafe condition, the availability of required parts, the practical aspect of installing the required modification within a maximum interval of time allowable for all affected airplanes to continue to operate without compromising safety, and the average regular maintenance interval for the majority of the affected operators. In consideration of these items, as well as the reports of damage to slides during functional tests, the FAA has determined that 15 months represents the maximum interval of time allowable wherein the modifications can reasonably be accomplished and an acceptable level of safety can be maintained. However, under the provisions of paragraph (b) of the final rule, operators may apply for an alternative method of compliance or adjustment of the compliance time by presenting data to the FAA to justify such an extension.

One commenter requests clarification as to how the requirements of Airworthiness Directive (AD) 91-15-13, Amendment 39-7077 (56 FR 34019, July 25, 1991) relate to the requirements of this AD. Specifically, AD 91-15-13, which references Boeing Service Bulletin 767-27-0104, requires modification of the inboard edges of the rub strip on the inboard spoilers. This modification is also described in Boeing Service Bulletin 767-57-0043, which is referenced in the proposal. The FAA concurs that clarification is necessary. On April 13, 1992, the FAA issued AD 92-10-01, Amendment 39-8234 (57 FR 19529, May 7, 1992) to supersede AD 91-15-13. Note 1 in paragraph (a) of the final rule has been revised to clearly state that modification of the inboard edges of the rub strip on the inboard spoilers, previously accomplished in accordance with AD 92-10-01, does not have to be repeated to comply with the requirements of this AD.

Since the issuance of the Notice of Proposed Rulemaking (NPRM), the FAA has reviewed and approved Boeing Service Bulletin 767-57-0043, Revision 2, dated September 16, 1993. This revision to the service bulletin merely corrects minor typographical errors contained in Revision 1, dated May 6, 1993, that was referenced in the NPRM. Therefore, paragraph (a) of the final rule has been revised to reference Revision 2 as an additional source of service information.

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

There are approximately 476 Boeing Model 767 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 166 airplanes of U.S. registry will be affected by this AD, that it will take approximately 40 work hours per airplane to accomplish the required actions, and that the average labor rate is $55 per work hour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $365,200, or $2,200 per airplane. This total cost figure assumes that no operator has yet accomplished the requirements of this AD.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

93-25-06 Boeing: Amendment 39-8772. Docket 93-NM-102-AD.

Applicability: Model 767 series airplanes, equipped with over-wing escape slides, line positions 1 through 476 inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent damage to the over-wing escape slide, which could hinder inflation of the slide to a usable configuration during an emergency evacuation, accomplish the following:

(a) Within 15 months after the effective date of this AD, modify the trailing edge panels and the aft flaps, in accordance with Boeing Service Bulletin 767-57-0043, Revision 1, dated May 6, 1993; or Revision 2, dated September 16, 1993.

Note 1: Portions of the modification required by this AD (to modify the inboard edges of the rub strip on the inboard spoilers) are required by AD 92-10-01, Amendment 39-8234, which references Boeing Service Bulletin 767-27-0104, Revision 2, dated September 12, 1991. As allowed by the phrase, "unless accomplished previously," if the requirements of that AD have already been accomplished, this AD does not require that those portions of the modification be repeated.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(c) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) The modification shall be done in accordance with Boeing Service Bulletin 767-57-0043, Revision 1, dated May 6, 1993; or Boeing Service Bulletin 767-57-0043, Revision 2, dated September 16, 1993. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. Copies may

be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(e) This amendment becomes effective on January 31, 1994.

Issued in Renton, Washington, on December 13, 1993.

Bill R. Boxwell,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93-30805 Filed 12-29-93; 8:45 am]

BILLING CODE 4910-13-P

FEDERAL TRADE COMMISSION

16 CFR Part 436

Trade Regulation Rule; Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures

AGENCY: Federal Trade Commission.

ACTION: Notice of Commission action to vacate extension effecting stay.

SUMMARY: After reviewing the evidence and comment submitted in response to an Advance Notice of Proposed Rulemaking (ANPR), the Federal Trade Commission has decided not to initiate a rulemaking to amend the earnings claim and preemption provisions of its Franchise Rule (16 CFR part 436). The ANPR was published on February 16, 1989 (54 FR 7041), and the record for public comment was reopened for receipt of additional evidence and comment on September 22, 1989 (54 FR 39000), and again on February 13, 1991 (56 FR 5783).

The Commission has also determined that the extension of time issued on February 16, 1989 (54 FR 7041) which effected a stay of its order published June 15, 1987 (52 FR 22686), requiring franchisors that have chosen to use the Uniform Franchise Offering Circular ("UFOC") to comply with the Franchise Rule to follow the revised UFOC earnings claim requirements by January 1, 1989, is no longer necessary to prevent inconsistent state and federal compliance obligations. Accordingly, the Commission is vacating the stay, and franchisors wishing to use the UFOC to comply with the Franchise Rule must now comply with the UFOC Guidelines as revised by the North American Securities Administrators' Association on November 21, 1986.

DATES: The Commission's action vacating the extension is effective as of December 30, 1993, and applies to any annual revision, amendment to reflect a material change, or quarterly update prepared on or after December 30, 1993.

ADDRESSES: Any questions about Franchise Rule compliance obligations arising from this notice should be addressed to Franchise Rule Staff, Division of Marketing Practices, Federal Trade Commission, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Lawrence H. Norton, Assistant Director, Division of Marketing Practices, PC-H-238, Federal Trade Commission, Washington, DC 20580 (202) 326-3128.

SUPPLEMENTARY INFORMATION: On February 16, 1989, the Commission issued an Advance Notice of Proposed Rulemaking ("ANPR") requesting public comment on whether or not it should initiate a rulemaking proceeding to amend the earnings claim and preemption provisions of its Trade Regulation Rule on Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures ("Franchise Rule") (16 CFR part 436). The Commission extended the initial 60-day comment period for an additional 60 days on April 12, 1989 (54 FR 14662), and granted a request from the International Franchise Association ("IFA") for a subsequent reopening of the record for an additional 60 days on September 22, 1989 (54 FR 39000). After reviewing the 220 submissions received, the Commission was not persuaded that an amendment proceeding on either the earnings claim or preemption issue would be in the public interest, but decided to reopen the record once more to obtain additional evidence not then available

In a notice issued February 13, 1991 (56 FR 5783), the Commission announced a reopening of the record for receipt of further evidence and comment until August 6, 1992, to permit sufficient time for studies to be conducted and submitted on the effect of new streamlined earnings claim requirements of the Uniform Franchise Offering Circular ("UFOC"), a disclosure format franchisors may use in lieu of the Franchise Rule disclosure format to comply with federal and state disclosure requirements. The Commission also requested "the best evidence available" of "the nature and pervasiveness of any inconsistencies in state [registration and disclosure] requirements," and sought to encourage the submission of deficiency letters that would demonstrate any conflicts or inconsistencies by authorizing their inclusion in the record in redacted form to shield the identity of the franchisor, its law firm and the state official who issued the letter.

Ten submissions were received during the reopening, six of which provided new data or evidence. One, a study which included comparative data on the use of earnings claims in disclosures filed in the State of Maryland before and after the streamlined UFOC earnings claim requirements took effect, showed what the authors termed a "modest" three percent increase overall in the availability of pre-sale earnings information to potential franchise purchasers that might be attributed to the revised UFOC earnings disclosure requirements.[1] The reopening produced no other studies or comments relevant to the question of whether the public interest would be served by amendment of the Franchise Rule to provide a comparable simplification of its earnings claim disclosure provisions, as the initial comments had advocated.

Three submissions on the preemption issue during the reopening provided a total of only seven deficiency letters to support the contention of the American Bar Association and others that pervasive conflicts and inconsistencies in state registration and disclosure requirements create a compelling need for amendment of the preemption provision of the Franchise Rule.[2] None of the deficiency letters, nor any of the other evidence and comment submitted prior to or during the reopening, demonstrates that a direct conflict exists in which one state requires a disclosure that another will not permit. To the extent that the submissions demonstrate any inconsistencies among state laws, the laws involved primarily deal with the franchise relationship rather than pre-sale disclosure.

The one conflict of record occurred between federal and state disclosure requirements. It arose when two states did not adopt the revised UFOC earnings claim requirements by January 1, 1991, the date on which franchisors using the UFOC for compliance with the Franchise Rule were required to use only the revised requirements. The two states have since acted to permit the use of the revised earnings claim requirements in their respective jurisdictions, and the conflict is now moot.

[1] W. Lewis & M. Forseth, Earnings Claim Study (1987-1991): A Study of Franchisors Registered in Illinois and Maryland (Final Report, May 11, 1992).

[2] The comment, prepared by the ABA Antitrust Section, was endorsed by the House of Delegates as ABA policy, and by the Governing Committee of the ABA Forum Committee on Franchising. The IFA, a trade association representing some 650 business-format franchisors, advanced similar arguments in a prior submission, but did not submit evidence or comment during the reopening.

Accordingly, the Commission is vacating the stay issued to permit franchisors to avoid the conflict by continuing to use the original UFOC earnings claim requirements to comply with the Rule. All new franchise disclosures, annual revisions, amendments to reflect a material change and quarterly updates prepared on or after December 30, 1993, must comply with the revised earnings claim requirements in Item 19 of the UFOC Guidelines issued by the North American Securities Administrators' Association on November 21, 1986.

Having reviewed the entire record, the Commission is not persuaded that a rulemaking to amend the earnings claim or preemption provisions of the Franchise Rule would be in the public interest. The available evidence does not indicate that revision of the earnings claim requirements of the Franchise Rule would be reasonably likely to enhance the accessibility of franchise earnings information in the marketplace to a significant extent, and there is no evidence of a direct conflict among state registration and disclosure requirements. Moreover, the very limited response to the Commission's invitation to the industry to develop an evidentiary record of deficiency letters suggests that any inconsistencies in state registration and disclosure requirements are neither so significant nor pervasive as to be reasonably likely to demonstrate a compelling need for preemption.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 93-31789 Filed 12-29-93; 8:45 am]

BILLING CODE 6750-01-M

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16 CFR Part 436

Trade Regulation Rule; Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures

AGENCY: Federal Trade Commission.

ACTION: Authorization for use of disclosures prepared in compliance with amended Uniform Franchise Offering Circular Guidelines in lieu of disclosures required by the Commission's Franchise Rule.

SUMMARY: The Commission has approved the use, as of January 1, 1994, of disclosures prepared in accordance with amended Uniform Franchise Offering Circular Guidelines adopted by the North American Securities Administrators Association on April 25, 1993, for compliance with the pre-sale disclosure requirements of the Commission's Franchise Rule (16 CFR 436.1(a)–(e)).

DATES: Franchisors may use disclosures prepared in accordance with either the present or amended Uniform Franchise Offering Circular Guidelines as of January 1, 1994. Authorization to prepare disclosures that comply with the present UFOC Guidelines is revoked effective six months to the day after the date on which the last state requiring pre-sale registration of a franchise permits the use of the amended Guidelines. UFOC disclosures required to be prepared, amended, revised or filed on and after the revocation date by the Rule or state law must satisfy the requirements of the UFOC Guidelines as amended by NASAA on April 25, 1993, for use in compliance with the Franchise Rule.

ADDRESSES: Questions about Franchise Rule compliance obligations arising from this notice should be addressed to Franchise Rule Staff, Division of Marketing Practices, Federal Trade Commission, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Lawrence H. Norton, Assistant Director, Division of Marketing Practices, PC–H–238, Federal Trade Commission, Washington, DC 20580 (202) 326–3128.

SUPPLEMENTARY INFORMATION: The Commission's trade regulation rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" ("Franchise Rule" or "Rule") (16 CFR part 436) requires franchisors to provide pre-sale disclosures of material information to prospective franchisees. The form and content of the required disclosures is prescribed by §§ 436.1(a)–(e) of the Rule.

When the Rule was issued, the Commission authorized the use of an alternative disclosure format, known as the Uniform Franchise Offering Circular ("UFOC"), in lieu of the disclosures required by §§ 436.1(a)–(e) of the Rule (43 FR 59614, 59722). The UFOC had been prepared by state franchise law administrators to enable franchisors to use a single document to comply with the differing pre-sale disclosure requirements of the franchise registration and disclosure laws in their jurisdictions.

The Commission's initial approval of the UFOC extended only to disclosures that complied with the UFOC Guidelines as adopted by the Midwest Securities Commissioners Association ("MSCA") on September 5, 1975 (44 FR 49966, 49970). The Commission subsequently granted a petition from the MSCA's successor, the North American Securities Administrators Association (NASAA), for approval of amendments to the UFOC Guidelines that NASAA had adopted on November 27, 1986 (52 FR 22686).

In a request filed July 2, 1993, NASAA now has asked that the Commission approve new amendments to the UFOC Guidelines adopted on April 25, 1993 (Extra Edition, Bus. Fran. Guide (CCH), Rpt. No. 161 (May 25, 1993)). Unlike the limited 1986 revisions, which principally affected the UFOC earnings claim requirements, the new amendments are the product of a comprehensive revision of the UFOC Guidelines. They include significant changes and additions to the present Guidelines, most notably the requirement that UFOC disclosure documents use "plain English."

In issuing the Franchise Rule, the Commission recognized that although the UFOC and the Rule are "substantively similar in content," there are "certain areas in which the UFOC requires more disclosure than the Commission's Rule, and certain areas where the Commission's Rule requires more disclosure than the UFOC." After analyzing the differences between the two disclosure formats, however, the Commission proceeded to approve the present UFOC upon finding that, "viewed as a whole, * * * compliance with the UFOC disclosures results in protection to prospective franchisees equal to or greater than that provided by [the] Rule" (43 FR at 59722).

Having conducted a thorough review and analysis of the new amendments to the UFOC Guidelines, the Commission finds that, viewed as a whole, they provide prospective franchisees with protection equal to or greater than that provided by the Franchise Rule. Accordingly, the Commission is authorizing the use of disclosures prepared in accordance with the UFOC Guidelines, as amended by NASAA on April 25, 1993, in lieu of the disclosures required by Sections 436.1(a)–(e) of the Franchise Rule, as of January 1, 1994. This authorization remains subject to the conditions the Commission previously has articulated for use of the UFOC disclosure format for compliance with the Franchise Rule (43 FR at 59723 n.232; 44 FR at 49970–71).

Section 265 of the General Instructions to the amended UFOC Guidelines provides that the new requirements will take effect "six months after the Federal Trade Commission and each NASAA member whose jurisdiction requires pre-sale registration of a franchise adopts them," but "no late than January 1, 1995." The provision specifies that, thereafter, "all

initial franchise applications, renewals and re-registrations must comply with these Guidelines."

In the interest of uniformity, the Commission is accommodating the implementation timetable provided by the amended UFOC Guidelines by authorizing the use, as of January 1, 1994, of disclosures prepared in accordance with the amended UFOC Guidelines, and revoking its prior authorization for preparation of disclosures in accordance with the present UFOC Guidelines effective six months to the day after the date on which the last state requiring pre-sale registration of a franchise adopts the amended UFOC Guidelines. UFOC disclosures required to be prepared, amended, revised or filed on and after the revocation date by the Rule or state law must satisfy the requirements of the UFOC Guidelines as amended by NASAA on April 25, 1993, for use in compliance with the Franchise Rule.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 93-31790 Filed 12-29-93; 8:45 am]

BILLING CODE 6750-01-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-33371; IC-19981]

RIN 3235-AG01

Elimination of Filing Requirements for Preliminary Proxy Materials Under Certain Circumstances

AGENCY: Securities and Exchange Commission.

ACTION: Final rules.

SUMMARY: The Securities and Exchange Commission ("Commission") has adopted amendments to the proxy and information statement filing requirements. The amendments broaden the exclusion from the preliminary filing requirement to include shareholder action on new compensation plans as well as amendments to existing plans. These amendments codify a prior interpretation regarding amendments to existing plans and extend this position to the submission of new compensation plans for shareholder action. The amendments relieve registrants and the Commission of unnecessary administrative burdens and processing costs associated with the filing and processing of proxy materials currently the subject of selective review procedures, but which are not ordinarily selected for review in preliminary form.

EFFECTIVE DATE: These rules are effective on December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Gregg W. Corso, Paula Dubberly, Brian L. Henry or Thomas D. Twedt, (202) 272-3097, Division of Corporation Finance, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission has adopted an amendment to Rule 14a-6 [1] and Rule 14c-5 [2] of the Securities Exchange Act of 1934 ("Exchange Act").[3] These amendments modify the preliminary filing requirements for proxy and information statements.

I. Amendments to Rule 14a-6 and 14c-5

In a companion release to the recently enacted refining amendments to the executive compensation rules, the Commission proposed to codify a prior interpretation that a proxy or information statement is not subject to the preliminary filing requirement because it relates to shareholder action on amendments to an existing employee benefit plan.[4] In addition, the Commission asked whether this exclusion should be extended to shareholder action on new plans.[5]

This proposal was intended to relieve registrants and the Commission of unnecessary administrative burdens and processing costs associated with the filing and processing of proxy materials currently the subject of selective review procedures, but which are not ordinarily selected for review in preliminary form. In light of the support expressed by commenters for these rule changes, the Commission today is adopting the proposed change and extending its scope to include new plans.[6] The amendments revise Rule 14a-6 and Rule 14c-5 specifically to include approval or ratification of compensation plans or amendments to such plans as exclusions from the preliminary filing requirements.

In responding to the Commission's request for comments on extending the exclusion to new plans, many commenters observed that there is no reason to differentiate between shareholder action on an amendment to an existing plan and action on a new plan. The disclosure requirements for both matters under Regulations 14A and 14C are virtually identical.[7] Moreover, the objectives sought by the adoption of a new plan can generally be achieved through amendment of an existing plan.

The amendment adopted today affects only filing requirements; it does not affect disclosure requirements. As under current practice, definitive materials will still be subject to being selected for review. As previously announced, the staff during the 1994 proxy season plans to review the proxy statements of those registrants who were requested last year to make changes in future filings, as well as proxy statements of additional registrants.[8]

II. Cost Benefit Analysis

No specific data were provided in response to the Commission's request regarding the costs and benefits of these amendments. The Commission believes that the benefits to be gained by amending the proxy and information statement filing requirements outweighs the costs, if any, associated with implementing the proposals.

III. Final Regulatory Flexibility Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis in accordance with 5 U.S.C. 604.

1. The Commission is proposing amendments to Rules 14a-6 and 14c-5 under the Exchange Act to codify an interpretive position and to eliminate the necessity to file a preliminary proxy or information statement when a new compensation plan is submitted for shareholder approval.

2. No comments were received with respect to the Initial Regulatory Flexibility Analysis.

3. A number of significant alternatives to the proposed amendments have been considered. One alternative would be to provide differing or simplified requirements for small businesses that are based on performance rather than design standards. However, the adoption of performance standards

[1] 17 CFR 240.14a-6.

[2] 17 CFR 240.14c-5.

[3] 15 U.S.C. 78a *et seq.*

[4] Release No. 34-33232 (November 29, 1993) (58 FR 63017). The interpretive position extending the exclusion to amendments of existing employee benefit plans was articulated in 1991. Release No. 34-28869 [58 FR 7242] at note 244. See also *Thompson Hine and Flory* (avail. March 29, 1991) (affirming that plan amendments do not trigger the preliminary filing requirements of Rule 14a-6).

[5] *Id.*

[6] The Commission received 12 letters of comment, which may be inspected and copied at the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549, File No. S7-31-93.

[7] Item 10, Schedule 14A (17 CFR 240.14a-101).

[8] Release No. 33-7032 (November 29, 1993) (58 FR 63010); see also *Procedures for Early Staff Review of Executive Compensation Disclosure*, SEC News Digest, Issue 93-235 (December 8, 1993).

would not be consistent with the Commission's statutory mandate to require disclosure to investors of material information necessary to make informed investment decisions. The amendments clarify and broaden an interpretation that simplifies reporting requirements for all registrants, including small businesses. Other alternatives would involve the establishment of different compliance or reporting requirements or timetables to take into account the resources available to small businesses and to provide an exemption from coverage of the provisions for small businesses. Since the amendments impose no added burden on small business issuers, different treatment is not warranted.

IV. Effective Date

The amendments to Rules 14a–6 and 14c–5 shall be effective upon publication in the **Federal Register**. This date is less than 30 days after publication in the **Federal Register** in accordance with the Administrative Procedures Act, which allows effectiveness in less than 30 days after publication for, *inter alia*, "a substantive rule which grants or recognizes an exemption or relieves a restriction." 5 U.S.C. 553(d)(1).

V. Statutory Basis

The amendments contained herein are being proposed pursuant to sections 12, 13, 14(a), 15(d) and 23(a) of the Exchange Act.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

Text of Amendment

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78i, 78j, 78*l*1, 78m, 78n, 78o, 78p, 78s, 78w, 78x, 78*l*(d), 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

2. By amending § 240.14a–6 by revising paragraph (a) and the undesignated paragraph preceding the notes to read as follows:

§ 240.14a–6 Filing requirements.

(a) *Preliminary proxy statement.* Five preliminary copies of the proxy statement and form of proxy shall be filed with the Commission at least 10 calendar days prior to the date definitive copies of such material are first sent or given to security holders, or such shorter period prior to that date as the Commission may authorize upon a showing of good cause thereunder. A registrant, however, shall not file with the Commission a preliminary proxy statement, form of proxy or other soliciting material to be furnished to security holders concurrently therewith if the solicitation relates to an annual (or special meeting in lieu of the annual) meeting, or for an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) or a business development company, if the solicitation relates to any meeting of security holders at which the only matters to be acted upon are:

(1) The election of directors;

(2) The election, approval or ratification of accountant(s);

(3) A security holder proposal included pursuant to Rule 14a–8 (§ 240.14a–8 of this chapter);

(4) The approval or ratification of a plan as defined in paragraph (a)(7)(ii) of Item 402 of Regulation S–K (§ 229.402(a)(7)(ii) of this chapter) or amendments to such a plan;

(5) With respect to an investment company registered under the Investment Company Act of 1940 or a business development company, a proposal to continue, without change, any advisory or other contract or agreement that previously has been the subject of a proxy solicitation for which proxy material was filed with the Commission pursuant to this section; and/or

(6) With respect to an open-end investment company registered under the Investment Company Act of 1940, a proposal to increase the number of shares authorized to be issued.

This exclusion from filing preliminary proxy material does not apply if the registrant comments upon or refers to a solicitation in opposition in connection with the meeting in its proxy material.

* * * * *

3. By amending § 240.14c–5 to revise paragraph (a) and the undesignated paragraph preceding the notes to read as follows:

§ 240.14c–5 Filing requirements.

(a) *Preliminary information statement.* Five preliminary copies of the information statement shall be filed with the Commission at least 10 calendar days prior to the date definitive copies of such statement are first sent or given to security holders, or such shorter period prior to that date as the Commission may authorize upon a showing of good cause therefor. In computing the 10-day period, the filing date of the preliminary copies is to be counted as the first day and the 11th day is the date on which definitive copies of the information statement may be mailed to security holders. A registrant, however, shall not file with the Commission a preliminary information statement if it relates to an annual (or special meeting in lieu of the annual) meeting, of security holders at which the only matters to be acted upon are:

(1) The election of directors;

(2) The election, approval or ratification of accountant(s);

(3) A security holder proposal identified in the registrant's information statement pursuant to Item 4 of Schedule 14C (§ 240.14c–101); and/or

(4) The approval or ratification of a plan as defined in paragraph (a)(7)(ii) of Item 402 of Regulation S–K (§ 229.402(a)(7)(ii) of this chapter) or amendments to such a plan.

This exclusion from filing a preliminary information statement does not apply if the registrant comments upon or refers to a solicitation in opposition in connection with the meeting in its information statement.

* * * * *

Dated: December 23, 1993.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–31819 Filed 12–29–93; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

RIN 1205–AA89

Wage and Hour Division

29 CFR Part 507

RIN 1215–AA69

Labor Condition Applications and Requirements for Employers Using Aliens on H–1B Visas in Specialty Occupations and as Fashion Models

AGENCIES: Employment and Training Administration, Labor, and Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Interim final rule.

SUMMARY: In order to implement procedural requirements applicable to

the temporary entry of nonimmigrant professionals into the United States from Mexico pursuant to transition provisions of the North American Free Trade Agreement (NAFTA), the Department of Labor (Department or DOL) is amending its regulations promulgated under the Immigration and Nationality Act (INA). Under the terms of NAFTA, employers will be required to file an attestation, in the case of registered nurses, and a labor condition application, in the case of all other professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA, supplying the information mandated under INA section 212 ((m) and (n), respectively).

This rule implements the provisions of NAFTA pertaining to the employment of Mexican citizens as professionals other than registered nurses, pursuant to the regulations implementing section 212(n) of the INA. By a separate rule to be published in the **Federal Register**, the regulations promulgated under section 212(m) of the INA, pertaining to facilities using nonimmigrants as registered nurses under H–1A visas, are also being amended to implement these provisions of NAFTA.

EFFECTIVE DATE: Effective on the date the NAFTA enters into force with respect to the United States, which is January 1, 1994, on an exchange of written notifications certifying completion of necessary legal procedures. The Department will publish a document in the **Federal Register** confirming the effective date.

FOR FURTHER INFORMATION CONTACT: On 20 CFR part 655, subpart H, and 29 CFR part 507, subpart H, regarding the labor attestation and labor condition application procedures, contact Patrick Stange, Division of Foreign Labor Certification, U.S. Employment Service, Employment and Training Administration, Department of Labor, 200 Constitution Avenue, NW., room N–4456, Washington, DC 20210. Telephone: (202) 219–5263 (this is not a toll-free number).

On 20 CFR part 655, subpart I, and 29 CFR part 507, subpart I, regarding the enforcement process, contact Solomon Sugarman, Wage and Hour Division, Employment Standards Administration, Department of Labor, 200 Constitution Avenue, NW., room S–3510, Washington, DC 20210. Telephone: (202) 219–7605 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This regulation contains no reporting or recordkeeping requirements subject to the Paperwork Reduction Act. The information collection requirements contained in the regulations currently in effect under the Department's H–1B program were previously submitted to the Office of Management and Budget (OMB) and assigned OMB Control No. 1205–0310.

II. Background

The North American Free Trade Agreement (NAFTA) has been implemented by the U.S. Congress through legislation. NAFTA Implementation Act, Pub. L. 103–182, 107 Stat. 2057 (December 8, 1993). This legislation prescribes certain procedures for the temporary entry of Mexican professionals as nonimmigrants for employment in the United States. *Ibid.* at section 341(a) and (b).

Under the provisions of Appendix 1603.D.4 of Annex 1603 of the NAFTA, the number of Mexican professionals entering the United States pursuant to Annex 1603, Section D, of the NAFTA is limited to 5,500 annually. This limit may be increased by agreement between Mexico and the United States and will expire 10 years after NAFTA enters into effect, unless the two countries decide to remove the limit earlier. This limit is separate from the 65,000 annual limit on admissions under H–1B visas established by section 214(g)(1)(A) of the INA.

As authorized by Annex 1603, Section D, paragraph 5(b), of the NAFTA and section 341 of the NAFTA Implementation Act, during the period that the transition provisions of Appendix 1603.D.4 of Annex 1603 of the NAFTA are in effect, Mexican professionals will be subject to the attestation requirements of section 212(m) of the INA in the case of a registered nurse, and the labor condition application requirements of section 212(n) of the INA in the case of all other professionals as set out in Appendix 1603.D.1 of Annex 1603 of NAFTA. See 8 U.S.C. 1182(m) and § 1182(n). Mexican professionals' entry into the United States under these provisions of NAFTA neither forecloses nor establishes their eligibility for entry under other similar provisions of the INA.

In order to implement its responsibilities with respect to the admission of Mexican professionals during the transition period provided under the NAFTA, the Department will require health care facilities seeking to use the services of Mexican registered nurses to file H–1A labor attestations, and employers seeking to employ Mexican citizens in other professions set out in Appendix 1603.D.1 to file H–1B labor condition applications, under and pursuant to applicable regulations implementing section 212(m) and section 212(n) of the INA, at 20 CFR part 655, subparts D and H; 29 CFR part 504, subpart D; and 29 CFR part 507, subpart H (as appropriate). Complaints regarding such attestations and labor condition applications will be processed under and pursuant to existing regulations at 20 CFR part 655, subparts E and I; 29 CFR part 504, subpart E; and 29 CFR part 507, subpart I (as appropriate).

This rule amends the applicability section of the regulations promulgated pursuant to section 212(n) of the INA pertaining to employers using nonimmigrants on H–1B visas in specialty occupations and as fashion models, to extend the procedures to Mexican professionals temporarily entering the United States under the transition provisions of the NAFTA.

Executive Order 12866

This rule is not a "significant regulatory action" within the meaning of Executive Order 12866, in that it is not likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no regulatory impact analysis has been prepared.

Regulatory Flexibility Analysis

The Department has determined that this regulation will not have a significant economic impact on a substantial number of small entities. The rule is required to implement statutory provisions enacted by the Congress pursuant to the NAFTA, which are largely procedural in nature, or which narrowly extend the scope of the rule to include filing requirements for the temporary entry of Mexican professionals during the transition

period of NAFTA. The Department has certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. Therefore, no regulatory flexibility analysis is required.

Publication as an Interim Final Rule

The Department has determined that the public interest requires the immediate issuance of this interim final rule. Under the terms of the NAFTA and its enacting legislation, the provisions extending the attestation requirement of section 212(m) of the INA (in the case of a registered nurse) and the labor condition application requirement of section 212(n) of the INA (in the case of all other professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA) to the temporary entry of Mexican professionals during the transition period under NAFTA take effect on the date the Agreement enters into force with respect to the United States (January 1, 1994, upon an exchange of written notifications certifying the completion of necessary legal procedures). Insufficient time existed since the enactment of the implementing provisions for the Department to issue a proposal for comments, review the comments, and promulgate a final rule to be effective when the underlying statutory provisions take effect. Moreover, under the Administrative Procedure Act, procedural amendments to regulations do not require prior public notice and an opportunity for public comment. The changes being made by this rule do not affect the substantive requirements of the underlying laws or rules; nor do they modify or revoke existing rights or obligations, or create new ones. These technical changes merely apply the applicable regulations in accordance with statutory provisions enacted with respect to NAFTA that extend the scope of the rule to include the temporary entry to Mexican professionals during NAFTA's transition period. Therefore, there is good cause to dispense with public comment on this rule under 5 U.S.C. 553(b)(3)(B).

In addition, for these same reasons, it has been determined that good cause exists for waiving the requirements to delay the effective date of these technical amendments under 5 U.S.C. 553(d). It is impracticable and unnecessary to provide for a delayed effective date because the statutory amendments extending the procedural filing requirements of section 212(m) and section 212(n) of the INA under NAFTA are effective upon NAFTA's entry into force.

Catalog of Federal Domestic Assistance Number

This program is not yet listed in the Catalog of Federal Domestic Assistance.

List of Subjects

20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Crewmembers, Employment, Enforcement, Fashion models, Forest and forest products, Guam, Health professions, Immigration, Labor Longshore work, Migrant labor, Nurse, Penalties, Registered nurse, Reporting and recordkeeping requirements, Specialty occupation, Students, Wages.

29 CFR Part 507

Administrative practice and procedures, Aliens, Employment, Enforcement, Fashion models, Immigration, Labor, Penalties, Reporting and recordkeeping requirements, Specialty occupation, Wages, Working conditions.

Text of the Interim Final Joint Rule

The text of the interim final joint rule as adopted by ETA and the Wage and hour Division, ESA, appears below:

In § ____.700, paragraph (c) after the heading, "*Applicability*", is redesignated as new paragraph (c)(1) and a new paragraph (c)(2) is added to read as follows:

§ ____.700 Purpose, procedure, and applicability of subparts H and I.

* * * * *

(c) *Applicability.* (1) * * *

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, subparts H and I of this part shall apply to the entry of a nonimmigrant who is a citizen of Mexico under and pursuant to the provisions of section D of Annex 1603 of NAFTA in the case of all professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA other than registered nurses. In the case of a registered nurse, the provisions of 20 CFR part 655, subparts D and E, and 29 CFR part 504, subparts D and E, shall apply.

Adoption of the Interim Final Joint Rule

Accordingly, part 655 of chapter V of title 20, and part 507 of chapter V of title 29 of the Code of Federal Regulations, are amended as follows:

TITLE 20—EMPLOYEES' BENEFITS

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The authority citation for 20 CFR part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H) (i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued uder 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101–238, 193 Stat. 2099, 2103 (8 U.S.C. 1182 note); and sec. 341 (a) and (b), Pub. L. 103–182, 107 Stat. 2057.

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note); and sec. 341 (a) and (b), Pub. L. 103–182, 107 Stat. 2057.

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

2. Part 655 is amended as set forth in the interim final joint rule above in this document.

TITLE 29—LABOR

CHAPTER V—WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR

PART 507—ENFORCEMENT OF H–1B LABOR CONDITION APPLICATIONS

3. The authority citation for 29 CFR part 507 is revised to read as follows:

Authority: 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184, and 29 U.S.C. 49 *et seq.*; Pub. L. 102–232, 105 stat. 1733, 1748 (8 U.S.C. 1182 note); and sec. 341 (a) and (b), Pub. L. 103–182, 107 Stat. 2057.

4. Part 507 is amended as set forth in the interim final joint rule above in this document.

Signed at Washington, DC, this 27th day of December, 1993.

Doug Ross,

Assistant Secretary for Employment and Training.

John R. Fraser,

Acting Assistant Secretary for Employment Standards.

[FR Doc. 93–32064 Filed 12–29–93; 8:45 am]

BILLING CODE 4510–30–M; 4510–27–M

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 375

[DoD Directive 5122.5]

Assistant to the Secretary of Defense for Public Affairs; Office Organization and Functions

AGENCY: Office of the Secretary, DoD.

ACTION: Final rule.

SUMMARY: This rule identifies and reflects new organizational and functional arrangements within the Office of the Secretary of Defense.

EFFECTIVE DATE: December 2, 1993.

FOR FURTHER INFORMATION CONTACT: Mr. R. Kennedy, Office of Organizational and Management Planning, 703–697–1142.

SUPPLEMENTARY INFORMATION:

List of Subjects in 32 CFR Part 375

Organizations and functions (government agencies).

Accordingly, 32 CFR part 375 is revised to read as follows:

PART 375—ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS

Sec.

Authority: 10 U.S.C. 113.

§ 375.1 Purpose.

Pursuant to the authority vested in the Secretary of Defense by 10 U.S.C. 113, this part establishes the position of ATSD(PA), with responsibilities, functions, and authorities of the ATSD(PA) as prescribed in this part.

§ 375.2 Applicability.

This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Unified and Specified Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "the DoD Components").

§ 375.3 Responsibilities and functions.

The Assistant to the Secretary of Defense (Public Affairs) is the principal staff advisor and assistant to the Secretary and Deputy Secretary of Defense for DoD public information, internal information, the Freedom of Information Act, mandatory declassification review and clearance of DoD information for public release, community relations, information training, and audiovisual matters. In the exercise of this responsibility, the ATSD(PA) shall:

(a) Develop policies, plans, and programs in support of DoD objectives and operations.

(b) Ensure a free flow of news and information to the media, the general public, the internal audiences of the Armed Forces, and other appropriate forums, limited only by national security constraints as authorized by E.O. 12356, 3 CFR, 1982 Comp., p. 166, and statutory mandates. Appendices A and B to this part delineate principles that guide the Department of Defense with respect to media coverage of DoD activities.

(c) Act as the spokesperson and releasing agency for DoD information and audiovisual materials to news media representatives. Evaluate news media requests for DoD support and cooperation and determine appropriate level of DoD participation.

(d) Monitor, evaluate, and develop systems, standards, and procedures for the administration and management of approved policies, plans, and programs.

(e) Issue policy guidance to the DoD Components.

(f) As required, participate with the Comptroller of the Department of Defense in planning, programming, and budgeting activities.

(g) Promote coordination, cooperation, and mutual understanding among DoD Components and with other Federal, State, and local agencies and the civilian community.

(h) Serve on boards, committees, and other groups, and represent the Secretary of Defense outside of the Department of Defense.

(i) Conduct security reviews, consistent with E.O. 12356 and DoD Directives 5230.9[1] and 5400.4,[2] of all material prepared for public release and publication originated by the Department of Defense, including testimony before congressional committees, or by its contractors, DoD employees as individuals, and material submitted by sources outside the Department of Defense for such review.

(j) Review for conflict with established DoD and national security policies or programs, official speeches, news releases, photographs, films, and other information originated within the Department of Defense for public release, or similar material submitted for review by other executive agencies of the U.S. Government.

(k) Oversee the provision of news analysis and news clipping services for the OSD, Chairman of the Joint Chiefs of Staff and the Joint Staff, and the Military Departments' headquarters.

(l) As required, prepare speeches, public statements, congressional testimony, articles for publication, and other materials for public release by selected DoD and White House officials.

(m) Serve as official point of contact for public and media appearances by DoD officials, and conduct advanced planning and coordination, as required, with private, public, and media organizations for such events.

(n) Receive, analyze, and reply to inquiries regarding DoD policies, programs, or activities that are received from the general public either directly or from other Government Agencies. Prepare and provide to the referring office replies to inquiries from the general public that are forwarded from the Congress and the White House.

(o) Evaluate and approve:

(1) Requests for DoD cooperation in programs involving relations with the public consistent with DoD Directive 5410.18[3] and DoD Instruction 5410.19.[4]

(2) Requests by news media representatives or other non-DoD personnel for travel in military carriers for public affairs purposes.

(p) Establish policy for the Department of Defense Freedom of Information Act Program consistent with 5 U.S.C. 552 and DoD Directive 5400.7.[5]

(q) Direct and administer the Freedom of Information Act Program consistent with DoD Directive 5400.7 and DoD Instruction 5400.10,[6] and the access portion of the DoD Privacy Act consistent with DoD Directive 5400.11[7] for the OSD, Chairman of the Joint Chiefs of Staff and the Joint Staff, and other DoD Components as may be assigned.

(r) Direct and administer the Mandatory Declassification Review Program consistent with E.O. 12356 and

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

[2] See footnote 1 to § 375.3.

[3] See footnote 1 to § 375.3.

[4] See footnote 1 to § 375.3.

[5] See footnote 1 to § 375.3.

[6] See footnote 1 to § 375.3.

[7] See footnote 1 to § 375.3.

Program consistent with E.O. 12356 and DoD Directive 5200.1[8] for the OSD, Chairman of the Joint Chiefs of Staff and the Joint Staff, and other DoD Components as may be assigned.

(s) Provide DoD assistance to non-Government, entertainment-oriented motion picture, television, and video productions consistent with DoD Instruction 5410.16.[9]

(t) Evaluate and coordinate the DoD response to requests for speakers received by the Department of Defense and, as required, assist in scheduling, programming, and drafting speeches for the participation of qualified personnel.

(u) Perform such other functions as the Secretary of Defense may assign.

§ 375.4 Relationships.

(a) In the performance of assigned functions and responsibilities, the ATSD(PA) shall:

(1) Report directly to the Secretary and Deputy Secretary of Defense.

(2) Exercise direction, authority, and control over the American Forces Information Service (AFIS) in accordance with DoD Directive 5122.10.[10]

(3) Coordinate and exchange information with other OSD officials, heads of the DoD Components, and Federal officials having collateral or related functions.

(4) Use existing facilities and services of the Department of Defense and other Federal Agencies to avoid duplication and achieve maximum efficiency and economy.

(5) Maintain liaison with and provide assistance to the general public, representatives of the news media, and private organizations seeking information relating to the activities of the Department of Defense.

(b) Other OSD officials and heads of the DoD Components shall coordinate with the ATSD(PA) on all matters related to the functions cited in § 375.3.

§ 375.5 Authorities.

The ATSD(PA) is hereby delegated authority to:

(a) Issue DoD Instructions, publications, and one-time directive-type memoranda, consistent with DoD 5025.1–M,[11] which carry out policies approved by the Secretary of Defense in assigned fields of responsibility. Instructions to the Military Departments shall be issued through the Secretaries of those Departments, or their designees. Instructions to Unified and Specified Commands regarding public affairs matters shall be issued directly to the Commanders of the Unified and Specified Commands. Instructions that have operational implications shall be coordinated with the Chairman of the Joint Chiefs of Staff, consistent with DoD Directive 5105.35.[12]

(b) Obtain reports, information, advice, and assistance, consistent with the policies and criteria of DoD Directive 8910.1.[13]

(c) Communicate directly with the DoD Components. The channel of communications with the Unified and Specified Commands regarding public affairs matters shall be between the ATSD(PA) and the Commanders of the Unified and Specified Commands. Communications that have operational implications shall be coordinated with the Chairman of the Joint Chiefs of Staff consistent with DoD Directive 5105.35.

(d) Communicate with other Government Agencies, representatives of the legislative branch, and members of the public.

(e) Establish arrangements for DoD participation in those non-DoD Government programs for which the ATSD(PA) has been assigned primary staff cognizance.

(f) Act as the sole agent at the Seat of Government for the release of official DoD information for dissemination through any form of public information media.

(g) Establish accreditation criteria and serve as the approving and issuing authority for credentials for news gathering media representatives traveling in connection with coverage of official DoD activities.

(h) Approve military participation in public exhibitions, demonstrations, and ceremonies of national or international significance.

(i) In the absence of a known DoD originator of classified information, declassify official information submitted for security review, mandatory declassification review, and in response to Freedom of Information Act actions.

Appendix A to Part 375—Principles of Information

It is the policy of the Department of Defense to make available timely and accurate information so that the public, Congress, and the news media may assess and understand the facts about national security and defense strategy. Requests for information from organizations and private citizens will be answered in a timely manner. In carrying out this policy, the following principles of information will apply:

1. Information will be made fully and readily available, consistent with statutory requirements, unless its release is precluded by current and valid security classification. The provisions of the Freedom of Information Act will be supported in both letter and spirit.

2. A free flow of general and military information will be made available, without censorship or propaganda, to the men and women of the Armed Forces and their dependents.

3. Information will not be classified or otherwise withheld to protect the government from criticism or embarrassment.

4. Information will be withheld only when disclosure would adversely affect national security or threaten the safety or privacy of the men and women of the Armed Forces.

5. The Department's obligation to provide the public with information on its major programs may require detailed public affairs planning and coordination within the Department and with other government agencies. The sole purpose of such activity is to expedite the flow of information to the public; propaganda has no place in Department of Defense public affairs programs.

Appendix B to Part 375—Statement of DoD Principles for News Media Coverage of DoD Operations

1. Open and independent reporting will be the principal means of coverage of U.S. military operations.

2. Pools are not to serve as the standard means of covering U.S. military operations. Pools may sometimes provide the only feasible means of early access to a military operation. Pools should be as large as possible and disbanded at the earliest opportunity—within 24 to 36 hours when possible. The arrival of early-access pools will not cancel the principle of independent coverage for journalists already in the area.

3. Even under conditions of open coverage, pools may be appropriate for specific events, such as those at extremely remote locations or where space is limited.

4. Journalists in a combat zone will be credentialed by the U.S. military and will be required to abide by a clear set of military security ground rules that protect U.S. forces and their operations. Violation of the ground rules can result in suspension of credentials and expulsion from the combat zone of the journalist involved. News organizations will make their best efforts to assign experienced journalists to combat operations and to make them familiar with U.S. military operations.

5. Journalists will be provided access to all major military units. Special operations restrictions may limit access in some cases.

6. Military public affairs officers should act as liaisons but should not interfere with the reporting process.

7. Under conditions of open coverage, field commanders should be instructed to permit journalists to ride on military vehicles and aircraft whenever feasible. The military will be responsible for the transportation of pools.

8. Consistent with its capabilities, the military will supply PAOs with facilities to enable timely, secure, compatible transmission of pool material and make these facilities available whenever possible for filing independent coverage. In cases when

[8] See footnote 1 to § 375.3.
[9] See footnote 1 to § 375.3.
[10] See footnote 1 to § 375.3.
[11] See footnote 1 to § 375.3.
[12] See footnote 1 to § 375.3.
[13] See footnote 1 to § 375.3.

government facilities are unavailable, journalists will, as always, file by any other means available. The military will not ban communications systems operated by news organizations, but electromagnetic operational security in battlefield situations may require limited restrictions on the use of such systems.

9. These principles will apply as well to the operations of the standing DoD National Media Pool system.

Dated: December 22, 1993.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 93-31786 Filed 12-29-93; 8:45 am]

BILLING CODE 5000-04-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 162

[CGD 93-016]

RIN 2115-AE48

Ambrose Channel Navigation Restrictions

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is deleting the inland waterways navigation regulations for Ambrose Channel, Lower New York Bay. The regulation has become outdated and no longer serves a useful safety purpose. In addition, the navigation restrictions have proven to be an administrative burden for the mariner and the Coast Guard.

EFFECTIVE DATE: February 14, 1994.

FOR FURTHER INFORMATION CONTACT: Irene Hoffman, Project Manager, Vessel Traffic Services Division. The telephone number is 202-267-6277.

SUPPLEMENTARY INFORMATION:

Drafting Information

The principal persons involved in drafting this document are Irene Hoffman, Project Manager, Vessel Traffic Services Division and Mr. Nicholas Grasselli, Project Counsel, Office of Chief Counsel.

Regulatory History

On September 1, 1993, the Coast Guard published a notice of proposed rulemaking entitled "Ambrose Channel Navigation Restrictions" in the **Federal Register** (58 FR 46144). The Coast Guard received two letters commenting on the proposal. A public hearing was not requested and one was not held.

Background and Purpose

The Ambrose Channel navigation restriction was originally established by an order issued by the United States Army Corps of Engineers on March 28, 1924. As published on September 29, 1977 (42 FR 51758), the Coast Guard assumed responsibility for this navigational restriction.

This navigation regulation restricted the use of Ambrose Channel to certain vessels. The class of vessels prohibited from transiting the channel were those vessels not under sufficient power and control, sailing vessels, and other vessels engaged in towing. However, sailing vessels and other vessels engaged in towing could obtain permission to navigate the channel from Vessel Traffic Service New York (VTSNY).

These navigation restrictions have become outdated due to numerous channel improvements. The Ambrose Channel was widened to 2000 feet, dredged to over 45 feet in depth, and is well marked. It is the main channel and the only practical access to or egress from the Port of New York. It is heavily traveled, but not congested. By removing the navigation restriction for certain vessels in Ambrose Channel, the level of vessel safety is not diminished. In addition, requiring sailing and towing vessels to obtain prior approval and a transit permit from VTSNY for entry and exit has proven to be an administrative burden to the mariner and the Coast Guard.

Discussion of Comments and Changes

This final rule will lift navigation restrictions prohibiting certain vessels from navigation within the channel, as well as removing requirements for sailing and towing vessels to acquire prior transit approval from VTSNY. The Coast Guard believes that eliminating these restrictions will not have an adverse impact on navigation safety. The Coast Guard received two letters in response to the NPRM. These comments supported the removal of the Ambrose Channel, Lower New York Bay navigation restrictions (33 CFR 162.25) but one comment expressed concerns about the level of safety associated with the joint use of Ambrose Channel by ship and barge traffic.

The comment identified the following three additional restrictions which should be considered in place of the existing restrictions:

(1) Limiting the length of the towing hawser allowed in Ambrose Channel to 150 meters (500 feet) or some lesser amount;

(2) Prohibiting sailing vessels, tugs, and tows with a draft of 15 feet or less from transiting Ambrose Channel; and

(3) Amending the boundaries for bunching of tows and adjusting of tow lengths and making up of tows for sea, so as to prohibit such activities north of the Verrazano-Narrows Bridge.

With reference to the first two safety issues addressed above (i.e. length of tow and use of Ambrose Channel for sailing vessels, tugs and tows), the International Regulations for the Prevention of Collisions at Sea, 1972 (72 COLREGS), 33 U.S.C. foll. 1602 and Inland Navigation Rules set out responsibilities and operating guidelines and requirements for vessels. Specifically, COLREGS and Inland Rule 9 set out rules pertaining to the conduct of vessels while operating in or near narrow channels. Rule 9 prohibits sailing vessels and vessels less than 20 meters from impeding the passage of vessels that can safely navigate only within a narrow channel, such as Ambrose Channel. Additionally, 33 CFR 163.05 sets out requirements for the length of tows of seagoing barges within inland waters. As such, implementing regulations which address these two safety issues would be redundant.

In addition, the third safety issue (limits for bunching of tows) has previously been examined by the Coast Guard. 33 CFR 163.20 defines the areas where it is safe to undertake the operation of bunching of tows and where it is required before entry. However, the Coast Guard will reexamine the existing limits for bunching of tows in the New York Harbor area. If it is determined that these boundaries should be modified, a separate rulemaking will be initiated.

Additionally, the Corp of Engineers' noted that by removing this Coast Guard navigation restriction, their authority to regulate the Ambrose Channel under 33 U.S.C. 453 is not diminished.

Regulatory Evaluation

This rule is not a significant regulatory action under Executive Order 12866 is not significant under "Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary. The removal of the Ambrose Channel navigation regulations will have no foreseeable economic impact.

Small Entities

The final rule reduces the overall number of individuals or entities affected by the existing regulations. Therefore, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this rule will not have a significant

economic impact on a substantial number of small entities.

Collection of Information

This rule contains no collection of information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). It removes the requirement for certain vessels to obtain Coast Guard approval to transit the Ambrose Channel.

Federalism

The Coast Guard has analyzed this rule in accordance with the principles and criteria contained in Executive Order 12612 and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. The authority to regulate concerning the navigable waters of the United States is committed to the Coast Guard by statute.

Environment

The Coast Guard considered the environmental impact of this rule and concluded that, under section 2.B.2(c) and (1) of Commandant Instruction M16475.1B, this rule is categorically excluded from further environmental documentation. The deletion of the Ambrose Channel Regulation will not affect the environment or vessel safety. A Categorical Exclusion Determination is available in the docket for inspection or copying where indicated under "ADDRESSES."

List of Subjects in 33 CFR Part 162

Navigation (water), Waterways.

For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 162 as follows:

PART 162—INLAND WATERWAYS NAVIGATION REGULATIONS

1. The authority citation for part 162 continues to read as follows:

Authority: 33 U.S.C. 1231; 49 CFR 1.46.

§ 162.25 [Removed]

2. Section 162.25 is removed.

Dated: December 22, 1993.

W.J. Ecker,

Rear Admiral, U.S. Coast Guard, Chief, Office of Navigation Safety and Waterway Services.

[FR Doc. 93-31984 Filed 12-29-93; 8:45 am]

BILLING CODE 4910-14-M

33 CFR Part 165

[CGD01-93-144]

RIN 2115-AA97

Safety Zone; New Years Eve, South Street Seaport Fireworks, East River, NY

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for a New Years Eve fireworks program located in the East River. This event is sponsored by South Street Seaport, Inc., and will take place from 11:30 p.m. on Friday, December 31, 1993 until 12:30 a.m. on Saturday, January 1, 1994. A rain date is scheduled from 11:30 p.m. on January 1, 1994, until 12:30 a.m. on January 2, 1994. This safety zone is needed to protect the boating public from the hazards associated with fireworks exploding in the area.

EFFECTIVE DATES: This rule is effective from 11:30 p.m. on December 31, 1993 until 12:30 a.m. on January 1, 1994. A rain date is scheduled from 11:30 p.m. on January 1, 1994, until 12:30 a.m. on January 2, 1994.

FOR FURTHER INFORMATION CONTACT: LT R. Trabocchi, Project Manager, Captain of the Port, New York (212) 668-7933.

SUPPLEMENTARY INFORMATION:

Drafting Information

The drafters of this notice are LT R. Trabocchi, Project Manager, Captain of the Port, New York and CDR J. Astley, Project Attorney, First Coast Guard District, Legal Office.

Regulatory History

Pursuant to 5 U.S.C. 553, a notice of proposed rulemaking was not published for this regulation and good cause exists for making it effective less than 30 days after **Federal Register** publication. Due to the date this application was received, there was not sufficient time to publish a proposed rule in advance of the event. Publishing a NPRM and delaying the event would be contrary to public interest since the fireworks display is for public viewing.

Background and Purpose

On November 3, 1993, South Street Seaport, Inc. submitted an application to hold a fireworks program in the East River off of South Street Seaport, Manhattan, New York. This regulation establishes a temporary safety zone in the East River between a line drawn along the Brooklyn Bridge and a line drawn from Pier 9, Manhattan to Pier 3, Brooklyn. This safety zone is being established to protect boaters from the hazards associated with fireworks exploding in the area. No vessel will be permitted to enter or move within this safety zone unless authorized to do so by the Coast Guard Captain of the Port, New York.

Regulatory Assessment

This regulation is not considered a significant regulatory action under Executive Order 12866 and not significant under Department of Transportation Regulatory Policies and Procedures (44 FR 11040; February 26, 1979). No vessel traffic will be permitted to transit the East River south of the Brooklyn Bridge at any time the safety zone is in effect. Though there is a regular flow of traffic through this area, there is not likely to be a significant impact on business, recreational, or commercial traffic for several reasons. Due to the limited duration of the event, the late hour of the event, the extensive advisories that will be made to the affected maritime community, and that commercial and pleasure craft can take an alternate route via the Hudson and Harlem Rivers, the Coast Guard expects the economic impact of this regulation to be so minimal that a full Regulatory Evaluation is unnecessary.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this regulation will have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632).

For the reasons given in the Regulatory Evaluation, the Coast Guard expects the impact of this regulation to be minimal. The Coast Guard certifies under 5 U.S.C. 605(b) that this regulation will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This regulation contains no collection of information requirements under the Paperwork Reduction Act (44 U.S.C. 3501).

Federalism

The Coast Guard has analyzed this action in accordance with the principles and criteria contained in Executive Order 12612 and has determined that this regulation does not raise sufficient

federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard has considered the environmental impact of these regulations and concluded that under section 2.B.2.c. of Commandant Instruction M16475.1B, it is an action under the Coast Guard's statutory authority to promote maritime safety and protect the environment, and thus is categorically excluded from further environmental documentation. A Categorical Exclusion Determination is included in the docket.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

Regulations

For reasons set out in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—[AMENDED]

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; 49 CFR 1.46.

2. A temporary § 165.T01–144 is added to read as follows:

§ 165.T01–144 New Years Eve, South Street Seaport Fireworks, East River, New York.

(a) *Location.* This temporary safety zone includes all waters of the East River south of the Brooklyn Bridge and north of a line drawn from Pier 9 Manhattan to Pier 3 Brooklyn.

(b) *Effective period.* This section is effective from 11:30 p.m. on December 31, 1993 until 12:30 a.m. on January 1, 1994. A rain date is scheduled from 11:30 p.m. on January 1, 1994, until 12:30 a.m. on January 2, 1994.

(c) *Regulations.* (1) The general regulations contained in § 165.23 apply to this safety zone.

(2) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on scene patrol personnel. U.S. Coast Guard patrol personnel include commissioned, warrant, and petty officers of the Coast Guard. Upon being hailed by a U.S. Coast Guard vessel via siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed. Coast Guard Auxiliary members may be present to inform vessel operators of this regulation and other applicable laws.

Dated: December 14, 1993.

T.H. Gilmour,

Captain, U.S. Coast Guard, Captain of the Port, New York.

[FR Doc. 93–31986 Filed 12–29–93; 8:45 am]

BILLING CODE 4910–14–M

33 CFR Part 165

[CGD01 93–401]

RIN 165–AA97

Safety Zone Regulation; Boston Inner Harbor, Boston, MA

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone in the Main Ship Channel, Boston Inner Harbor, in the vicinity of the New England Aquarium on New Year's Eve for the First Night 1994 Fireworks Display. The zone is needed to protect the fireworks barge OCEAN 125 and its attending tugs, and persons viewing the display, from the safety hazard associated with the explosives on board the fireworks barge and with the fireworks display. This zone will close the affected portion of the Boston Harbor Main Ship Channel to vessel traffic while this zone is in effect. Entry into the zone is prohibited unless authorized by the Captain of the Port (COTP) Boston.

EFFECTIVE DATES: This regulation becomes effective on December 31, 1993 at 11 p.m. local time when the fireworks barge OCEAN 125 proceeds by tow from Massport Pier 1, East Boston to a location just off the New England Aquarium in approximate position 42°-21'-38"N, 071°-02'-48"W. It terminates on January 1, 1994 at 12:30 a.m. local time or when the tug and barge are safely moored at Massport Pier 1, East Boston, unless terminated sooner by the Captain of the Port Boston.

FOR FURTHER INFORMATION CONTACT: LTJG Paul Gerecke or MSTC Daniel Dugery, USCG Marine Safety Office Boston, at (617) 223–3000.

SUPPLEMENTARY INFORMATION:

Drafting Information

The principal persons involved in drafting this document are LTJG Paul Gerecke, Vessel and Waterways Management Officer and MSTC Daniel Dugery, Assistant Vessel and Waterways Management Officer for the Captain of the Port Boston, and LCDR Jeffrey Stieb, project attorney, First Coast Guard District Legal Office.

Regulatory History

As authorized by 5 U.S.C. 553, a notice of proposed rulemaking was not published for this regulation, and good cause exits for making it effective in less than 30 days after **Federal Register** publication. Publishing an NPRM and delaying its effective date would be contrary to the public interest. The fireworks display is for public viewing and is to celebrate the New Year's holiday.

Background and Purpose

Responding to the request of event organizers as contained in a permit application submitted to the Coast Guard on October 29, 1993, the Captain of the Port (COTP) Boston is implementing this safety zone to protect mariners and the viewing public from the inherent hazards associated with the movement of a barge laden with explosives and with a fireworks display. The specific events requiring this regulation are the movement of the fireworks barge OCEAN 125 and its attending tugs in Boston Harbor between Massport Pier 1, East Boston and the New England Aquarium and the First Night 1994 Fireworks Display itself. The display is scheduled to take place on January 1, 1994, from 12 a.m. to 12:10 a.m. local time in the vicinity of the New England Aquarium in approximate position 42°-21'-38"N, 071°-02'-48"W. The safety zone will extend for two hundred yards in all directions around the fireworks barge OCEAN 125 and its attending tugs while the vessels proceed to and from, and are on site for the fireworks display. The zone will be in effect from 11 p.m. local time December 31, 1993, to 12:30 a.m. local time, January 1, 1994 or when the tug and barge are safely moored at Massport Pier 1, East Boston, unless terminated sooner by the Captain of the Port Boston. Implementation of this zone will close the affected portion of the 40 foot Boston Harbor Main Ship Channel directly off the New England Aquarium pier, to vessel traffic, and entry into the zone is prohibited unless authorized by the COTP Boston. A Coast Guard patrol craft will be on scene to enforce the safety zone. Details of this event will published in the Local Notice to Mariners and in a Safety Marine Information Broadcast.

Regulatory Evaluation

This rule is not a significant regulatory action under Executive Order 12866 and not significant under Department of Transportation Regulatory Policies and Procedures (44 FR 11040; February 26, 1979). The Coast

Guard expects the economic impact of this rule to be so minimal that a Regulatory Evaluation is unnecessary. Delays to the shipping industry from these regulations, if any, should be minor due to the short duration of the event and extensive advisories that will be made. Commercial vessel traffic and fishing vessels may experience slight delays in departures or arrivals during the display; however, mariners can time their movements just ahead or just after the fireworks display has been completed.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard must consider whether this proposal will have a significant economic impact on a substantial number of small entities. "Small entities" include independently owned and operated small businesses that are not dominant in their field and that otherwise qualify as "small business concerns" under section 3 of the Small Business Act (15 U.S.C. 632).

For the reasons discussed in the Regulatory Evaluation, the Coast Guard expects the impact of this proposal to be minimal. Therefore, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this final rule will not have a significant economic impact on a substantial number of small entities.

Collection of Information

This rule contains no collection of information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Federalism

The Coast Guard has analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 12612 and has determined that this proposal does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this rule and concluded under section 2.B.2.c of Commandant Instruction M16475.1B this proposal is categorically excluded from further environmental documentation. In fact, implementation of this rulemaking should help to reduce the risk of collision or other marine accidents. A Categorical Exclusion Determination will be made available in the docket for inspection or copying where indicated under "ADDRESSES".

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and record keeping requirements, Security measures, Waterways.

Regulation

For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—[AMENDED]

1. The authority citation for part 165 continues to read:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.549; 49 CFR 1.46

2. A temporary § 165.T01–401 is added to read as follows:

§ 165.T01–401 Safety Zone: Fireworks Display, Boston Main Channel, Boston Inner Harbor, Boston, MA.

(a) *Location.* The following area is a safety zone:

All waters of Boston Harbor within a 200 yard radius around the fireworks barge OCEAN 125 and its attending tugs while these vessels proceed from Massport Pier 1, East Boston, to a location 200 yards off the New England Aquarium in approximate position 42°–21′–38″N, 071°–02′–48″W, during the First Night 1994 Fireworks Display in Boston Harbor, and while returning to Pier 1, East Boston.

(b) *Effective date.* This section becomes effective on December 31, 1993, at 11 p.m. local time or when the fireworks barge OCEAN 125 and its attending tugs depart Massport Pier 1, East Boston. It terminates on January 1, 1994, at 12:30 a.m. local time or when the vessels return and are safely moored at Massport Pier 1, East Boston, unless terminated sooner by the Captain of the Port Boston.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, entry into or movement within this zone is prohibited unless authorized by the Captain of the Port Boston.

(2) All persons and vessels shall comply with the instructions of the COTP or the designated on scene personnel. U.S. Coast Guard patrol personnel include commissioned, warrant, and petty officers of the Coast Guard.

(3) The general regulations covering security zones in § 165.33 of this part apply.

Dated: December 17, 1993.

G.W. Abrams,

Captain, U.S. Coast Guard, Captain of the Port, Boston, Massachusetts.

[FR Doc. 93–31985 Filed 12–29–93; 8:45 am]

BILLING CODE 4910–14–M

33 CFR Part 165

[COTP St Louis Regulation 93–036]

RIN 2115–AA97

Safety Zone; Upper Mississippi River

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a safety zone on the Upper Mississippi River. This regulation is needed to control vessel traffic in the regulated area to provide safe working conditions and navigation within the affected area. The regulation will prohibit navigation in the regulated area for the safety of vessel traffic and the protection of life and property associated with bridge span replacement.

EFFECTIVE DATES: This regulation is effective December 17, 1993 and will terminate on January 16, 1994 unless sooner terminated by the Captain of the Port.

FOR FURTHER INFORMATION CONTACT: LT Timothy Deal, Operations Officer, Captain of the Port, St. Louis, Missouri at (314) 539–3823.

SUPPLEMENTARY INFORMATION:

Drafting Information

The drafters of this regulation are ENS Andrew B. Cheney, Project Officer, Marine Safety Office, St. Louis, Missouri and LCDR A. O. Denny, Project Attorney, Second Coast Guard District Legal Office.

Regulatory History

In accordance with 5 U.S.C. 553, a notice of proposed rulemaking has not been published for this regulation and good cause exists for making it effective in less than 30 days from the date of publication. Following normal rulemaking procedures would have been impracticable. Specifically, the nature of repairs to the Hannibal Railroad Bridge at mile 309.9 Upper Mississippi River leaves insufficient time to publish a notice of proposed rulemaking. The Coast Guard deems it to be in the public's best interest to issue a regulation without waiting for a comment period since the conditions present an immediate hazard.

Background and Purpose

Extensive damage resulting from numerous allisions with vessels has made repairs to the bridge structure necessary. Contractor vessels will be working in the navigation channel and will impede normal traffic flow. As a result of these conditions this regulation is necessary to provide safe working conditions and navigation within the affected area.

Regulatory Evaluation

This regulation is not considered a significant regulatory action under Executive Order 12866 and not significant under Department of Transportation Regulatory Policies and Procedures (44 FR 11040; February 26, 1979), it will not have a significant economic impact on a substantial number of small entities, and it contains no collection of information requirements.

The Coast Guard expects the impact of this regulation to be so minimal that a Regulatory Evaluation is unnecessary. The imposed restrictions are anticipated to be of short duration. To avoid any unnecessary adverse economic impact on businesses which use the river for commercial purposes, Captain of the Port, St. Louis, Missouri will monitor the situation and will authorize entry into the closed area as conditions warrant. Changes will be announced by Marine Safety Information Radio Broadcast on VHF Marine Band Radio, Channel 22 (157.1 MHZ). Mariners may also call the Port Operations Officer, Captain of the Port, St. Louis, Missouri at (314) 539–3823 for current information.

Federalism Assessment

Under the principles and criteria of Executive Order 12612, this regulation does not raise sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environmental Assessment

The Coast Guard considered the environmental impact of this regulation and concluded that, under section 2.B.2 of Commandant Instruction M16475.1B, this regulation is categorically excluded from further environmental documentation as an action required to protect public safety.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Records and recordkeeping, Security measures, Waterways.

Temporary Regulation

In consideration of the foregoing, subpart C of part 165 of title 33, Code of Federal Regulations, is amended as follows:

PART 165—[AMENDED]

1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 49 CFR 1.46 and 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5.

2. A temporary § 165.T02–076 is added, to read as follows:

§ 165.T02–076 Safety Zone: Upper Mississippi River.

(a) *Location.* The Upper Mississippi River between mile 308.9 and 310.9 is established as a safety zone.

(b) *Effective dates.* This section becomes effective on December 17, 1993 and will terminate on January 16, 1994.

(c) *Regulations.* The general regulations under § 165.23 of this part which prohibit entry into the described zones without authority of the Captain of the Port apply. The Captain of the Port, St. Louis, Missouri will notify the maritime community of river conditions affecting the areas covered by this safety zone by Marine Safety Information Radio Broadcast on VHF Marine Band Radio, Channel 22 (157.1 MHZ).

Dated: December 17, 1993.

Scott P. Cooper,

Commander, U.S. Coast Guard, Captain of the Port, St. Louis, Missouri.

[FR Doc. 93–31987 Filed 12–29–93; 8:45 am]

BILLING CODE 4910–14–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[FRL–4819–4]

Designation of Areas for Air Quality Planning Purposes; Tennessee; Correction of NO_2 Designation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Correcting amendment.

SUMMARY: This action corrects a typographical error in the Code of Federal Regulations. On March 3, 1978, the U.S. Environmental Protection Agency published rulemaking setting forth the attainment status of all States in relation to the national ambient air quality standards. (See 43 FR 8962.) The State of Tennessee was classified as "Cannot Be Classified or Better Than National Standards" for nitrogen dioxide (NO_2). At some point in time this designation was erroneously changed to "Does Not Meet Primary standards". This action corrects this typographical error.

EFFECTIVE DATE: This action is effective December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Additional information concerning this notice can be obtained by contacting: Richard Schutt, Regulatory Planning and Development Section, Air Programs Branch, Air, Pesticides & Toxics Management Division, Region IV Environmental Protection Agency, 345 Courtland Street, NE., Atlanta, Georgia 30365. The telephone number is 404/347–2864.

List of Subjects in 40 CFR Part 81

Air pollution control, National Parks, Wilderness areas.

Dated: December 13, 1993.

Patrick M. Tobin,

Acting Regional Administrator.

Therefore, 40 CFR part 81, subpart C, is amended by making a correcting amendment as follows:

PART 81—[AMENDED]

1. The authority citation for part 81 continues to read as follows:

Authority: 42.U.S.C. 7401–7671q.

2. Section 81.343 is amended by revising the attainment status designation table for NO_2 to read as follows:

§ 81.343 Tennessee.

* * * * *

TENNESSEE—NO_2

Designated area	Does not meet primary standards	Cannot be classified or better than national standards
Statewide	.....	x

[FR Doc. 93–31857 Filed 12–29–93; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 82

[FRL–4819–7]

Protection of Stratospheric Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rulemaking.

SUMMARY: With this action, EPA is establishing baseline production and consumption allowances for chemicals that EPA has added to the list of class I ozone-depleting substances in a **Federal Register** notice signed by the Administrator on November 30, 1993. These substances are methyl bromide

and hydrobromofluorocarbons (HBFCs). EPA is now establishing baseline production and consumption allowances for producers and importers of methyl bromide and HBFCs derived from data submitted to the Agency in response to a section 114 data collection request issued on July 27, 1993. The data collection request required companies to report the amounts of these substances that they produced, imported, exported, transformed or destroyed in 1991.

EFFECTIVE DATE: This rule is effective on January 1, 1994.

ADDRESSES: Public materials relevant to this rulemaking are contained in Air Docket No. A–92–13 at: U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20640. The public docket room is located in room M–1500, Waterside Mall (Ground Floor). Docket No. A–92–13 is the same docket as that used for the rule to add methyl bromide and the HBFCs to the class I list, which was published on December 10, 1993. Materials relevant to the allowances rulemaking have been placed in a new and separate section of Docket No. A–92–13, which is segregated from the sections of the docket containing material relevant to the December 10 listing rule. The data on which the consumption and production allowances promulgated in this allowances rule are based were submitted under a claim of confidentiality. That data is therefore confidential, pending final determination by the Administrator, and, therefore, is not available in the docket for public inspection.

FOR FURTHER INFORMATION CONTACT: Peter Voigt at (202) 233–9185, Program Implementation Branch, Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation, 6205J, 401 M Street SW., Washington DC 20460.

SUPPLEMENTARY INFORMATION:

I. Background

A. Newly Listed Substances

EPA has added methyl bromide and HBFCs to the list of class I substances under section 602 of the Clean Air Act in a final rule signed by the Administrator of EPA on November 30, 1993, 58 FR 65018 (December 10, 1993). As explained in the listing regulation, under title VI of the Clean Air Act, a newly listed substance is automatically subject to the section 604(a) phaseout schedule unless:

(1) The Administrator accelerates that schedule pursuant to section 606; or

(2) The Administrator determines that the section 604(a) schedule is unattainable and extends that schedule pursuant to section 602(d).

For reasons explained in the final rule, the Agency determined that the section 604(a) schedule is unattainable for methyl bromide and extended that schedule under section 602(d) to a freeze until the termination date. The regulations freeze production and consumption levels of methyl bromide at 1991 levels beginning on January 1, 1994 until January 1, 2001, when production and consumption will be eliminated. For HBFCs, the regulations freeze production and consumption at 1991 baseline levels beginning on January 1, 1994 until January 1, 1996, when production and consumption will be eliminated.

Under EPA's rules, controls on the production and consumption of regulated substances operates through a company-specific allowance system. Companies are prohibited from production and consumption beyond the amount for which they hold unexpended allowances. See 40 CFR 82.4. Section 607 of the Clean Air Act provides that the Administrator, by September 15, 1991, was to promulgate rules providing for the issuance of allowances for the production and consumption of class I and II substances and governing the transfer of such allowances. EPA promulgated rules issuing allowances for then-listed substances on March 6, 1991 (56 FR 9518). Section 607(b) and (c) specify that EPA's rules are to provide for trading of allowances on an ozone depletion weighted basis.

EPA's obligation to issue company-specific allowances is inherent in the allowance and trading scheme under the Act. As explained in the July 27 information collection request (58 FR 40048), the section 604 phaseout provision and the section 607 allowance and trading provision were drafted against the regulatory backdrop of EPA's implementation of the Montreal Protocol under authority existing prior to the Clean Air Act Amendments of 1990 (formerly section 151(b)). The Agency had implemented the Protocol production and consumption limits through company-specific allowances. See 53 FR 30566 (August 12, 1988). Enactment of sections 604 and 607 continued this approach, and the Agency's current regulations comport with it. (See regulation to implement 1992 and later production and consumption limits under section 604 (57 FR 33754, July 30, 1992)). EPA, through recent rulemaking, has adopted the same approach for methyl bromide and the HBFCs in its final listing regulation. EPA must issue company-specific allowances for methyl bromide and the HBFCs in order to implement the production and consumption freeze applicable to these substances. EPA received no comments on the November 9, 1993 allowances proposal.

B. Baseline Production and Consumption Allowances

To establish these allowances, EPA exercised its information collection authority under section 114(a) of the Clean Air Act to require companies to submit information on the amount of methyl bromide and HBFCs that they produced, imported, exported, transformed or destroyed in 1991. 58 FR 40048 (July 27, 1993). EPA has used the information collected to calculate the company-specific production and consumption allowances. On November 9, 1993, EPA proposed baseline production and consumption allowances for methyl bromide and HBFCs (58 FR 59630). EPA received no comments on the November 9 proposal. EPA has taken final action adding methyl bromide and the HBFCs to the class I list of ozone-depleting substances, 58 FR 65018 (December 10, 1993). With this rule, EPA is establishing the company-specific production and consumption allowances for these substances in order to implement the production and consumption limitations beginning January 1, 1994.

A company's production allowances are equal to its domestic production minus the amount that is transformed and destroyed by it or by other companies. Amounts of class I substances that are recycled are also excluded from the calculation of production allowances. For producers that also import, transformation is allocated proportionately between domestic production and imports. Second-party transformation not attributed to a specific producer is allocated proportionately among all producers, based on production share.

Company-specific consumption allowances for each chemical consist of a company's production allowances, as calculated above, plus its imports, minus its exports. Amounts imported for transformation and for destruction are excluded from the import total.

Exports that are not attributable to a specific company are proportionately allocated among all producers based on production share. In addition, imports of used and recycled ozone-depleting substances are excluded from the calculation of allowances.

II. Statutory Authority

EPA is authorized by section 604(c) of the Act to promulgate regulations implementing the phaseout of ozone-depleting substances, 57 FR 33754 (July 30, 1992). Pursuant to section 607, the phaseout is to be implemented through an allowance system. EPA also has broad authority under section 301(a) "to prescribe such regulations as are necessary to carry out [its] functions under this chapter" and broad authority under section 615 to promulgate regulations respecting the control of substances that may reasonably be anticipated to affect the stratosphere.

As explained above, EPA must promulgate company-specific production and consumption allowances in order to implement controls on methyl bromide and the HBFCs under title VI of the Clean Air Act. In addition, such controls are necessary to implement the controls on these substances that will become mandatory under the Montreal Protocol beginning in 1995. The reader is referred to the March 18 notice proposing to add these substances to the class I list for a full discussion of the Protocol Parties' agreement to controls on these substances at their Copenhagen meeting. See 58 FR 15014. Section 614(b) provides that title VI "shall not be construed, interpreted or applied to abrogate the responsibilities or obligations of the United States to implement fully the provisions of the Montreal Protocol."

III. Notice Prior to Effective Date

The effective date of this rule is January 1, 1994. Since title VI controls on production and consumption are implemented on an annual basis, the allowances must be effective January 1, 1994 in order to achieve the environmental benefits associated with controls in the 1994 calendar year.

EPA believes that the time between publication of this final rule and January 1, 1994 is sufficient for industry to comply with the annual production and consumption limits beginning January 1, 1994. EPA believes that the amount of time provided before the rule becomes effective is appropriate for several reasons.

First, EPA explained in its November 9 proposal that it was proposing production and consumption allowances at that time in order that the allowances would be available in time if the Agency were to establish a freeze beginning January 1, 1994. The comment period was to close no earlier than December 9, 1993, making it clear that EPA intended to provide less than 30 days notice of the final allowances prior to January 1, 1994. EPA received no comments on this or any other aspect of the November 9 proposal.

Second, only very small changes to the proposed allowances have been made, based on late receipts of data from companies that transformed methyl bromide in 1991. As a result, the affected companies had reasonably precise information regarding the anticipated level of allowances since the November 9 proposal, and they have been on notice since November 30, 1993, (when the Administrator signed the final rule listing methyl bromide and the HBFCs) that EPA was freezing production beginning January 1, 1994. The allowances contained in the final rule do not reflect substantial changes.

Third, EPA believes that compliance with the annual production controls necessitates less advance notice than other regulations for which compliance is required on a continuous basis or over a shorter period. Compliance with an annual limit on production and consumption is not likely to be violated until a significant part of a given year has elapsed. Steps during the first few days of 1994 that will prove necessary to comply for the entire calendar year should be minimal.

EPA notes that the general requirement under 5 U.S.C. 553(d) (the Administrative Procedure Act), that publication or service of a substantive rule be made not less than 30 days before it becomes effective does not apply here. Section 307(d)(1) of the Clean Air Act specifically applies to regulations under title VI of the Clean Air Act and provides that "[t]he provisions of sections 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies." Nowhere does subsection 307(d) expressly provide that section 553(d) of title 5 applies. Even if section 553(d) were to apply, EPA believes that the environmental benefits associated with controls in 1994 and the limited need for advance notice in this situation constitute good cause under section 553(d)(3) of title 5 to provide less than 30 days notice following publication. In any case, EPA has taken steps to provide notice of this final action to the regulated industry as soon as possible upon signature of the rule and prior to publication.

IV. Summary of Supporting Analyses

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51,735 (10/4/94)) the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to lead to a rule that may:

(1) have an annual effect on the economy of $100 million or more or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof;

(4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA has determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that federal agencies examine the impact of their regulations on small entities. Under 5 U.S.C. 604(a), whenever an agency is required to publish a general notice of proposed rulemaking, it must prepare and make available for public comment an initial regulatory flexibility analysis. Such an analysis is not required if the head of the agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, pursuant to 5 U.S.C. 605(b). The Administrator believes that this regulation will not have a significant impact on a substantial number of small entities and has concluded that a formal regulatory flexibility analyses is unnecessary.

This regulation establishes allowance levels for the production and consumption of the newly listed class I ozone-depleting chemicals. Baseline allowances in and of themselves do not impose any adverse costs on producers or importers. As the administrative mechanism for implementing regulations that are effective on January 1, 1994, the overall regulatory impacts on small business are impacts of the scheme as a whole and have been addressed in that rulemaking. See 58 FR 65018 at 65060 (December 10, 1993).

The Administrator certifies that this rule will not have a significant impact on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements governing the addition of newly listed substances to the list of class I ozone-depleting substances and the regulatory changes to section 604 of the Act has been submitted to OMB as required by section 35D of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. Comments regarding these requirements have been received and considered in the development of the final rule to implement changes in section 604.

The promulgation of the regulation establishing company-specific allowance levels will not generate additional recordkeeping and reporting requirements. As a result, no information collection request was prepared and submitted to OMB.

List of Subjects in 40 CFR Part 82

Administrative practice and procedure, Air pollution control, Chemicals, Chlorofluorocarbons, Exports, Imports, Ozone layer, Reporting and recordkeeping requirements, Stratospheric ozone.

Dated: December 22, 1993.

Carol M. Browner,

Administrator.

40 CFR part 82 is amended as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

2. Section 82.5 is amended by adding paragraphs (f) and (g) to read as follows:

§ 82.5 Apportionment of baseline production allowances.

* * * * *

(f) For Group VI controlled substances:

Controlled substance	Person	Allowances (kg)
Methyl Bromide.	Great Lakes Chemical Corporation.	19,945,788
	Ethyl Corporation.	8,233,894

(g) For Group VII controlled substances:

HBFC 22B1–1.	Great Lakes Chemical Corporation.	46,211

3. Section 82.6 is amended by adding paragraphs (f) and (g) to read as follows:

§ 82.6 Apportionment of baseline consumption allowances.

* * * * *

(f) For Group VI controlled substances:

Controlled substance	Person	Allowances (kg)
Methyl Bromide.	Great Lakes Chemical Corporation.	15,514,746
	Ethyl Corporation.	6,379,906
	AmeriBrom Inc.	3,524,393
	TriCal Inc	109,225

(g) For Group VII controlled substances:

HBFC 22B1–1.	Great Lakes Chemical Corporation.	40,110

* * * * *

[FR Doc. 93–31834 Filed 12–29–93; 8:45 am]
BILLING CODE 6560–50–P

40 CFR Part 300

[FRL–4819–5]

National Oil and Hazardous Substances Contingency Plan; National Priorities List Update

AGENCY: Environmental Protection Agency.

ACTION: Notice of deletion of the Mowbray Engineering Company Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA) announces the deletion of Mowbray Engineering Company Superfund Site in Greenville, Alabama from the National Priorities List (NPL). The NPL is Appendix B of the National Oil and Hazardous Substances Contingency Plan (NCP), which EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. EPA and the State of Alabama have determined that the responsible parties have implemented all the appropriate response actions under CERCLA and that no further cleanup by the responsible parties is appropriate. Moreover, EPA and the State of Alabama have determined that the remedial actions conducted at the site to date have been protective of public health, welfare, and the environment.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Timothy R. Woolheater, Remedial Project Manager, or Betty L. Winter, Community Relations, at 404–347–2643 in the South Superfund Branch, Waste Management Division, U.S. Environmental Protection Agency (Region IV), 345 Courtland Street, NE., in Atlanta, GA 30365.

ADDRESSES: Comprehensive information on this site is available at the following addresses:

EPA Region IV Public Docket, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, NE., Atlanta, Georgia 30365, Hours: Mon.–Fri. 8:00 a.m.–4:00 p.m.; and

Greenville Public Library, 309 Fort Dale Street, Greenville, Alabama 36037, 205–382–3216.

SUPPLEMENTARY INFORMATION: The site to be deleted from the NPL is: Mowbray Engineering Company Superfund Site, Greenville, Alabama. A Notice of Intent to Delete for this site was published (58 FR 45082) on August 6, 1993. The closing date for comments on the Notice of Intent to Delete was September 26, 1993. EPA received no comments; and, therefore, no responsiveness summary is necessary. The EPA identifies sites which appear to present a significant risk to public health, welfare, or the environment and maintains the NPL as the list of those sites. Sites on the NPL may be the subject of Hazardous Substance Response Trust Fund-financed remedial actions. Any site deleted from the NPL remains eligible for Fund-financed remedial actions in the unlikely event that conditions at the site warrant such action. Section 300.425(e)(3) of the NCP provides that Fund-financed actions may be taken at the sites deleted from the NPL when conditions warrant.

Deletion of a site from the NPL does not affect the responsible party liability or impede agency efforts to recover costs associated with response efforts.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping

requirements, Superfund, Water pollution control, Water supply.

Dated: November 17, 1993.

Don Guinyard,

Acting Regional Administrator, Environmental Protection Agency—Region 4.

For the reasons set out in the preamble, 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

1. The authority citation for part 300 continues to read as follows:

Authority: 42 U.S.C. 9601–9657; 33 U.S.C. 1321(c)(2); E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp.: p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp.: p. 193.

Appendix B [Amended]

2. Table 1 of appendix B to part 300 is amended by removing the Site "Mowbray Engineering Company, Greenville, Alabama" and by revising the total number of sites from 1,073 to read 1,072.

[FR Doc. 93–31860 Filed 12–29–93; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Public Land Order 7024

[ID–943–4210–06; IDI–08047 01]

Partial Revocation of Public Land Order No. 1770; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order revokes a public land order insofar as it affects 1,120 acres of public land withdrawn by the Department of Energy for the Idaho National Engineering Laboratory. The land is no longer needed for the purpose for which it was withdrawn. This action will open 1,120 acres to public sale and will permit the disposal of the land to Jefferson County for a multi-county landfill.

EFFECTIVE DATE: January 31, 1994.

FOR FURTHER INFORMATION CONTACT: Larry R. Lievsay, BLM Idaho State Office, 3380 Americana Terrace, Boise, Idaho 83706–2500, 208–384–3166.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. Public Land Order No. 1770, which withdrew public land for the Department of Energy's Idaho National Engineering Laboratory, is hereby revoked insofar as it affects the following described land:

Boise Meridian

T. 6 N., R. 33 E.,
Sec. 14;
Sec. 15, E½ and SW¼.

The area described contains 1,120 acres in Jefferson County.

2. At 9 a.m. on January 31, 1994, the land will immediately become available for sale to Jefferson County pursuant to Section 203 of the Federal Land Policy and Management Act of 1976, for a multi-county landfill.

Dated: December 21, 1993.

Bob Armstrong,

Assistant Secretary of the Interior.

[FR Doc. 93–31969 Filed 12–29–93; 8:45 am]

BILLING CODE 4310-66-M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 36

[CC Docket No. 80–286; FCC 93–549]

Establishment of a Joint Board

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: These revised rules adopt an indexed cap upon the Universal Service Fund ("USF"), which is derived from jurisdictional separations expense adjustments allowed under part 36 of the Commission's rules. The rules are changed in order to moderate growth in the USF during the next two years, while permanent changes in the USF mechanisms are under consideration.

EFFECTIVE DATE: January 1, 1994.

FOR FURTHER INFORMATION CONTACT: Deborah A. Dupont, Common Carrier Bureau, Accounting and Audits Division, (202) 632–7500.

SUPPLEMENTARY INFORMATION:

I. Introduction

1. On November 16, 1993, the Federal-State Joint Board adopted a recommended decision in CC Docket No. 80–286[1] The *Interim Recommendation,* addressing the issues raised in our *Interim Notice,*[2] concludes that this Commission should adopt rules to moderate growth in the Universal Service Fund ("USF") during a two-year interim period, while a rulemaking proceeding on permanent USF changes is pending. The Joint Board recommended that the interim rules employ an indexed cap approach, whereunder the total USF in a given year would not be allowed to exceed a specified amount, increased by an index factor equal to the increase in total working loops for the previous year. For the reasons discussed in this report and order and in the Joint Board's Interim Recommendation, we adopt the recommendations of the Joint Board and the interim rules set forth below.

II. Background

2. In the Interim Notice, we stated our intention to initiate a reevaluation of the current part 36 rules governing high cost assistance and we referred the issue of possible changes in those rules to the Federal-State Joint Board in this proceeding.[3] At the same time, we proposed interim modifications of the USF assistance mechanisms and requested the Joint Board to prepare a recommended decision regarding those proposals.

3. In the Interim Notice, we observed that growth in the USF since its implementation of 1986 has been pronounced, increasing from $445 million to more than $700 million.[4] We expressed particular concern over the wide fluctuations in the rate of annual USF growth, which has ranged from approximately one percent to more than 19 percent.[5] We stated our desire to hold the USF to a moderate rate of growth while we and the Joint Board are in the process of studying and perhaps revising the current high cost mechanisms. For that reason, we proposed interim measures to moderate USF growth during the pendency of our proceeding to make permanent changes to the USF mechanisms. We indicated that interim rules would remain in effect for a maximum of two years and would not constitute prejudgment of the issues for purposes of the permanent rulemaking.

4. We proposed two primary alternatives for interim measures to moderate USF growth for the next two years. First, we proposed to index the

[1] "Recommended Decision," Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board", FCC 93J–3 (released December 10, 1993) ("Interim Recommendation").

[2] "Notice of Proposed Rulemaking," Amendment of part 36 and Establishment of a Joint Board, 58 FR 48815 (September 20, 1993) ("Interim Notice").

[3] See the Interim Notice, and decisions cited therein, for a brief history of the part 36 high cost assistance measures.

[4] We cited data submitted by the National Exchange Carrier Association ("NECA") in CC Docket No. 93–123 (filed July 21, 1993) indicating that the total level of payments into the USF during 1993 will be approximately $741 million.

[5] Interim Notice at ¶13 and n.16. As we explained, our calculation of the USF annual amounts and growth rates were based upon the data for projected USF payments at full transition.

threshold for receiving USF assistance to the rate of growth in the average cost per loop for non-price cap carriers. We stated our expectation that this method could be effective in moderating USF growth by preventing growth in the fund attributable primarily to a disparity between the growth in costs per loop for price cap and no-price cap carriers. Under the second alternative, maximum growth in the total USF would be indexed to the rate of growth in the total number of working loops in the nation. If the current rules would cause the USF to exceed the indexed cap, we proposed two means of adjusting USF assistance in order to ensure that the USF does not exceed the indexed cap.

5. The first means of implementing the indexed cap would involve adjusting each USF recipient's assistance by the same proportionate amount. The second means of implementation would require adjusting the threshold for receiving assistance in order to produce a total USF at the indexed cap level. We indicated that adjusting the threshold would actually be accomplished by adjusting the nationwide average cost per loop for purposes of determining USF assistance.[6]

6. We expressed our intention to implement interim measures that would not have a significant adverse impact upon the highest-cost carriers most in need of assistance. We requested comment upon the effect that each of the proposed alternatives would have on recipients of high cost assistance. We also invited comment upon the effectiveness of the alternatives in moderating USF growth during the two-year interim period.

7. Comments were filed on October 6, 1993, and reply comments were submitted on October 18, 1993.[7] On November 16, 1993, the Joint Board met in New York City and adopted its recommendations regarding interim measures. The Joint Board recommended that we adopt rules to implement an indexed cap to moderate USF growth, adjusting the threshold for receiving assistance if the current rules would cause the total USF to exceed the indexed cap. The Interim Recommendation was released on December 10, 1993.

[6] See discussion in Interim Notice at ¶¶ 22–25.

[7] A number of late-filed comments and reply comments were submitted in this proceeding and are cited by the Joint Board in its decision. Because those comments essentially concur in comments submitted on a timely basis by other parties, we believe that all parties had adequate opportunity to respond to the arguments presented. We therefore have included the late-filed comments and reply comments in the record of this proceeding.

III. Summary of Joint Board's Interim Recommendation

8. In its Interim Recommendation, the Joint Board found that concern regarding the reasonableness of the overall rate of increase in the USF is well-founded. The Joint Board rejected suggestions that the burden on interstate telecommunications should be evaluated in terms of the USF cost per minute of interstate toll usage, explaining that the loop costs on which USF assistance is based are not generally usage sensitive. In addition, the Joint Board disagreed with some commenters' argument that the Joint Board's determination in 1984 not to recommend a $1 billion cap established that the current size of the USF, and hence the rate of increase to date, is reasonable. The Joint Board explained that reluctance to set an absolute cap on the USF bears little or no relation to the reasonableness of the rate of growth over a particular time period. Further, the Joint Board noted that circumstances, including the transition away from rate of return regulation for the largest local exchange carriers ("LECs"), have changed significantly since implementation of the USF nearly eight years ago.

9. The Joint Board determined that USF growth has been erratic and found unconvincing the explanations tendered by commenters for the wide fluctuations in annual growth. The Joint Board stated its belief that a sudden, large-scale increase in the USF during the pendency of our permanent USF rulemaking would significantly impede efforts to reevaluate the high cost assistance rules and, if necessary, revise them. The Joint Board explained that in the past, changes in jurisdictional separations methodologies frequently have involved lengthy transition periods to ameliorate shifts in jurisdictional cost allocations. If the USF were to increase significantly during the next two years, while a permanent USF rulemaking is in progress, the transition process would be rendered more difficult, particularly if any LECs whose assistance increased pronouncedly during that interim period were to receive less assistance under the new permanent rules. The Joint Board reasoned that some moderate USF growth while the permanent rulemaking is in progress will ensure adequate support for the highest cost LEC study areas while, at the same time, protecting against sudden large increases in the fund that could make retargeting or restructuring of the USF assistance mechanisms more difficult.

10. The Joint Board rejected the indexed threshold proposal, which would involve determining each year's nationwide average cost per loop by indexing the prior year's average cost per loop to the rate of growth in the average cost per loop for all non-price cap carriers. The Joint Board found that the indexed threshold presented no degree of certainty regarding the total USF level and, in addition, had the potential for significant volatility because it excluded price cap carriers, which provide the predominant portion of subscriber loops nationwide, from calculation of the proposed index.

11. The Joint Board recommended, instead, the use of an indexed cap, which affords a greater degree of certainty in the total USF size. The Joint Board determined that indexing growth in the USF to growth in the total number of working loops would produce stable, moderate USF growth during the two-year interim period while still preserving adequate assistance for the recipients most in need of assistance. The Joint Board decided that several alternatives proposed in the comments were not suitable as interim index factors. For example, the proposal to index the size of the USF to growth in interstate toll minutes of use was found to be inconsistent with the fact that USF loop costs are not generally traffic sensitive. In addition, the Joint Board indicated that the proposals of the Florida and Illinois commissions, designed to address undue fluctuations in USF revenues on a study area-specific basis and to reduce possible uneconomic incentives, raised broad issues more appropriately addressed in the long-term, permanent USF rulemaking. The Joint Board therefore did not recommend that the Commission adopt those alternative index factors for the two-year interim period.[8]

12. The Joint Board recommended that the indexed cap should be implemented by adjusting the threshold for receiving assistance to ensure that the total USF does not exceed the indexed cap amount.[9] The Joint Board determined that the differences between 1994 assistance per loop under the current rules and under the recommended alternative would be very small and should have no potential to affect adversely the continued availability of local telephone service at reasonable rates. In contrast, another option under consideration, involving proportionate reduction of all

[8] Interim Recommendation at ¶¶ 44–45.

[9] See discussion of this methodology, *supra* at ¶¶ 4–5 and in the Interim Notice at ¶¶ 22–25.

recipients' assistance levels, was judged inadvisable because it would impose the largest decreases upon the highest cost study areas most in need of assistance. The Joint Board also rejected a proposal to adjust each recipient's assistance by the same dollar amount per loop. The Joint Board explained that such a method would have an unfairly large effect upon large study areas, because large study areas receive a smaller percentage of USF assistance per loop than small study areas at the same cost level.[10]

13. Addressing procedural issues raised in the comments, the Joint Board rejected the argument that interested parties were not afforded adequate opportunity to comment upon the proposed interim measures. The Joint Board noted that numerous comments, many of them lengthy, were submitted by parties representing a wide variety of viewpoints and interests. In addition, the Joint Board explained, the proposed measures would not be permanent and would not prejudge the issues for purposes of the permanent rulemaking.[11] The Joint Board also rejected the argument that limiting USF growth for two years would amount to retroactive ratemaking because the recovery of USF costs has a built-in lag of two years. The Joint Board pointed out that the interim measures would not change the USF rates paid by interstate interexchange carriers during prior periods, nor would USF recipients be precluded from recovering all of their loop costs through current or future rates.[12]

IV. Discussion

14. In its Interim Recommendation, the Joint Board carefully considered the effects of any interim USF changes upon recipients of high cost assistance. Throughout that decision, the Joint Board stated its desire to maintain adequate USF support for high cost LECs, particularly those highest-cost LEC study areas most in need of assistance, during the pendency of the rulemaking on permanent USF changes. We are in full accord with that goal. Universal availability of telephone service at reasonable rates continues to be an important policy for us as well as for the Joint Board.

15. At the same time, as the Joint Board observed, numerous regulatory, technological, and market changes in the telecommunications industry strongly suggest that a fresh look at the goals and effects of the USF high cost assistance mechanisms would serve the public interest.[13] Moreover, the conclusion of the eight-year USF transition period further warrants reevaluation of the existing USF rules.

16. It is unfortunate that some commenters in this proceeding appear to have interpreted the Interim Notice as a sign that we have lessened our commitment to universal service goals, for that is most assuredly not the case. On the contrary, our intention to proceed with a permanent rulemaking on USF support reflects our desire to ensure that our rules provide assistance fairly, effectively, efficiently, and in a manner consistent with technological and competitive advancements within the telecommunications industry. As we undertake this evaluation of our support mechanisms, we cannot foreclose the possibility of revisions that may retarget assistance, resulting in some carriers or subscribers receiving more assistance and others receiving less.

17. We therefore agree with the Joint Board's determination that it would be prudent to implement interim measures to moderate USF growth during the pendency of the permanent USF rulemaking. As the Joint Board aptly observed, past efforts to revise jurisdictional separations procedures have involved lengthy transition periods to ease carriers' adjustment to potential jurisdictional shifts caused by the separations changes. These transition periods have significantly delayed full implementation of new methodologies. Because we shall soon initiate a rulemaking to evaluate the current high cost assistance mechanisms and, perhaps, to revise those procedures, it is sensible to adopt interim rules to prevent large increases in the USF during the pendency of the permanent rulemaking.

18. We believe that these interim measures should reduce difficulties that might otherwise be experienced in implementing new permanent assistance mechanisms on a timely basis. This prophylactic approach is particularly appropriate because, in the past, the USF has manifested an erratic pattern of growth. The Joint Board correctly observed that the comments provided no real basis for assurance that another sudden increase in the USF will not occur within the next two years. Indeed, explanations proffered by commenters for sudden surges of the USF level in the past are notably speculative and unconvincing.[14] We therefore agree with the Joint Board that measures to moderate USF growth would facilitate our ability to revise the USF mechanisms, if necessary, without jeopardizing the continued availability of local telephone service at reasonable rates.

19. We also concur in the Joint Board's finding that the indexed cap represents an effective means of moderating USF growth during the interim period. The Joint Board explained that the indexed cap approach affords a degree of certainty regarding the total level of the USF that is lacking in the proposal to index the threshold for USF assistance to the rate of growth in non-price cap carrier costs per loop. That certainty is important, because ensuring moderate USF growth is the very rationale for adopting interim measures.

20. Using the rate of growth in the total number of loops nationwide as an index factor will ensure a stable, moderate rate of growth during the interim period.[15] Although the adoption of an absolute cap (or "freeze") pending further rulemaking has precedent in this proceeding,[16] we do not believe that a freeze is essential to accomplish our goal of preventing sudden, pronounced increases in the USF during the interim period. Allowing a moderate rate of growth in the USF is sufficient to avoid impedence of the permanent rulemaking, and subsequent implementation of its conclusions. At the same time, allowing some USF growth represents an attempt to accommodate the concerns of commenters who argue that additional funds are needed for carriers that plan to replace facilities in the short-term or that may expand service to additional customers. The rate of growth in total loops is a suitable index factor, not only because it has a demonstrated history of stable, moderate growth, but also because it reflects expansion in the subscriber base of the nationwide network. Using the rate of growth in the total number of loops as the index factor for the USF cap will accomplish our goal of avoiding pronounced USF growth during the two-year interim period while continuing to ensure the availability of basic local telephone service at reasonable rates.

21. Contrary to the contentions of some commenters, the Joint Board's determination, some years ago, not to recommend a cap on the total USF

[10] Interim Recommendation at ¶ 50.

[11] *Id.* at ¶¶ 57–61.

[12] *Id.* at ¶ 63.

[13] See Interim Recommendation at ¶¶ 10–11.

[14] See discussion in the *Interim Recommendations* at ¶¶ 21 and 25, and citations to the record contained therein.

[15] As we explained in the Interim Notice, data submitted on the public record annually by NECA indicate growth in the total number of loops ranging from two to 3.6 percent from 1984 to 1991, the most recent year for which data are available.

[16] See n.53 in the Interim Recommendation.

should not preclude a different conclusion under the present circumstances. As AT&T explained, and the Joint Board reiterated in its Interim Recommendation, regulatory changes such as the freezing of study areas boundaries and the initiation of price cap incentive regulation for the interstate rates of most large LECs bear on the issue of what constitutes a reasonable USF level.[17] Moreover, it is important to recall neither the Joint Board nor this Commission ever determined that $1 billion would constitute a reasonable USF total for a particular point in time. During the first year of the USF transition, the fully phased-in USF amount would have been only $445 million, and only one-eighth of that amount was reflected in interstate rates. Thus, consideration of a USF cap may not have been of primary importance in 1984, prior to the beginning of USF implementation and before there was any basis for evaluating the reasonableness of USF growth.

22. Circumstances have changed considerably since initial consideration of the USF high cost mechanisms. During the past eight years, the USF has grown by approximately 60 percent, with annual rates of growth ranging from one percent to more than 19 percent. In light of our experience with the USF since initial consideration of the issues in 1984, the changed regulatory environment and other circumstances, and our desire to prevent excessive USF growth during the pendency of the permanent USF rulemaking, we believe that the Joint Board's recommendation for an indexed USF cap should be adopted.

23. We also concur in the Joint Board's recommendation that the indexed cap should be implemented by adjusting the threshold for receiving USF assistance. The Joint Board pointed out that the effects of this means of implementation upon recipient carriers during 1994 would be extremely small, and found that it has no potential to diminish the continued availability of local telephone service at reasonable rates.[18] We agree. Changes of this magnitude would have a *de Minimis* effect, and even somewhat larger changes should not cause significant harm. Moreover, if circumstances change, the Joint Board encouraged recipients who would experience a significant adverse impact per loop per month to submit waiver requests, and we support that means of addressing any unforeseeable problems that may occur during the interim period.

24. We agree with and hereby adopt as our own the Joint Board's analysis of the procedural issues. specifically the adequacy of the opportunity for comment and the retroactive ratemaking issue, raised in the comments. We likewise adopt the Joint Board's conclusion that the determinations of the Interim Recommendation and the Interim Order should not prejudge the issues for purposes of the permanent USF rulemaking. Finally, we concur with the Joint Board's position that, should the permanent USF rulemaking conclude sooner than expected, the new rules should replace the interim rules as soon as practicable. In sum, we adopt the recommendations of the Joint Board in its Interim Recommendation, as well as the Joint Board's reasoning in support of those recommendations.

25. We indicated in the Interim Notice our intention to put interim rules into effect on January 1, 1994, explaining that new USF tariffs generally go into effect at the beginning of each year. Because the recommended indexed cap approach which we are adopting requires the calculation of USF totals and index factors on a calendar year basis, there is additional reason to implement the interim rules at the beginning of the year. Accordingly, we find good cause for making the rule amendments effective on less than 30 days notice[19] and shall require that the interim rules become effective on January 1, 1994.

V. Ordering clauses

26. Accordingly, pursuant to sections 1, 4(i), 221(c), and 410(c) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 221(c), and 410(c), It is hereby ordered, that part 36 of the Commission's rules and regulations, 47 CFR part 36 Subpart F—Universal Service Fund, is amended as shown below, effective January 1, 1994.

[17] Interim Recommendation at ¶ 17–19.

[18] See discussion in the Interim Recommendation at ¶ 52 and in n. 104, citing NECA's projection that for 1994 the approximate maximum difference between USF assistance under the current rules and under the indexed cap approach recommended by the Joint Board should be 18 cents per loop per month. Those calculations were based on a 1993 total that did not include prior period adjustments nor administrative costs. For that reason, and because the derivation of the USF under our part 36 rules does not, strictly speaking, include costs other than current period expense adjustments, we have decided to exclude prior period adjustments and administrative costs from the indexed USF cap. Compare Interim Recommendation at n. 105. We emphasize, however, that we shall carefully monitor any changes in those excluded costs during the interim period, in order to ensure that the purpose underlying adoption of the indexed cap is not undermined.

[19] See 5 U.S.C. 553(d)(3).

List of Subjects in 47 CFR, Part 36

Communications common carriers, Reporting and recordkeeping requirements. Telephone.

Federal Communications Commission,

William F. Caton,

Acting Secretary.

Part 36 of title 47 of the Code of Federal Regulations is amended as follows:

PART 36—JURISDICTIONAL SEPARATIONS PROCEDURES; STANDARD PROCEDURES FOR SEPARATING TELECOMMUNICATIONS PROPERTY COSTS, REVENUES, EXPENSES, TAXES AND RESERVES FOR TELECOMMUNICATIONS COMPANIES

1. The authority citation for part 36 continues to read as follows:

Authority: 47 U.S.C. 151, 154 (i) and (j), 205, 221(c), 403 and 410.

2. Section 36.601 is amended by adding a new paragraph (c) to read as follows:

§ 36.601 General.

* * * * *

(c) During an interim period commencing on January 1, 1994, and terminating on January 1, 1996, the annual amount of the total Universal Service Fund shall not exceed the amount of the total Universal Service Fund for the immediately preceding calendar year, increased by a rate equal to the rate of increase in the total number of working loops during the calendar year preceding the June filing. The total Universal Service Fund shall consist of the Universal Service expense adjustments, including amounts calculated pursuant to §§ 36.612(a) and 36.631. The rate of increase in total working loops shall be based upon the difference between the number of total working loops on December 31 of the year preceding the June filing and the number of total working loops on December 31 of the second year preceding that filing, both calculated pursuant to § 36.611(a)(8).

3. Section 36.622 is amended by revising the first sentence of paragraph (a) and by adding a new paragraph (c) to read as follows:

§ 36.622 National and study area average unseparated loop costs.

(a) National Average Unseparated Loop Cost per Working Loop. Except as provided in paragraph (c) of this section, this is equal to the sum of the Loop Costs for each study area in the country as calculated pursuant to § 36.621(a) divided by the sum of the

working loops reported in § 36.611(a)(8) for each study area in the country.* * * * * * * * * *

(c) During an interim period commencing on January 1, 1994, and terminating on January 1, 1996, the National Average Unseparated Loop Cost per Working Loop shall be the greater of:

(1) The amount calculated pursuant to the method described in paragraph (a) of this section; or

(2) An amount calculated to produce the maximum total Universal Service Fund allowable pursuant to § 36.601(c).

[FR Doc. 93-31838 Filed 12-29-93; 8:45 am]
BILLING CODE 6712-01-M

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 525 and 552

[Acquisition Circular AC-93-1]

General Services Administration Acquisition Regulation; Implementation of the Memorandum of Understanding Between the United States of America and the European Economic Community (EC) on Government Procurement and the North American Free Trade Agreement

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Temporary rule.

SUMMARY: This Acquisition Circular temporarily amends the General Services Administration Acquisition Regulation to implement the Memorandum of Understanding between the United States and the European Economic Community (EC) on Government Procurement and the North American Free Trade Agreement (NAFTA) as approved by Congress.

DATES: Effective Date: January 1, 1994. This amendment to the GSAR applies to solicitations issued on or after January 1, 1994.

Expiration Date: December 31, 1994.

Comment Date: February 28, 1994.

ADDRESSES: Comments should be submitted to Marjorie Ashby, Office of GSA Acquisition Policy (VP), 18th and F Streets, NW, Room 4006, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Edward J. McAndrew, Office of GSA Acquisition Policy, (202) 501-1224.

SUPPLEMENTARY INFORMATION:

A. Background

a. The United States has entered into agreements with EC and NAFTA countries which provide, among other things, for offers of EC and NAFTA country end products over certain thresholds without regard to the Buy American Act. In addition, these agreements provide an exemption from the Buy American Act for EC and NAFTA construction materials furnished under construction contracts with an estimated value of $6,500,000 or more. Consequently, no price differential is to be applied to EC and NAFTA country construction materials, nor to offers of EC and NAFTA country end products.

b. The evaluation criteria in GSAR 552.225-75, Buy American Act Notice-Construction Materials, are modified to eliminate the use of the 6 percent evaluation factor where EC and NAFTA country construction materials are proposed for use under such contracts.

c. The provision at 552.225-8 and the clause at 552.225-9 which implement the General Services Administration Board of Contract Appeals (GSBCA) decision in *International Business Machines Corporation*, GSBCA No. 10532-P, May 18, 1990, are revised to reflect the NAFTA Implementation Act's definition of Mexican or Canadian end products as eligible products.

d. Section 525.402 is revised to reflect the change in the threshold for application of the Trade Agreements Act.

B. Determination to Issue a Temporary Regulation

A determination has been made to issue a temporary rule in order to meet the January 1, 1994, effectivity date for implementation of NAFTA. However, pursuant to Public Law 98-577 and FAR 1.501, public comments are solicited and will be considered in formulating a final rule.

C. Executive Order 12866.

This temporary rule was not submitted to the Office of Management and Budget because it is not a significant rule as defined in Executive Order 12866, Regulatory Planning and Review.

D. Regulatory Flexibility Act

The changes do not appear to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et sequentia* because they permit offerors to use EC and NAFTA country end products or construction materials above certain thresholds without application of Buy American Act preference. For this reason, a regulatory flexibility analysis has not been prepared. However, comments from small entities concerning this temporary change will be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and cite 5 U.S.C. 601 *et sequentia* (Acquisition Circular AC-93-1) in correspondence.

E. Paperwork Reduction Act

The provision at 552.225-75, Buy American Act Notice-Construction Materials, which is being modified by this rule, does contain an information collection requirement. However, the revision does not affect the information collection requirements which have previously been approved by OMB and assigned Control Number 3090-0198.

List of Subjects in 48 CFR Parts 525 and 552

Government procurement.

PARTS 525 AND 552—[AMENDED]

Accordingly, 48 CFR parts 525 and 552 are temporarily amended as follows:

1. The authority citation for 48 CFR parts 525 and 552 continues to read as follows:

Authority: 40 U.S.C. 486(c).

2. Section 525.203 is revised effective January 1, 1994 through December 31, 1994 to read as follows:

525.203 Evaluation of offers.

(a) The HCA or a designee may authorize the use of a particular foreign construction material when the use of a comparable domestic construction material would unreasonably increase the cost of the contract. The cost of a particular domestic construction material shall be determined to be reasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent. The cost of construction material includes all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued).

(b) The evaluation process described in paragraph (a) of this section does not apply to:

(1) Excepted materials listed in the solicitation; or

(2) European Community (EC) and North American Free Trade Agreement (NAFTA) country construction materials offered in response to solicitations for construction contracts with an estimated value of $6,500,000 or more.

(c) Offerors proposing to use foreign construction materials (other than EC or NAFTA country construction materials on contracts with an estimated value of $6,500,000 or more) are required to provide adequate information for Government evaluation under paragraph

(a) of this section. Offerors may submit alternate offers for comparable domestic construction materials at stated prices. When foreign construction material (other than EC or NAFTA country construction materials on contracts with an estimated value of $6,500,000 or more) is not authorized under paragraph (a), evaluation of the offer must be based on the stated price, if any, for comparable domestic material. If an offeror proposing to use foreign construction materials (other than EC or NAFTA country construction materials on contracts with an estimated value of $6,500,000 or more) does not furnish data on the cost of comparable domestic construction materials, and the use of foreign construction material is not authorized, such offer must be rejected, unless the contracting officer is able to obtain prices on comparable domestic material which verifies that domestic prices are unreasonable.

(d) The contracting officer shall add 6 percent to the cost of foreign construction materials (other than EC or NAFTA country construction materials on contracts with an estimated value of $6,500,000 or more) authorized for use in accordance with paragraph (a) of this section, to the prices offered, if applicable, for evaluation purposes only.

3. Section 525.205 is revised effective January 1, 1994 through December 31, 1994 to read as follows:

525.205 Solicitation provision and contract clause.

The contracting officer shall insert the provision at 552.225–75, Buy American Act Notice—Construction Materials in solicitations for construction that include the Buy American Act—Construction Materials clause at FAR 52.225–5 and have an estimated value less than $6,500,000. Alternate I shall be used for construction contracts with an estimated value of $6,500,000 or more that include the Buy American Act—Construction Materials Under European Community Agreement and NAFTA clause at FAR 52.225–15.

4. Section 525.402 is amended effective January 1, 1994 through December 31, 1994 by removing "$176,000" from the last sentence of paragraph (a) and substitute "$182,000".

5. Section 552.225–8 is revised effective January 1, 1994 through December 31, 1994 to read as follows:

552.225–8 Trade Agreements Act Certificate.

As prescribed in 525.407(a), insert the following provision:

Trade Agreements Act Certificate (Jan 1994) (Deviation FAR 52.225–8)

(a) The Offeror, by signing this offer, certifies that each end product to be delivered under this contract is a U.S. made end product, a designated country end product, a Caribbean Basin country end product, a Canadian end product or a Mexican end product as defined in the clause entitled "Trade Agreements Act" at 48 CFR 552.225–9.

(b) Offers will be evaluated in accordance with subpart 25.4 of the Federal Acquisition Regulation except that offers of U.S. made end products, designated country end products, Caribbean Basin end products, Canadian end products, or Mexican end products shall be evaluated without the restrictions of the Buy American Act or the Balance of Payments Program.

(End of Provision)

6. Section 552.225–9 is revised effective January 1, 1994 through December 31, 1994 to read as follows:

552.225–9 Trade Agreements Act.

As prescribed in 525.407(a), insert the following clause.

Trade Agreements Act (Jan 1994) (Deviation FAR 52.225–9)

(a) This clause implements the Trade Agreements Act of 1979 (19 U.S.C. 2501–2582) by providing a preference for U.S. made end products, designated country end products, Caribbean Basin country end products, Canadian end products or Mexican end products over other products.

"Caribbean Basin country end products," as used in this clause, means an article that: (1) Is wholly the growth, product, or manufacture of a Caribbean Basin country (as defined in section 25.401 of the Federal Acquisition Regulation (FAR)), or (2) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. The term includes services (except transportation services) incidental to its supply; provided that the value of those incidental services does not exceed that of the product itself. It does not include service contracts as such. The term excludes products that are excluded from duty free treatment from Caribbean countries under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2703(b)). These exclusions presently consist of: (i) Textiles and apparel articles that are subject to textile agreements; (ii) footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel not designated as eligible articles for the purpose of the Generalized System of Preference under title V of the Trade Act of 1974; (iii) tuna, prepared or preserved in any manner in airtight containers; (iv) petroleum, or any product derived from petroleum; and (v) watches and watch parts (including cases, bracelets and straps) of whatever type including, but not limited to, mechanical, quartz digital or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Tariff Schedule of the United States (TSUS) column 2 rates of duty apply.

"Designated country end product," as used in this clause, means an article that: (1) Is wholly the growth, product, or manufacture of the designated country (as defined in section 25.401 of the Federal Acquisition Regulation (FAR)), or (2) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. The term includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed that of the product itself. It does not include service contracts as such.

"Canadian end product," as used in this clause, means an article that: (1) Is wholly the growth, product, or manufacture of Canada, or (2) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in Canada into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term includes services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself. It does not include service contracts as such.

"Mexican end product," as used in this clause, means an article that: (1) Is wholly the growth, product, or manufacture of Mexico, or (2) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in Mexico into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. The term includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed that of the product itself. It does not include service contracts as such.

"End products," as used in this clause, means those articles, materials, and supplies to be acquired under this contract for public use.

"U.S. made end product," as used in this clause, means an article which: (1) Is wholly the growth, product, or manufacture of the United States, or (2) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

"Nondesignated country end products," as used in this clause, means any end product which is not a U.S. made end product, designated country end product, Caribbean Basin Country end product, Canadian end product or Mexican end product.

"United States," as used in this clause, means the United States, its possessions,

Puerto Rico, and any other place which is subject to its jurisdiction, but does not include leased bases or trust territories.

(b) The Contractor agrees to deliver under this contract only U.S. made end products, designated country end products, Caribbean Basin country end products, Canadian end products or Mexican end products or, if a national interest waiver is granted under section 302 of the Trade Agreements Act of 1979, nondesignated country end products. Only if such waiver is granted may a nondesignated country end product be delivered under this contract(s).

(c) Offers will be evaluated in accordance with the policies and procedures of Part 25 of the FAR except that offers of U.S. made end products, designated country end products, Caribbean Basin end products, Canadian end products or Mexican end products shall be evaluated without the restrictions of the Buy American Act or the Balance of Payments Program.

(End of Clause)

7. Section 552.225–75 is revised effective January 1, 1994 through December 31, 1994 to read as follows:

552.225–75 Buy American Act Notice—construction materials.

As prescribed in 525.205, insert the following provision:

Buy American Act Notice—Construction Materials (Jan 1994)

(a) The Buy American Act (41 U.S.C. 10) generally requires that only domestic construction material be used in performing this contract (See the clause entitled "Buy American Act—Construction Materials"). This requirement does not apply to the excepted construction material or components listed below:

(List Applicable Excepted Materials or Indicate "None.")

(b) Offers based on the use of other foreign construction material may be acceptable for award if the Government determines that—

(1) Comparable domestic construction material in sufficient and reasonably available quantities, of a satisfactory quality, is unavailable; or

(2) Use of comparable domestic construction material is impracticable or would unreasonably increase the cost of this contract.

(c) Any offer based on the use of one or more other foreign construction materials shall include current data, based on a reasonable canvass of suppliers, in the format listed in paragraph (g) below, clearly demonstrating that the cost of each other foreign construction material, plus 6 percent, is less than the cost of each comparable domestic construction material. The cost of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate may be issued).

(d) For evaluation purposes, the Government will add to the offer 6 percent of the cost of other foreign construction material that qualifies for acceptance under paragraph (c) above.

(e) When offering other foreign construction material, offerors may also offer, at stated prices, any available comparable domestic construction material to avoid the possibility that the entire offer will be rejected if the other foreign construction material is not accepted under (c) above. If any other foreign construction material does not qualify for acceptance under paragraph (c) above, the Government will evaluate the offer on the basis of the stated price for comparable domestic construction material, and the Offeror shall be required to furnish such domestic construction material at that price. If the Offeror does not state a price for a comparable domestic construction material, and the other foreign construction material does not qualify for acceptance under paragraph (c) above, the offer will be rejected in sealed bid procurements and may be rejected in negotiated procurements.

(f) If the foregoing procedure results in a tie between a foreign offer as evaluated and a domestic offer, award shall be made on the domestic offer. In such case, offers proposing to use any foreign construction material will be considered to be foreign offers.

(g) For evaluation purposes under paragraph (c) above, the following information and any applicable supporting data based on the canvass of suppliers shall be included in the offer for the use of one or more other foreign construction materials:

FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS COST COMPARISON

Construction material description	Unit of measure	Quantity	Cost (dollars)*
Item 1:			
Foreign construction material.			
Comparable domestic construction material.			
Item 2:			
Foreign construction material.			
Comparable Domestic construction material.			

*Include all delivery costs to the construction site and any applicable duty.

(End of Provision)

Alternate I (JAN 1994). If Alternate I is used, paragraphs (a) and (f) of the basic clause should be deleted and the following paragraphs (a) and (f) substituted. In addition, two asterisks should be inserted after the phrase "Foreign construction material" each time it appears in the chart in paragraph (g) and the following explanation added at the bottom of the chart "** Do not include EC or NAFTA country construction materials."

(a) The Buy American Act (41 U.S.C. 10) generally requires that only domestic construction material be used in performing this contract. However, the Memorandum of Understanding between the United States of America and the European Community (EC) on Government procurement and the North American Free Trade Agreement (NAFTA) exempt EC and NAFTA country construction material from application of the Buy American Act. (See FAR 52.225–15 "Construction Materials under European Community and NAFTA Agreements"). Therefore, the Contractor shall use only domestic construction material, EC construction materials, or NAFTA country construction materials in the performance of this contract except for other foreign construction materials, if any, listed below. "Other foreign construction material," as used in this provision, means construction material that is not EC or NAFTA country construction material as defined in FAR 52.225–15.

(List Applicable Excepted Materials or Indicate "None.")

(f) If the foregoing procedure results in a tie between an offer that includes other foreign construction material as evaluated and an offer that includes domestic, EC or NAFTA construction material, award shall be made on the offer providing domestic, EC or NAFTA construction material.

Dated: December 22, 1993.

Richard H. Hopf, III,

Associate Administrator for Acquisition Policy.

[FR Doc. 93–31966 Filed 12–29–93; 8:45 am]

BILLING CODE 6820–61–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 1805

[NFS Case No. 941414]

Expedited Implementation of the North American Free Trade Agreement; NASA FAR Supplement Synopsizing Requirements

AGENCY: Office of Procurement, Procurement Policy Division, NASA.

ACTION: Interim rule with request for comments.

SUMMARY: The North American Free Trade Agreement (NAFTA) requires that all procurements covered by it must be synopsized in the Commerce Business Daily. In this rule, NASA is implementing internal regulations concerning synopses of requirements where contract award and performance will take place outside the U.S.

DATES: This interim rule is effective January 1, 1994; comments must be received on or before February 28, 1994.

ADDRESSES: Comments may be submitted to Mr. William T. Childs, NASA Headquarters, Office of Procurement (Code HP), Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: William T. Childs, (202) 358–0454.

SUPPLEMENTARY INFORMATION: The North American Free Trade Agreement (NAFTA) requires that all procurements covered by it must be synopsized in the Commerce Business Daily. This requirement may be impractical for some procurements made in overseas locations. Therefore, the FAR provides that defense agencies may develop internal regulations concerning synopses of requirements where contract award and performance will take place outside the U.S.

NAFTA applies to procurements of supplies and services (with some exceptions, such as R&D). Although there are several different dollar thresholds in NAFTA, it is generally not possible to know at the time of synopsis which threshold applies, or whether a NAFTA-covered firm will propose. Therefore, all actions must be synopsized at the lowest applicable threshold.

Impact

NASA certifies that this regulation will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The regulation imposes no new burdens on the public under the Paperwork Reduction Act, as implemented at 5 CFR part 1320.

List of Subjects in 48 CFR Part 1805

Government procurement.

Tom Luedtke,

Acting Deputy Associate Administrator for Procurement.

PART 1805—PUBLICIZING CONTRACT ACTIONS

1. The authority citation for 48 CFR part 1805 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

2. In section 1805.202, the existing paragraph is designated as paragraph (a), and a new paragraph (b) is added as follows:

1805.202 Exceptions.

* * * * *

(b) In accordance with FAR 5.202(a)(12), unless another exception applies, contract actions that will be made and performed outside the United States shall be synopsized in the Commerce Business Daily as follows: The contracting officer shall synopsize: (1) All contract actions for supplies or services (other than R&D and construction) with an estimated value above $25,000, and (2) all contract actions for construction with an estimated value above $6,500,000.

[FR Doc. 93–31996 Filed 12–29–93; 8:45 am]

BILLING CODE 7510–01–M

GENERAL SERVICES ADMINISTRATION

Board of Contract Appeals

48 CFR Part 6101

Rules of Procedure of the General Services Administration Board of Contract Appeals

AGENCY: Board of Contract Appeals, General Services Administration.

ACTION: Final rule.

SUMMARY: This document contains final revisions to the rules governing proceedings before the General Services Administration Board of Contract Appeals (Board). It supersedes the current rules of procedure of the Board in their entirety. The Board by majority vote has adopted these revised rules pursuant to its authority contained in section 111 of the Federal Property and Administrative Services Act of 1949 (commonly known as the Brooks Act) and the Contract Disputes Act of 1978. The revised rules will govern bid protest proceedings before the Board pursuant to the Brooks Act and contract appeals pursuant to the Contract Disputes Act of 1978, as well as any applications for costs incurred with regard to such protests and appeals. These revisions will clarify the Board's procedures in certain respects, as well as streamline those procedures to ensure that cases are processed in the most efficient possible manner.

EFFECTIVE DATE: January 3, 1994.

FOR FURTHER INFORMATION CONTACT: Wilbur T. Miller, Chief Counsel, GSA Board of Contract Appeals, (202) 501–0891. Copies of the rules may be obtained from: Office of the Clerk of the Board, (202) 501–0116.

SUPPLEMENTARY INFORMATION:

Regulatory Flexibility Act

The General Services Administration certifies that these revisions will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Background

On December 22, 1992, the Board published in the **Federal Register** (57 FR 60783) a notice inviting written comments on proposed revisions to its rules of procedure. This notice announced the Board's intention to revise its existing rules of procedure, 48 CFR part 6101, and explained that the purpose of the proposed revisions was to clarify the Board's procedures in certain respects, as well as to streamline those procedures so as to ensure that cases are processed in the most efficient possible manner. The notice explained how to obtain copies of the proposed rules and invited interested persons to submit comments by February 12, 1993.

The Board received extensive comments from the public and from federal agencies. After consideration of these comments, the Board's members adopted the proposed rules, as revised, by majority vote.

The most significant changes made by the Board's new rules are highlighted in the next section of the preamble. Following that, the preamble summarizes the more significant comments received by the Board during the comment period and indicates how these comments were addressed in preparing the final version of the rules.

Highlights of Significant Changes Contained in the New Rules

The new rules contain several significant refinements of the Board's prior procedures. The definition of "filing" (section 6101.1(b)) has been changed to provide that all materials except a notice of appeal and an application for costs are filed when received by the Office of the Clerk during working hours. Specific rules are provided for the two mentioned exceptions. In addition, a new subparagraph is added to provide guidance for filing of pleadings by facsimile transmission, and the working hours of the Board for filing purposes are specifically noted (section 6101.1(b)(15)); section 6101.38(a) contains related changes specifying the hours of the Clerk.

The rule relating to the computation of time (section 6101.2) has been revised

to provide for situations where the Board is required to close due to inclement weather or other emergency. In addition, changes have been made to the method of calculating short time deadlines. Weekends and holidays under the proposed change would count only when a time deadline is eleven or more days, rather than seven as formerly, and the number of exceptions to this rule has been reduced.

The Board has made several changes in the rule pertaining to the filing of cases (section 6106.5). A category of participation in a case has been added, as the Board may, in its discretion, permit an entity to participate in a special or limited way, such as by filing an amicus curiae brief. Section 6101.5(b)(3)(iii) includes changes governing timeliness of a protest where a protester first protests to the procuring agency. A denial of an agency protest based on an alleged impropriety apparent on the face of the solicitation (or amendment) would give the protester no more than ten working days to protest to the Board, even if more than ten days are available after the agency denial before submission of bids or proposals. This proposed rule alters the practice under the existing rule and case law. Section 6101.5(b)(4) provides that an intervention filed after an amendment to a protest will be timely within four working days of receipt of the amendment, but such intervention may relate only to the newly raised ground of protest added by the amendment. Section 6101.5(d) contains more specificity as to the requirements placed on the contracting officer to give notice of the protest.

With regard to appearances before the Board, the rules have been revised to provide expressly that business entities may be represented only by an attorney or by an appropriate official or employee (section 6101.6(a)). Entities may not be represented by a non-attorney consultant. A motion to withdraw an appearance is now required and the contents of such a motion are stated.

With regard to pleadings, the rules have been revised to provide that in an appeal, a dispositive motion or a motion for a more definite statement may be filed in lieu of the answer only with the permission of the Board (section 6101.7(c)). Protest answers are now due no later than ten working days after the filing of the protest, rather than fifteen calendar days, and the time limits for filing amendments to a protest have been clarified.

The rule governing summary relief motions (section 6101.8(g)) has been substantially revised. Reference to such motions being available only in appeals has been deleted. Parties are advised that a motion for summary relief should be filed only when a party believes that based upon uncontested material facts, it is entitled to relief in whole or in part as a matter of law. Both the moving and opposing parties must file separate documents in addition to their briefs detailing the alleged uncontested facts and material facts which allegedly remain in dispute. The opposing party is cautioned that it may not rest upon the mere allegations or denials of its pleadings; if its response contests facts asserted by the movant, it must set forth specific facts showing that there is a genuine issue of material fact. If the adverse party does not so respond, summary relief, if appropriate, shall be entered against it. For good cause shown, if an opposing party cannot present facts essential to justify its opposition, the Board may defer ruling on the motion to permit affidavits to be obtained or other discovery to be conducted.

The rule governing conferences (section 6101.10) has been revised to provide expressly for the possibility of employment of alternative dispute resolution techniques. The possibilities include appointment of a neutral from within the Board to conduct the alternate proceedings.

The rules governing the Board's small claims and accelerated procedures (sections 6101.13, 6101.14) have been entirely rewritten. The changes are intended to clarify and simplify the rules, not substantively alter the practice in these areas. References to specific deadlines in such cases have been deleted; the new rules state that the Board will establish in each case such procedures as are appropriate for resolution of the case within the applicable time frame.

The Board made several revisions to the rules relating to discovery (sections 6101.15, 6101.16, and 6101.17). Discovery will be available in all cases only to the extent incorporated into a discovery plan that is approved by the Board. Permissive intervenors and other persons granted limited rights of participation may be permitted rights of discovery in accordance with an order of the Board. Time limits for raising objections to discovery requests are established in section 6101.15(f)(2), and a requirement is added that parties attempt to resolve discovery disputes before bringing such disputes to the attention of the Board. The parties must now ask the Board for an order authorizing the taking of depositions in appeals as well as protests (section 6101.16).

Answers in protest cases must be amended within five working days after service, and the rules contain a new requirement that a party that has responded to written interrogatories, requests for admission, or requests for production of documents, upon becoming aware of deficiencies or inaccuracies in its original responses, or upon acquiring additional information or additional relevant documents, shall supplement its responses (section 6101.17(f)).

Sanctions and disciplinary proceedings are governed by an entirely new section 6101.18. (Former section 6101.18, permitting the appointment of hearing examiners in certain cases, has been eliminated.) Parties and their representatives are advised to adhere to the Board's orders and to applicable statutes and regulations providing standards of conduct. Attorneys are advised to adhere to the rules of professional conduct and ethics of the jurisdictions in which they are licensed. Specific sanctions, such as preclusion of issues or evidence or dismissal of a case, are provided for misconduct by a party. The rule also provides for further disciplinary proceedings in appropriate circumstances.

The rule addressing dismissals (section 6101.28) has been completely rewritten. It now specifies that every dismissal will be with prejudice to reinstatement, unless otherwise requested. The rule also shortens the period of time after which a dismissal without prejudice will convert to one with prejudice, unless otherwise provided by the Board.

The new rules contain a number of changes to the rules dealing with Board decisions and reconsideration of those decisions (sections 6101.29, 6101.30, and 6101.32). Section 6101.29(b)(2) now advises the parties that in a protest, the Board ordinarily will, within the forty-five-day period applicable to the original protest, decide all issues, including those raised by amendment or intervention. However, in instances when the decision cannot be rendered within that period, the Board will whenever possible notify the parties prior to the originally-scheduled hearing date, or date for record submission, if it believes that because of a new ground of protest raised by an amendment or by an intervention, the protest might not be decided within the original forty-five-day period.

Section 6101.30 has been substantially rewritten to clarify conditions for making a request for full Board consideration and has been changed to provide for full Board consideration upon majority vote of the

Board's judges. The time limits for and effect of filing a motion for reconsideration have also been clarified. The limits are thirty calendar days in an appeal and seven working days in a protest after the date of receipt by the moving party of the decision or order (section 6101.32(c)). A pending motion for reconsideration does not affect the finality of a decision or suspend its operation.

Section 6101.35 has been rewritten to provide guidelines and time limits for the filing of cost applications. These include the submission of exhibits documenting the claimed costs, signed and verified by appropriate persons. Applications may now be filed with regard to protests as well as appeals, within thirty calendar days after a final disposition (including the running of the period for appeal).

Summary of Comments

The Board received written comments from twenty-seven commentators. Commentators included federal agencies, components of federal agencies, two bar association groups, four attorneys in private practice who have practiced before the Board, and one corporation. Four commentators had only brief, general comments on the rules; the other twenty-three addressed twenty-nine of the forty rules. The Board carefully considered each comment, and many suggestions contained in the comments were adopted. The more significant comments are discussed below in a section-by-section format.

Section 6101.1 (Scope of Rules; Definitions; Construction; Rulings and Orders; Panels; Situs)

At the suggestion of one commentator, the statement that an appeal may be filed by submitting a written notice of appeal to the contracting officer has been deleted from section 6101.1(b)(5). An appeal is to be filed with the Clerk of the Board. At the suggestion of two commentators, a new subparagraph is added to section 6101.1(b)(5) to provide guidance on filing pleadings by facsimile transmission, and section 6101.1(b)(15) now provides the working hours of the Board for filing purposes.

Section 6101.2 (Time: Enlargement; Computation)

All four commentators who addressed this rule suggested that it should clarify the exceptions to the time computation rules and address situations when the Clerk's Office closes early. Section 6101.2(c), relating to the computation of time, has been amended to provide for situations where the Board is required to close due to inclement weather or other emergency. In addition, changes have been made to the method of calculating short time deadlines. Weekends and holidays would count only when a time deadline is eleven or more days, rather than seven as formerly, so as to conform to the Federal Rules of Civil Procedure, and the number of exceptions to this rule has been reduced.

Section 6101.3 (Service of Papers)

At the suggestion of two commentators, the current practice regarding the filing of discovery papers with the Board has been changed. Now, discovery requests and responses are not to be filed with the Board, unless the Board orders otherwise.

Section 6101.4 (Appeal File; Protest File)

Pagination requirements are included in section 6101.4(d). At the suggestion of five commentators, the requirement that the entire file be consecutively paginated has been dropped. Instead, the pages within each exhibit shall be numbered consecutively unless the exhibit already is paginated in a logical manner.

Section 6101.5 (Filing Cases; Time Limits for Filing; Docketing; Notice of Protest by Contracting Officer)

Two commentators suggested that an intervenor should be required to support any additional grounds of protest it might assert in the same manner as a protester. (Indeed, one commentator suggested that protesters be held to a higher standard than that set for intervenors.) Section 6106.5(a)(4) now provides that all new grounds of protest asserted by intervenors must be described in the same manner as those supporting a protest (section 6101.7(b)(2)(v)).

Four commentators supported the change to section 6101.5(b)(3)(iii) governing timeliness of a protest where a protester first protests to the procuring agency. A denial of an agency protest based on an alleged impropriety apparent on the face of the solicitation (or amendment) would give the protester no more than ten working days to protest to the Board, even if more than ten days are available after the agency denial before submission of bids or proposals. This rule alters the practice under the existing rule and case law, to require protesters to pursue matters promptly once they have been raised.

Section 6101.5(b)(4) provides that an intervention filed after an amendment to a protest will be timely within four working days of receipt of the amendment, but such intervention may relate only to the newly raised ground of protest added by the amendment. Two commentators specifically supported this change.

Section 6101.5(d) contains more specificity as to the requirements placed on the contracting officer to give notice of the protest, and shortens from five to three working days the time in which the contracting officer must notify the Board that all interested parties have been notified of the protest. The proposed version of this rule shortened the time period from five days to one day; in response to the concerns of three commentators that their agencies would be hard pressed to comply, the final version specifies three-day notice.

Section 6101.6 (Appearances; Notice of Appearance)

Section 6101.6 has been amended to provide expressly that business entities may be represented only by an attorney or by an appropriate official or employee. Entities may not be represented by a non-attorney consultant. One commentator questioned whether this limitation was consistent with the Board's statutory obligation to provide, to the extent practicable, the informal, expeditious, and inexpensive resolution of disputes. The purpose of section 6101.6 is to provide to corporations and other business entities a parallel privilege of pro se representation. Such a party is not permitted under the rule to retain a non-party, non-attorney representative, such as a consultant, which could be construed as the unauthorized practice of law.

Section 6101.7 (Pleadings)

Section 6106.7(c)(1) has been amended to provide that, in an appeal, a dispositive motion or a motion for a more definite statement may be filed in lieu of the answer only with permission of the Board. The proposed version of this section provided that a dispositive motion or motion for a more definite statement could not be filed in lieu of an answer. Six commentators objected to the change, noting that agency counsel sometimes receive appeals that are subject to summary dismissal, and, in such situations, drafting an answer is a waste of agency resources. The Board is concerned that the filing of dispositive motions in lieu of answers at the last allowable moment slows appeal proceedings. It recognizes, however, that some appeals are proper subjects for dispositive motions. The rule has been revised in response to the comments received.

Pursuant to section 6101.7(c)(2), protest answers are now due no later than ten working days after the filing of the protest, rather than fifteen working days. Three agency counsel objected to the shortening of this time period; however, the Board concluded that the prompt filing of answers is helpful to the development of a case.

Section 6101.7(f)(2) clarifies the time limits for filing amendments to a protest and reflects the suggestions of five commentators that leave of the Board not be required to amend a protest to include an additional ground of protest.

Section 6101.8 (Motions)

Section 6106.8(g), governing summary relief motions, has been substantially revised along lines proposed by five commentators. Reference to such motions being available only in appeals has been deleted. Parties are advised that a motion for summary relief should be filed only when a party believes that based upon uncontested material facts, it is entitled to relief in whole or in part as a matter of law. Both the moving and opposing parties must file separate documents in addition to their briefs detailing the alleged uncontested facts and material facts which allegedly remain in dispute. The opposing party is cautioned that it may not rest upon the mere allegations or denials of its pleadings; if its response contests facts asserted by the movant, it must set forth specific facts showing that there is a genuine issue of material fact. If the adverse party does not so respond, summary relief, if appropriate, shall be entered against it. For good cause shown, if an opposing party cannot present facts essential to justify its opposition, the Board may defer ruling on the motion to permit affidavits to be obtained or other discovery to be conducted.

Section 6101.10 (Conferences; Conference Memorandum; Prehearing Order; Prehearing and Presubmission Briefs)

This section has been amended to provide expressly for the possibility of employment of alternative dispute resolution techniques. At the suggestion of five commentators, the possibilities include appointment of a neutral from within the Board, including the panel chairman, to conduct the alternate proceedings.

Section 6101.15 (General Provisions Governing Discovery)

Under changes to section 6106.15(d), discovery will be available in all cases only to the extent incorporated into a discovery plan that is approved by the Board. One commentator actively supported this change, and none criticized it. Similarly well-received was the new provision that permissive intervenors and other persons granted limited rights of participation may be permitted rights of discovery in accordance with an order of the Board. Time limits for raising objections to discovery requests are established in section 6101.15(f)(2). The proposed rule required objections to discovery requests in appeals to be filed within ten working days. Four commentators requested a longer time period. The rule now provides that such objections must be filed in fifteen calendar days. The limited period is intended to promote identification and resolution of objections sufficiently early that they will not delay responses to discovery requests. Finally, at the suggestion of two commentators, section 6101.15(f)(3) adds a requirement that parties attempt to resolve discovery disputes before bringing such disputes to the attention of the Board.

Section 6101.16 (Depositions)

The parties must now ask the Board for an order authorizing the taking of depositions in appeals as well as protests. One commentator felt this unnecessarily involved the Board in a matter easily resolved by the parties; another commentator supported the change. The Board adopted the change in an effort to focus the parties' attention on the necessity for specific depositions, and to increase control against excessive discovery.

Section 6101.17 (Interrogatories)

Section 6101.17(a) is revised to require answers to interrogatories in protest cases within five working days after service. The Board's current rule requires answers within ten calendar days, and five commentators suggested that the more liberal time period be maintained. The revised rule retains the five-day filing requirement, but provides that the time period established in the rules may be altered by the panel chairman in any case in which a different period is requested.

At the suggestion of two commentators, section 6101.17(f) contains a new requirement that a party that has responded to written interrogatories, requests for admission, or requests for production of documents, upon becoming aware of deficiencies or inaccuracies in its original responses, or upon acquiring additional information or additional relevant documents, shall supplement its responses.

Section 6101.18 (Sanctions and Other Proceedings)

Section 6101.18, permitting the appointment of hearing examiners in certain case, has been eliminated in its entirety. The one comment received on this change was supportive. A new section 6101.18 is added to govern sanctions and disciplinary proceedings. Portions of this rule replace former provisions that appeared in sections 6101.10(d) and 6101.15(g). Parties and their representatives are advised to adhere to the Board's orders and to applicable statutes and regulations providing standards of conduct. In the proposed version of section 6101.18(a), attorneys were to required to follow the American Bar Association's Model Rules of Professional Conduct. In response to the concerns of six commentators, that subsection advises attorneys to the rules of professional conduct and ethics of the jurisdictions in which they are licensed. The rule also states that the Board will also look to voluntary professional guidelines in evaluating an individual's conduct.

Section 6101.28 (Dismissals)

In response to five comments received, section 6101.28 has been completely rewritten. Every commentator suggested that the proposed rule lacked clarity, and one noted that grounds for dismissal should not be mixed with types of dismissals. The current rule specifies that every dismissal will be with prejudice to reinstatement, unless otherwise requested. The rule also shortens the period of time after which a dismissal without prejudice will convert to one with prejudice, unless otherwise provided by the Board.

Section 6101.29 (Decisions)

Section 6101.29(b)(2) now advises the parties that in a protest, the Board ordinarily will, within the forty-five-day period applicable to the original protest, decide all issues, including those raised by amendment or intervention. However, in instances when the decision cannot be rendered within that period, the Board will whenever possible notify the parties prior to the originally-scheduled hearing date, or date for record submission, if it believes that because of a new ground of protest raised by an amendment or by an intervention, the protest might not be decided within the original forty-five-day period. This addition to section 6101.29 was supported by all three commentators commenting on this rule.

Section 6101.30 (Full Board Consideration)

This section has been substantially rewritten to clarify conditions for making a request for full Board consideration. Section 6101.30(a) requires that a request for full Board consideration must be made after the panel to which the case is assigned has issued its decisions on a motion for reconsideration or relief from decision. Two commentators suggested that this entailed too much delay; however, the Board determined that it was useful to an informed consideration of such a request. Section 6101.30(b) has been changed to provide for full Board consideration upon majority vote of the Board's judges. This change was strongly supported by three of the four commentators commenting on this rule.

Section 6101.32 (Reconsideration; Amendment of Decisions; New Hearings)

Section 6101.32(c) clarifies time limits for filing a motion for reconsideration. The limits are thirty calendar days in an appeal and seven working days in a protest after the date of receipt by the moving party of the decision or order. At the suggestion of one commentator, section 6101.32(d) has been added to clarify that a motion pending under this rule does not affect the finality of a decision or suspend its operation.

Section 6101.35 (Award of Costs)

Section 6101.35 has been rewritten to provide guidelines and time limits for the filing of cost applications. These include the submission of exhibits documenting the claimed costs, signed and verified by appropriate persons. Applications may now be filed with regard to protests as well as appeals, within thirty calendar days after a final disposition (including the running of the period for appeal). All three commentators commenting on this rule supported the guidelines and time limits.

List of Subjects in 48 CFR Part 6101

Administrative practice and procedures, Government procurement.

Adoption of Revised Rules

For the reasons set out in the preamble, 48 CFR part 6101 is revised to read as follows:

PART 6101—RULES OF THE GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS

Sec.

Appendix—Form Nos. 1–5

Authority: 41 U.S.C. 601–613; 40 U.S.C. 759(f)(8).

6101.0 Foreword.

The General Services Administration Board of Contract Appeals was established under the Contract Disputes Act of 1978, 41 U.S.C. 601–613, as an independent tribunal to hear and decide contract disputes between government contractors and the General Services Administration (GSA) and other executive agencies of the United States. The Board also hears and decides protests filed under the Brooks Act, 40 U.S.C. 759(f), which involve procurements subject to that Act, and conducts proceedings as required under other laws. The Board will act in accordance with the rules in this part and applicable standards of conduct so that the integrity, impartiality, and independence of the Board are preserved.

6101.1 Scope of rules; definitions; construction; rulings and orders; panels; situs [Rule 1].

(a) *Scope.* The rules in this part govern proceedings in all cases filed with the Board on or after January 3, 1994, and all further proceedings in cases then pending, except to the extent that in the opinion of the Board, their use in a particular case pending on the effective date would be infeasible or would work an injustice, in which event the former procedure applies. The Board will look to the rules in this part for guidance in conducting other proceedings authorized by law.

(b) *Definitions*—(1) *Appeal; appellant.* The term "appeal" means a contract dispute filed with the Board. The term "appellant" means a party filing an appeal.

(2) *Application; applicant.* The term "application" means a submission to the Board of a request for reimbursement of costs, under the Equal Access to Justice Act, 5 U.S.C. 504, or the Brooks Act, 40 U.S.C. 759(f)(5)(C), pursuant to 6101.35. The term "applicant" means a party filing an application.

(3) *Board judge; judge.* The term "Board judge" or "judge" means a member of the Board.

(4) *Case.* The term "case" means an appeal, protest, petition, or application.

(5) *Filing.* (i) Any document, other than a notice of appeal or an application for costs, is filed when it is received by the Office of the Clerk of the Board during the Board's working hours. A notice of appeal or an application for costs is filed upon the earlier of (A) its receipt by the Office of the Clerk of the Board or (B) if mailed, the date on which it is mailed. A United States Postal Service postmark shall be prima facie evidence that the document with which it is associated was mailed on the date thereof.

(ii) Facsimile transmissions to the Board and the parties are permitted. Parties are expected to submit their facsimile machine numbers with their filings. The Board's facsimile machine number is: (202) 501–0664. The filing of a document by facsimile transmission occurs upon receipt by the Board of the entire printed submission. Parties are specifically cautioned that deadlines for the filing of cases will not be extended merely because the Board's facsimile machine is busy or otherwise unavailable at the time on which the filing is due.

(6) *Interested party.* The term "interested party" means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.

(7) *Intervening agency.* The term "intervening agency" means either (i) the General Services Administration, (ii) the agency for which GSA or another agency is conducting the procurement, or (iii) any other agency, when the agency seeking to intervene has submitted a motion to intervene in a protest in accordance with 6101.5(a)(4)(ii) and the motion has been granted. An intervening agency described in paragraph (b)(7) (i) or (ii) will be accorded the same rights as an intervenor of right; an intervening agency described in paragraph (b)(7)(iii) will be accorded the same rights as a permissive intervenor.

(8) *Intervenor of right.* The term "intervenor of right" means (i) an interested party who files with the Board a notice of intervention in accordance with 6101.5(a)(4)(i) and who has not filed a protest concerning the same procurement with the United States General Accounting Office (GAO), or (ii) in a protest involving a procurement being conducted by an entity other than a Federal agency, the entity conducting the procurement.

(9) *Intervenor, permissive.* The term "permissive intervenor" means any entity that (i) is an interested party and has filed a protest concerning the same procurement at the GAO, has submitted a motion to intervene in a protest in accordance with 6101.5(a)(4)(iii), and whose motion has been granted, or (ii) has been permitted by the Board in its discretion to intervene in a case.

(10) *Party.* The term "party" means an appellant, applicant, petitioner, protester, respondent, intervenor of right, intervening agency, or permissive intervenor.

(11) *Petition; petitioner.* The term "petition" means a request filed under 41 U.S.C. 605(c)(4) that the Board direct a contracting officer to issue a written decision on a claim. The term "petitioner" means a party submitting a petition.

(12) *Protest; protester.* The term "protest" means a written objection by an interested party to a solicitation by a Federal agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection to a proposed award or the award of such a contract. The term "protester" means an interested party who files a protest with the Board and who has not filed a protest with the GAO concerning the same procurement.

(13) *Respondent.* The term "respondent" means the Government agency whose decision, action, or inaction is the subject of an appeal, protest, petition, or application.

(14) *Working day.* The term "working day" means any day other than a Saturday, Sunday, or Federal holiday.

(15) *Working hours.* The Board's working hours are 8 a.m. to 4:30 p.m., Eastern Time, on each working day.

(c) *Construction.* The rules in this part shall be construed to secure the just, speedy, and inexpensive resolution of every case. The Board looks to the Federal Rules of Civil Procedure for guidance in construing those Board rules which are similar to Federal Rules.

(d) *Rulings, orders, and directions.* The Board may apply the rules in this part and make such rulings and issue such orders and directions as are necessary to secure the just, speedy, and inexpensive resolution of every case before the Board. Any ruling, order, or direction that the Board may make or issue pursuant to the rules in this part may be made on the motion or request of any party or on the initiative of the Board. The Board may also amend, alter, or vacate a ruling, order, or direction upon such terms as are just. In making rulings and issuing orders and directions pursuant to the rules in this part, the Board takes into consideration those Federal Rules of Civil Procedure which address matters not specifically covered herein.

(e) *Panels.* Each case will be assigned to a panel consisting of three judges, with one member designated as the panel chairman, in accordance with such procedures as may be established by the Board. The panel chairman is responsible for processing the case, including scheduling and conducting proceedings and hearings. In addition, the panel chairman may, without participation by other panel members, decide an appeal under the small claims procedure (6101.13), suspend procurement authority in a protest (6101.19(d)), rule on nondispositive motions (except for amounts in controversy under 6101.13(a)(2)), and dismiss a case if no party objects (6101.28(c)). All other matters, except for those before the full Board under 6101.30, are decided for the Board by a majority of the panel.

(f) *Situs.* The address of the Office of the Clerk of the Board is: Room 7022, General Services Administration Building, 18th and F Streets, NW., Washington, DC 20405. The Clerk's telephone number is: (202) 501–0116. The Clerk's facsimile machine number is (202) 501–0664.

6101.2 Time: enlargement; computation [Rule 2].

(a) *Time for performing required actions.* All time limitations prescribed in the rules in this part or in any order or direction given by the Board are maximums, and the action required should be accomplished in less time whenever possible.

(b) *Enlarging time.* Upon request of a party for good cause shown, the Board may enlarge any time prescribed by the rules in this part or by an order or direction of the Board. The exceptions are the time limits for filing appeals and protests (6101.5(b)(1) and (3)) and for convening the suspension hearing (6101.19(a)(2)). A written request is required, but in exigent circumstances an oral request may be made and followed by a written request. An enlargement of time may be granted even though the request was filed after the time for taking the required action expired, but the party requesting the enlargement must show good cause for its inability to make the request before that time expired.

(c) *Computing time.* Except as otherwise required by law, in computing a period of time prescribed by the rules in this part or by order of the Board, the day from which the designated period of time begins to run shall not be counted, but the last day of

the period shall be counted unless that day is (i) a Saturday, a Sunday, or a Federal holiday, or (ii) a day on which the Office of the Clerk of the Board is required to close earlier than 4:30 p.m., or does not open at all, as in the case of inclement weather, in which event the period shall include the next working day. When the period of time prescribed or allowed is less than 11 days, any intervening Saturday, Sunday, or Federal holiday shall not be counted. When the period of time prescribed or allowed is 11 days or more, intervening Saturdays, Sundays, and Federal holidays shall be counted except as otherwise provided. The exceptions are the 10-day period after contract award for filing a protest which requests a suspension hearing (6101.19(a)(2)), the 25-day period for commencement of the hearing on the merits of the protest (6101.19(a)(3)), and the 45-day period for deciding the protest (6101.29(b)). Time for filing any document or copy thereof with the Board expires when the Office of the Clerk of the Board closes on the last day on which such filing may be made.

6101.3 Service of papers [Rule 3].

(a) *On whom service must be made.* When a party sends a document to the Board it must at the same time send a copy to any other party in the manner provided in paragraph (b) of this section. Subpoenas (6101.20) and documents filed *in camera* (6101.12(h)) are exceptions to this requirement. Any papers required to be served on a party (except requests for discovery and responses thereto, unless ordered by the Board to be filed) shall be filed with the Board before service or within a reasonable time thereafter.

(b) *When service must be made*—(1) *Appeals, applications, and petitions.* When a party to an appeal, application, or petition files a document with the Board, it must serve a copy on the other party by mail or some other equally or more expeditious means of transmittal.

(2) *Protests.* When a protest is filed with the Board, the protester must serve a copy on the contracting officer whose decision or action is being protested by means reasonably calculated to effect delivery on the same day the protest is filed with the Board. When a party to a protest files with the Board any other document, it must serve a copy on every other party by means reasonably calculated to effect delivery within 1 day after the document is filed with the Board.

(c) *Proof of service.* Except when service is not required, a party sending a document to the Board must indicate to the Board that a copy has also been sent to every other party. This may be done by certificate of service, by the notation of a photostatic copy (cc:), or by any other means that can reasonably be expected to indicate to the Board that other parties have received a copy.

(d) *Failure to make service.* If a document sent to the Board by a party does not indicate that a copy has been served on every other party, the Board may return the document to the party that submitted it with such directions as it considers appropriate, or the Board may inquire whether a party has received a copy and note on the record the fact of inquiry and the response, and may also direct the party that submitted the document to serve a copy on any other party. In the absence of proof of service a document may be treated by the Board as not properly filed.

6101.4 The appeal file; protest file [Rule 4].

(a) *Submission to the Board by the contracting officer.* Within 30 calendar days from receipt of notice that an appeal has been filed or, in a protest, within 10 working days after its filing, or within such time as the Board may allow, the contracting officer shall file with the Board appeal or protest file exhibits consisting of all documents and other tangible things relevant to the claim or protest and to the contracting officer's decision which has been appealed or protested, including:

(1) The contracting officer's decision, if any, from which the appeal or protest is taken;

(2) The contract, if any, including amendments, specifications, plans, and drawings;

(3) All correspondence between or among the parties that is relevant to the appeal or protest, including the written claim or claims that are the subject of the appeal, and evidence of their certification, if any;

(4) Affidavits or statements of any witnesses on the matter in dispute or under protest and transcripts of any testimony taken before the filing of the notice of appeal or protest;

(5) All documents and other tangible things on which the contracting officer relied in making the decision or in taking the action protested, including a copy of the agency procurement request, the delegation of procurement authority, if any, and any correspondence relating thereto;

(6) The abstract of bids, if any;

(7) In a protest, a copy of the solicitation, protester's bid or proposal, and, if bid opening has occurred and no contract has been awarded, a copy of any bid relevant to the protest;

(8) In a protest of a negotiated procurement when no award has been made, a copy of any offer or proposal being considered for award and which is relevant to the protest (ordinarily, these documents will be submitted under a protective order issued by the Board); and

(9) Any additional existing evidence or information deemed necessary to determine the merits of the appeal or protest.

The contracting officer shall serve a copy of the appeal or protest file on all parties at the same time that the contracting officer files it with the Board, except that (i) the contracting officer need not serve on any party those documents furnished the Board *in camera* pursuant to 6101.12(h) and (ii) the contracting officer shall serve documents submitted under protective order only on those individuals who have been granted access to such documents by the Board. However, the contracting officer must serve on all parties a list identifying the specific documents filed with the Board, giving sufficient details necessary for their recognition. The list must not reveal the number and identity of the offerors whose proposals are filed in *in camera* and should include an identifying statement, e.g., "proposal(s) being considered for award." This list must also be filed with the Board as an exhibit to the appeal or protest file.

(b) *Submission to the Board by any other party.* Within 30 calendar days after filing of the respondent's appeal file exhibits, within 5 working days after receipt of the respondent's protest file exhibits, or within such time as the Board may allow, any other party shall file with the Board for inclusion in the appeal or protest file documents or other tangible things relevant to the appeal or protest that have not been submitted by the contracting officer. Any other party shall serve a copy of its additional exhibits upon the respondent and every other party at the same time as it files them with the Board.

(c) *Submissions on order of the Board.* The Board may, at any time during the pendency of the appeal or protest, require any party to file other documents and tangible things as additional exhibits.

(d) *Organization of the appeal and protest files.* Appeal and protest file exhibits may be originals or true, legible, and complete copies. They shall be arranged in chronological order within each submission, earliest documents first; bound in a looseleaf binder on the left margin except where size or shape makes such binding impracticable; numbered; tabbed; and indexed. The numbering shall be consecutive, in whole arabic numerals

(no letters, decimals, or fractions), and continuous from one submission to the next, so that the complete file, after all submissions, will consist of one set of consecutively numbered exhibits. In addition, the pages within each exhibit shall be numbered consecutively unless the exhibit already is paginated in a logical manner. Consecutive pagination of the entire file is not required. The index should include the date and a brief description of each exhibit and shall indicate which exhibits, if any, have been filed with the Board *in camera* or under protective order or otherwise have not been served on every other party.

(e) *Lengthy or bulky documents.* The Board may waive the requirement to furnish other parties copies or duplicates of bulky, lengthy, or outsized documents submitted to the Board as exhibits.

(f) *Use of appeal or protest file as evidence.* All exhibits in the appeal or protest file are part of the record upon which the Board will render its decision, except for those as to which an objection has been sustained. Unless otherwise ordered by the Board, objection to any exhibit may be made at any time before the first witness is sworn or, if the appeal or protest is submitted on the record pursuant to 6101.11, at any time prior to or concurrent with the first record submission. The Board may enlarge the time for such objections and will consider an objection made during a hearing if the ground for objection could not reasonably have been earlier known to the objecting party. If an objection is sustained, the Board will so note in the record.

(g) *When appeal or protest file not required.* Upon motion of a party, the Board may postpone or dispense with the submission of any or all appeal or protest file exhibits.

6101.5 Filing cases; time limits for filing; docketing; notice of protest by contracting officer [Rule 5].

(a) *Filing cases.* Filing of a case occurs as provided 6101.1(b)(5).

(1) *Notice of appeal.* (i) A notice of appeal shall be in writing and should be signed by the appellant or by the appellant's attorney or authorized representative. If the appeal is from a contracting officer's decision, the notice of appeal should describe the decision in enough detail to enable the Board to differentiate that decision from any other; the appellant can satisfy this requirement by attaching to the notice of appeal a copy of the contracting officer's decision. If an appeal is taken from the failure of a contracting officer to issue a decision, the notice of appeal should describe in detail the claim that the contracting officer has failed to decide; the appellant can satisfy this requirement by attaching a copy of the written claim submission to the notice of appeal.

(ii) A written notice in any form, including the one specified in the appendix to this part, is sufficient to initiate an appeal. The notice of appeal should include the following information:

(A) The number and date of the contract;

(B) The name of the agency and the component thereof against which the claim has been asserted;

(C) The name of the contracting officer whose decision or failure to decide is appealed and the date of the decision, if any;

(D) A brief account of the circumstances giving rise to the appeal; and

(E) An estimate of the amount of money in controversy, if any and if known.

(iii) The appellant must send a copy of the notice of appeal to the contracting officer whose decision is appealed or, if there has been no decision, to the contracting officer before whom the appellant's claim is pending.

(2) *Petition.* (i) A petition shall be in writing and should be signed by the petitioner or by the petitioner's attorney or authorized representative. The petition should describe in detail the claim that the contracting officer has failed to decide; the contractor can satisfy this requirement by attaching to the petition a copy of the written claim submission.

(ii) The petition should include the following information:

(A) The number and date of the contract;

(B) The name of the agency and the component thereof against which the claim has been asserted; and

(C) The name of the contracting officer whose decision is sought.

(3) *Protest.* The form for a protest is the pleading prescribed in 6101.7(b)(2), which must be filed with the Board, with a copy to the contracting officer as prescribed in 6101.3(b)(2). A protest may not be filed with the Board by an interested party who has proceeded with a protest of the same procurement at the GAO.

(4) *Intervention.* Intervention as a party in a protest is permitted, as follows:

(i) *Notice of intervention by intervenor of right.* An intervenor of right may intervene in a protest by filing a notice of intervention with the Board and serving copies upon all known parties, including any intervening parties. It shall be the responsibility of the intervenor to contact the Board or the respondent to obtain any information it requires for filing its notice of intervention and for serving it upon other parties. The notice shall set forth the name, address, telephone number, and facsimile machine number of the person signing the notice, the nature of the party's direct economic interest that would be affected by the award of the contract or by failure to award the contract, the party's statement of position regarding each issue of protest, and any other grounds for protest or defenses to the protest. All new grounds must be fully described in accordance with 6101.7(b)(2)(v) and must be timely asserted as provided in paragraph (b)(3) of this section. Receipt of such notice will be acknowledged by the Board, and it shall be the responsibility of the intervenor to contact the Board to ascertain the status of the protest, including the time and place of any hearings or other proceedings.

(ii) *Motion to intervene by intervening agency.* The Board may permit an intervening agency, upon motion timely filed pursuant to paragraph (b)(4) of this section, to intervene in a protest, provided that the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

(iii) *Motion to intervene by permissive intervenor.* The Board may permit any entity defined in 6101.1(b)(9), upon motion timely filed pursuant to paragraph (b)(4) of this section, to intervene in a protest. Such entity is eligible to intervene only on the issues already under protest and only if its participation will not unduly delay or prejudice the rights of the original parties. This limited participation may affect the movant's rights of discovery and cross-examination and involvement in any hearing or settlement of the protest. A permissive intervenor will not be permitted to elect a hearing (6101.9). A motion to intervene must include the information described in paragraph (a)(4)(i) of this section, and must be served upon all parties.

(5) *Application.* An application for costs shall meet all requirements specified in 6101.35(c).

(6) *Other participation.* The Board may, in its discretion, permit an entity to participate in a case in a special or limited way, such as filing an *amicus curiae* brief.

(b) *Time limits for filing appeals, petitions, protests, interventions, and applications*—(1) *Appeals.* (i) An appeal from a decision of a contracting officer

shall be filed no later than 90 calendar days after the date the appellant receives that decision.

(ii) An appeal may be filed with the Board should the contracting officer fail or refuse to issue a timely decision on a claim submitted in writing, properly certified if required.

(2) *Petitions.* A contractor may file with the Board a petition that the Board direct a contracting officer to issue a written decision on a claim.

(3) *Protests.* A protest will be considered by the Board if it includes the information required by 6101.7(b)(2) and is timely filed.

(i) A ground of protest based upon alleged improprieties in any type of solicitation which are apparent before bid opening or the closing time for receipt of initial proposals shall be filed before bid opening or the closing time for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated therein must be protested no later than the next closing time for receipt of proposals following the incorporation.

(ii) A ground of protest, other than one covered in paragraph (b)(3)(i) of this section, shall be filed no later than 10 working days after the basis for the ground of protest is known or should have been known, whichever is earlier.

(iii) If a party initially files a protest with an agency within the time limits prescribed in paragraphs (b)(3)(i) and (ii) of this section, it may file a protest with the Board raising the same ground(s) not later than 10 working days after formal notification, or actual or constructive knowledge, of initial adverse agency action.

(iv) A protest which is timely under this section but is filed more than 10 calendar days after contract award will not be subject to the procedure in 6101.19 for suspension hearing and decision.

(4) *Intervention.* Any intervenor of right or intervening agency receiving notice of a protest as provided in paragraph (d) of this section may, by intervening within 4 working days after receipt of notice, participate fully as a party to a protest. When such a party intervenes, it may raise at the time it files its notice or motion any new ground concerning the protested procurement, provided that the new ground is timely raised under paragraph (b)(3) of this section and further that the notice or motion complies fully with the pertinent requirements of paragraph (a)(3) of this section. An intervenor of right or an intervening agency may also file a motion to intervene within 4 working days of receipt of an amendment to the protest which raises a new ground. Such intervention shall be limited to the newly raised ground.

(5) *Applications.* An application for costs shall be filed within 30 calendar days of a final disposition in the underlying appeal or protest, as provided in 6101.35(b).

(c) *Notice of docketing.* Notice of appeal, petitions, protests, and applications will be docketed by the Office of the Clerk of the Board, and a written notice of docketing will be sent promptly to all parties.

(d) *Notice of protest by contracting officer.* Within 1 working day after receipt of a copy of the protest, the contracting officer shall give oral or written notice of the protest: to all firms solicited who appear to be affected by the protest, if sealed bids or initial offers or proposals have not been opened; to all bidders or offerors, if no award has been made and bids have been opened or the date for receipt of initial proposals has passed; or, if award has been made, to the contractor and all bidders or offerors. This notice shall be provided to an officer, a managing agent, or the individual who has signed the bid or proposal. If the procuring entity is other than the GSA, notice shall also be given to the Director, Authorizations and Management Reviews Division (KMA) or the GSA official who delegated procurement authority to the entity. If the GSA is procuring on behalf of another agency, notice shall also be given by the contracting officer to the specific office of the agency for which GSA is conducting the procurement, and to the legal office with responsibility for Board protests involving that agency. If only written notice is provided under this paragraph it must be provided by means reasonably calculated to effect delivery within 1 working day after the copy of the protest is received by the contracting officer. If oral notice is given, it shall be confirmed in writing or by telegram or by electronic means on the same date the oral notice is provided. The contracting officer will confirm by written notification to the Board within 3 working days after receipt of the protest whether the requisite notice was provided and list all persons and agencies to whom such notice was given. This submission may be *in camera* or under protective order.

6101.6 Appearances; notice of appearance [Rule 6].

(a) *Appearances before the Board*—(1) *Appellant; petitioner; protester; applicant; intervenor.* Any appellant, petitioner, protester, applicant, or intervenor may appear before the Board by an attorney at law licensed to practice in a state, commonwealth, or territory of the United States, in the District of Columbia, or in a foreign country. An individual appellant, petitioner, protester, applicant, or intervenor may appear in his own behalf; a corporation, trust, or association may appear by one of its officers or by any other authorized employee; and a partnership may appear by one of its members or by any other authorized employee.

(2) *Respondent; intervening agency.* The respondent and any intervening agency may appear before the Board by an attorney at law licensed to practice in a state, commonwealth, or territory of the United States, in the District of Columbia, or in a foreign country. Alternatively, the respondent may appear by the contracting officer or by the contracting officer's authorized representative.

(b) *Notice of appearance.* Unless a notice of appearance is filed by some other person, the person signing the notice of appeal, petition, protest, application, notice of intervention, or motion to intervene shall be deemed to have appeared on behalf of the appellant, petitioner, protester, or intervenor, and the head of the respondent agency's or the intervening agency's litigation office shall be deemed to have appeared on behalf of the respondent. A notice of appearance in the form specified in the appendix to this part is sufficient.

(c) *Withdrawal of appearance.* Any person who has filed a notice of appearance and who wishes to withdraw from a case must file a motion stating the grounds for withdrawal. Any such motion shall, whenever possible, provide the name, address, telephone number, and facsimile machine number of the person who is proposed to succeed the movant in representing the party.

6101.7 Pleadings [Rule 7].

(a) *Pleadings required and permitted.* Except as the Board may otherwise order, the Board requires the submission of a complaint or a protest and an answer. In appropriate circumstances, the Board may order or permit a reply to an answer.

(b) *Complaint; protest*—(1) *Complaint.* No later than 30 calendar days after the docketing of the appeal, the appellant shall file with the Board a complaint setting forth its claim or claims in simple, concise, and direct terms. The complaint should set forth the factual basis of the claim or claims, with appropriate reference to the

contract provisions, and should state the amount in controversy, or an estimate thereof, if any and if known. No particular form is prescribed for a complaint, and the board may designate the notice of appeal, a claim submission, or any other document as the complaint, either on its own initiative or on request of the appellant.

(2) *Protest.* A protest is commenced by filing it with the Board. The initial filing in a protest shall be in writing and signed by the protester or by the protester's attorney or authorized employee. It shall include:

(i) The name, address, telephone number, and facsimile machine number of the person signing the protest;

(ii) The number and date of the solicitation and the date for submission of sealed bids or initial proposals;

(iii) If a contract has been awarded, the number and date of the contract, and to whom awarded (if known);

(iv) The name and component of the agency or agencies involved, and the name of the contracting officer whose decision the Board is being asked to review;

(v) A simple, concise, and direct statement of the grounds for protest;

(vi) Citations to provisions of statute, regulation, or the delegation of procurement authority that the protester alleges were violated;

(vii) A statement of facts establishing that the protest complies with the timeliness requirements of 6101.5(b)(3); and

(viii) If a hearing is sought to determine whether procurement authority should be suspended, a specific request for such a hearing.

A protest timely filed which does not include the information required by this action will not be considered unless it is timely amended as permitted by paragraph (f)(2)(i) of this section.

(c) *Answer*—(1) *Appeal answer.* No later than 30 calendar days after the filing of the complaint or of the Board's designation of a complaint, the respondent shall file with the Board an answer setting forth simple, concise, and direct statements of its defenses to the claim or claims asserted in the complaint, as well as any affirmative defenses it chooses to assert. A dispositive motion or a motion for a more definite statement may be filled in lieu of the appeal answer only with the permission of the Board. If no answer is timely filed, the Board may enter a general denial, in which case the respondent may thereafter amend the answer to assert affirmative defenses only by leave of the Board and as other wise prescribed by paragraph (f)(1) of this section. The Board will inform the parties when it enters a general denial on behalf of the respondent.

(2) *Protest answer.* No later than 10 working days after the filing of the protest, the respondent shall file its answer with the Board setting forth its defenses to the protest, and its findings, actions, and recommendations in the matter. A dispositive motion or a motion for a more definite statement may not be filed in lieu of the protest answer.

(d) *Reply to an answer or response to a notice of intervention or motion to intervene.* If the Board orders or permits a reply to an answer or a response to a notice of intervention or motion to intervene, it shall be filed as directed by the Board.

(e) *Modifications to requirement for pleadings.* If the appellant has elected the small claims procedure provided by 6101.13 or the accelerated procedure provided by 6101.14, the submission of pleadings shall be governed by the applicable rule.

(f) *Amendment of pleadings*—(1) *Appeals.* Each party to an appeal may amend its pleadings once without leave of the Board at any time before a responsible pleading is filed; if the pleading is one to which no responsive pleading is permitted, such amendment may be made at any time within 20 calendar days after it is served or, in small claims proceedings under 6101.13, within 10 working days after it is served. The Board may permit the parties to amend pleadings further on conditions fair to both parties. If a response to the amended pleading was required by these rules or by an order of the Board, a response to the amended pleading shall be filed no later than 30 calendar days after the filing of the amended pleading or, in small claims proceedings, no later than 15 calendar days after the filing of the amended pleading. 6101.12(e) concerns amendments to pleadings to conform to the evidence.

(2) *Protests* (i) If a timely protest does not include all the information required by paragraph (b)(2) of this section, the Board may, in its discretion, so inform the protester and grant it leave to amend the protest to supply the missing information required by paragraphs (b)(2) (i), (ii), (iii), (iv) and (vi) of this section. A protest may be amended to include an additional ground of protest only if the amendment is filed in writing with the Board and served upon the contracting officer within the time limits of 6101.5(b)(3). Enlargement of time (6101.2(b)) will not be granted to comply with this requirement. As to any other information required in paragraph (b)(2) of this section, the Board will ordinarily grant such additional time for the filing of an amendment to the protest as is reasonable and fair in the circumstances. Except for purposes of determining the timeliness of the initial filing, the filing date of a protest which is amended by leave of the Board shall be the date of the filing of the amendment.

(ii) The notice of intervention or motion to intervene provided for in 6101.5(a)(4) may not be amended after the time limits set in 6101.5(b)(4) for filing such notice or motion.

6101.8 Motions [Rule 8].

(a) *How motions are made.* Motions may be oral or written. A written motion shall indicate the relief sought and, either in the text of the motion or in an accompanying legal memorandum, the grounds therefor. In addition, a motion for summary relief shall comply with the requirements or paragraph (g) of this section. 6101.25 prescribes the form and content of legal memoranda. Oral motions shall be made on the record and in the presence of the other party.

(b) *When motions may be made.* A motion filed in lieu of an answer pursuant to 6101.7(c)(1) shall be filed no later than the date on which the answer is required to be filed or such later date as may be established by the board. Any other dispositive motion shall be made as soon as practicable after the grounds therefor are known, except that all dispositive motions in a protest shall be filed no later than 15 calendar days after the filing of the protest. Any other motion shall be made promptly or as required by these rules.

(c) *Dispositive motions.* The following dispositive motions may properly be made before the Board:

(1) Motions to dismiss for lack of jurisdiction or for failure to sate a claim upon which relief can be granted or for failure to state a valid basis for protest;

(2) Motions to dismiss for failure to prosecute;

(3) Motions for summary relief (analogous to summary judgment);

(4) Motions to dismiss a protest which is frivolous or untimely filed; and

(5) Any other motion to dismiss with prejudice.

(d) *Other motions.* Other motions may be made in good faith and in proper form.

(e) *Jurisdictional questions.* The Board may at any time consider the issue of its jurisdiction to decide a case. When all facts touching upon the Board's jurisdiction are not of record, or in other appropriate circumstances, a decision on a jurisdictional question may be deferred pending a hearing on the

merits or the filing of record submissions.

(f) *Procedure.* Unless otherwise directed by the Board, a party may respond to a written motion other than a motion pursuant to 6101.30, 6101.31, 6101.32, or 6101.33 at any time within 3 working days after the filing of the motion in a protest, and within 20 calendar days after the filing of the motion in any other kind of case. Responses to motions pursuant to 6101.30, 6101.31, 6101.32, or 6101.33 may be made only as permitted or directed by the Board. The Board may permit hearing or oral argument on written motions and may require additional submissions from any of the parties. Procedure on oral motions made at hearing shall be determined as necessary in the course of their consideration.

(g) *Motions for summary relief.* (1) A motion for summary relief should be filed only when a party believes that based upon uncontested material facts, it is entitled to relief in whole or in part as a matter of law. A motion for summary relief should be filed as soon as feasible, to allow the Board to rule on the motion in advance of a scheduled hearing date.

(2) With each motion for summary relief, there shall be served and filed a separate document titled Statement of Uncontested Facts containing in separately numbered paragraphs all of the material facts upon which the moving party bases its motion as to which the moving party contends there is no genuine issue. This statement shall include references to the supporting affidavits or declarations and documents, if any, and to the 6101.4 appeal or protest file exhibits relied upon to support such statement.

(3) An opposing party shall file with its opposition (or cross-motion) a separate document titled Statement of Genuine Issues. This document shall identify, by reference to specific paragraph numbers in the moving party's Statement of Uncontested Facts, those facts as to which the opposing party claims there is a genuine issue necessary to be litigated. An opposing party shall state the precise nature of its disagreement and give its version of the facts, supported by citations to the supporting affidavits and documents, if any, and to the 6101.4 appeal or protest file exhibits relied upon to support the existence of a genuine dispute. An opposing party may also file a Statement of Uncontested Facts as to any relevant matters not covered by the moving party's statement.

(4) When a motion for summary relief is made and supported as provided in this section, an opposing party may not rest upon the mere allegations or denials of its pleadings, but the opposing party's response, by affidavits or as otherwise provided by this section, must set forth specific facts showing that there is a genuine issue of material fact. If the adverse party does not so respond, summary relief, if appropriate, shall be entered against the adverse party. For good cause shown, if an opposing party cannot present facts essential to justify its opposition, the Board may defer ruling on the motion to permit affidavits to be obtained or depositions to be taken or other discovery to be conducted, or may make such other order as is just.

(h) *Effect of pending motion.* Except as this part provides or the Board may order, a pending motion shall not excuse the parties from proceeding with the appeal or protest in accordance with this part and the orders and directions of the Board.

6101.9 Election of hearing or record submission [Rule 9].

Each party shall inform the Board, in writing, whether it elects a hearing or submission of its case on the record pursuant to 6101.11. Such an election may be filed at any time unless a time for filing is prescribed by the Board. A party electing to submit its case on the record pursuant to 6101.11 may also elect to appear at a hearing solely to cross-examine any witness presented by an opposing party, provided that the Board is informed of that party's intention within 10 working days of its receipt of notice of the election of hearing by another party. If a hearing is elected, the election should state where and when the electing party desires the hearing to be held and should explain the reasons for its choices. A hearing will be held if one of the parties elects one. If a party's decision whether to elect a hearing is dependent upon the intentions of another party or parties, it shall consult with such other party or parties before filing its election. If there is to be a hearing, it will be held at a time and place prescribed by the Board after consultation with the party or parties electing the hearing. The record submissions from a party that has elected to submit on the record shall be due as provided in 6101.11.

6101.10 Conferences; conference memorandum; prehearing order; prehearing and presubmission briefs [Rule 10].

(a) *Conferences.* The Board may convene the parties in conference, either by telephone or in person, for any purpose. In protests, a conference will ordinarily be held within 6 working days after the filing of the protest. The conference may be stenographically or electronically recorded, at the discretion of the Board. Matters to be considered and actions to be taking at a conference may include:

(1) Simplifying, clarifying, or severing the issues;

(2) Stipulations, admissions, agreements, and rulings to govern the admissibility of evidence, understanding on matters already of record, or other similar means of avoiding unnecessary proof;

(3) Plans, schedules, and rulings to facilitate discovery;

(4) Limiting the number of witnesses and other means of avoiding cumulative evidence;

(5) Stipulations or agreements disposing of matters in dispute; or

(6) Ways to expedite disposition of the case or to facilitate settlement of the dispute, including, if the parties and the Board agree, the use of alternative dispute resolution techniques, such as mediation, minitrials, and summary hearings.

(b) *Conference memorandum.* The Board may prepare a memorandum of the results of a conference or issue an order reflecting any actions taken, or both. Any memorandum or order so issued shall be placed in the record of the case. A copy of each memorandum will be sent to each party, and each party shall have 5 working days after receipt of the memorandum to object to the memorandum to object to the substance of it.

(c) *Prehearing order.* The Board may issue a prehearing or presubmission order to govern the proceedings in a case.

(d) *Alternative dispute resolution.* If alternative dispute resolution (ADR) is agreed to by the parties and the Board, a "Board Neutral" (either a judge or an attorney employed by the Board) will be appointed by the chairman of the Board or a designee to conduct the agreed upon proceedings. Alternatively, the parties may request that the panel chairman serve as the Board Neutral, in which case, if the ADR is unsuccessful, the panel chairman will retain the case. The panel chairman may suspend proceedings for a short period of time while the parties and the Board attempt to resolve the dispute, but the use of an ADR technique will not toll the relevant statutory time limit for deciding the case. This procedure is not intended to preclude use by the parties of other ADR techniques that do not require direct Board involvement.

(e) *Prehearing or presubmission briefs.* A party may, by leave of the Board, file a prehearing or presubmission brief at any time before

the hearing or upon or before the date on which first record submissions are due.

6101.11 Submission on the record without a hearing [Rule 11].

(a) *Submission on the record.* A party may elect to submit its case on the record without a hearing. A party submitting its case on the record may include in its written record submission or submissions:

(1) Any relevant documents or other tangible things it wishes the Board to admit into evidence;

(2) Affidavits, depositions, and other discovery materials that set forth relevant evidence; and

(3) A brief or memorandum of law.

The Board may require the submission of additional evidence or briefs and may order oral argument in a case submitted on the record.

(b) *Time for submission.* (1) If all parties have elected to submit the case on the record, the Board will issue an order prescribing the time for initial and, if appropriate, reply record submissions.

(2) If at least one party has elected a hearing and any other party has elected to submit its case on the record, any party submitting on the record shall make its initial submission no later than the commencement of the hearing or at an earlier date if the Board so orders, and a further submission in the form of a brief at the time for submission of posthearing briefs. The Board will accept a further record submission in the form of a reply brief if a party that attended the hearing is permitted to submit a reply brief; such a record submission will be due at the same time as the reply brief of the party or parties that attended the hearing. Submission of record submissions in the form of briefs is governed by 6101.25.

(c) *Objections to evidence.* Unless otherwise directed by the Board, objections to evidence (other than the appeal or protest file and supplements thereto) in a record submission may be made within 3 working days after the filing of the submission in a protest, and within 10 working days after the filing of the submission in any other kind of case. Replies to such objections, if any, may be made within 2 working days after the filing of the objection in a protest, and within 10 working days after the filing of the objection in any other kind of case. The Board may rule on such objections in its opinion deciding the merits or otherwise disposing of the case.

6101.12 Record of Board proceedings [Rule 12].

(a) *Composition of the record for decision.* The record upon which any decision of the Board will be rendered consists of:

(1) The notice of appeal, petition, protest, or application;

(2) Appeal or protest file exhibits other than those as to which an objection has been sustained;

(3) Hearing exhibits other than those as to which an objection has been sustained;

(4) Pleadings;

(5) Motions and responses thereto;

(6) Memoranda, orders, rulings, and directions to the parties issued by the Board;

(7) Documents and other tangible things admitted in evidence by the Board;

(8) Written transcripts or electronic recordings of proceedings;

(9) Stipulations and admissions by the parties;

(10) Depositions, or parts thereof, received in evidence;

(11) Written interrogatories and responses received in evidence;

(12) Briefs and memoranda of law; and

(13) Anything else that the Board may designate.

All other papers and documents in a case are part of the administrative record of the proceedings. The administrative record shall include file and hearing exhibits offered but not received in evidence in a case; it may also include correspondence with and among the parties, and depositions, interrogatories, offers of proof contained in the transcript, and other documents that are not part of the record for decision.

(b) *Time for entry into the record.* Except as the Board may otherwise order, nothing other than posthearing briefs will be received into the record after a hearing is completed. In cases submitted on the record without a hearing, nothing will be received into the record after the time for filing of the last record submission. Briefs will be due as provided in 6101.25(b).

(c) *Closing of the record.* Except as the Board may otherwise order, no proof shall be received in evidence after a hearing is completed or, in cases submitted on the record without a hearing, after notice by the Board to the parties that the record is closed and that the case is ready for decision.

(d) *Notice that the case is ready for decision.* The Board will give written notice to the parties when the record is closed and the case is ready for decision.

(e) *Amendments to conform to the evidence.* When issues within the proper scope of a case, but not raised in the pleadings, have been raised without objection or with permission of the Board at a hearing (see 6101.21h)) or in record submissions, they shall be treated in all respects as if they had been raised in the pleadings. The Board may formally amend the pleadings to conform to the proof or may order that the record be deemed to contain pleadings so amended.

(f) *Enlargement of the record.* The Board may at any time require or permit enlargement of the record with additional evidence and briefs. It may reopen the record to receive additional evidence and oral argument at a hearing.

(g) *Inspection of the record of proceedings; release of any paper, document, or tangible thing prohibited.* Except for any part thereof that is subject to a protective order or deemed an *in camera* submission, the record of proceedings in a case shall be made available at the office of the Board during the Board's normal working hours, as soon as practicable given the demands on the Board of processing the subject case and other cases. Except as provided in 6101.23(c) and 6101.37(d), no paper, document, or tangible thing which is part of the record of proceedings in a case may be released from the offices of the Board. Copies may be obtained by any person as provided in 6101.38(d). If such inspection or copying involves more than minimal costs to the Board, reimbursement will be required.

(h) *Protected and in camera submissions.* (1) a party may by motion request that the Board receive and hold materials under conditions that would limit access to them on the ground that such documents are privileged or confidential, or sensitive in some other way. The moving party must state the grounds for such limited access. The Board may also determine on its own initiative to hold materials under such conditions. The manner in which such materials will be held, the persons who shall have access to them, and the conditions (if any) under which such access will be allowed will be specified in an order of the Board. If the materials are held under such an order, they will be part of the record of the case. If the Board denies the motion, the materials may be returned to the moving party. If that party asks, however, that the materials be placed in the administrative record, in camera, for the purpose of possible later review of the Board's denial, the Board will comply with the request.

(2) A party may also ask, or the Board may direct, that testimony be received under protective order or in camera. The procedures under paragraph (h)(1) of this section shall be followed with respect to such request or direction.

6101.13 Small claims procedures in appeals [Rule 13].

(a) *Election.* (1) The small claims procedure is available solely at the appellant's election, and only when there is a monetary amount in dispute and that amount is $10,000 or less. Such election shall be made no later than 30 calendar days after the appellant's receipt of the agency answer, unless then panel chairman enlarges the time for good cause shown.

(2) At the request of the Government, or on its own initiative, the Board may determine whether the amount in dispute is greater than $10,000, such that the election is inappropriate. The Government shall raise any objection to the election no later than 10 working days after receipt of a notice of election.

(b) *Decision.* The panel chairman may issue a decision, which may be in summary form, orally or on writing. A decision which is issued orally shall be reduced to writing; however, such a decision takes effect at the time it is rendered, prior to being reduced to writing. A decision shall be final and conclusive and shall not be set aside except in case of fraud. A decision shall have no value as precedent.

(c) *Procedure.* Promptly after receipt of the appellant's election of the small claims procedure, the Broad shall establish a schedule of proceedings that will allow the timely resolution of the appeal. Pleadings, discovery, and other prehearing activities may be restricted or eliminated.

(d) *Time of decision.* Whenever possible, the panel chairman shall resolve an appeal under this procedure within 120 calendar days from the Board's receipt of the election. The time for processing an appeal under this procedure may be extended if the appellant has not adhered to the established schedule. Either party's failure to abide by the Board's schedule may result in the Board drawing evidentiary inferences adverse to the party at fault.

6101.14 Accelerated procedure in appeals [Rule 14].

(a) *Election.* (1) The accelerated procedure is available solely at the appellant's election, and only when there is a monetary amount in dispute and that amount is $50,000 or less. Such election shall be made no later than 30 calendar days after the appellant's receipt of the agency answer, unless the panel chairman enlarges the time for good cause shown.

(2) At the request of the Government, or on its own initiative, the Board may determine whether the amount in dispute is greater than $50,000, such that the election is inappropriate. The Government shall raise any objection to the election no later than 10 working days after receipt of a notice of election.

(b) *Decision.* Each decision shall be rendered by the panel chairman with the concurrence of one of the other judges assigned to the panel; in the event the two judges disagree, the third judge assigned to the panel will participate in the decision.

(c) *Procedure.* Promptly after receipt of the appellant's election of the accelerated procedure, the Board shall establish a schedule of proceedings that will allow for the timely resolution of the appeal. Pleadings may be simplified, and discovery and other prehearing activities may be restricted or eliminated.

(d) *Time of decision.* Whenever possible, the panel chairman shall resolve an appeal under this procedure within 180 calendar days from the Board's receipt of the election. The time for processing an appeal under this procedure may be extended if the appellant has not adhered to the established schedule. Either party's failure to abide by the Board's schedule may result in the Board drawing evidentiary inferences adverse to the party at fault.

6101.15 General provisions governing discovery [Rule 15].

(a) *Discovery methods.* The parties may obtain discovery by one or more of the following methods:

(1) Depositions upon oral examination or written questions;

(2) Written interrogatories;

(3) Requests for production of documents or other tangible things; and

(4) Requests for admission.

(b) *Scope of discovery.* Except as otherwise limited by order of the Board in accordance with this part, the parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending case, whether it relates to the claim or defense of a party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) *Discovery limits.* The Board may limit the frequency or extent of use of the discovery methods set forth in this section if it determines that:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) The party seeking discovery has had ample opportunity by discovery in the case to obtain the information sought; or

(3) The discovery is unduly burdensome and expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake.

(d) *Conduct of discovery.* Parties may engage in discovery only to the extent the Board enters an order which either incorporates an agreed plan and schedule acceptable to the Board or otherwise permits such discovery as the moving party can demonstrate is required for the expeditious, fair, and reasonable resolution of the case and, in a protest, is consistent with the requirements of 6101.19(a)(3). Permissive intervenors and other persons granted limited rights of participation may be permitted rights of discovery in accordance with an order of the Board.

(e) *Discovery conference.* At any time after a case has been filed (ordinarily within 6 working days after the filing of a protest) upon request of a party or on its own initiative, the Board may hold an informal meeting or telephone conference with the parties to identify the issues for discovery purposes; establish a plan and schedule for discovery; set limitations on discovery, if any; and determine such other matters as are necessary for the proper management of discovery. The Board may include in the conference such other matters as it deems appropriate in accordance with 6101.10.

(f) *Discovery objections.* (1) In connection with any discovery procedure, the Board, on motion or on its own initiative, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(i) That the discovery not be had;

(ii) That the discovery may be had only on specified terms and conditions, including a designation of the time and place, or that the scope of discovery be limited to certain matters;

(iii) That discovery be conducted with no one present except persons designated by the Board;

(iv) That confidential information not be disclosed or that it be disclosed only in a designated way; and

(v) Such other matters as justice may require.

(2) Unless otherwise ordered by the Board, any objection to a discovery request must be filed within 2 working days after receipt in a protest, or within 15 calendar days after receipt in any other kind of case. A party shall fully respond to any discovery request to which it does not file a timely objection. The parties are required to make a good faith effort to resolve objections to discovery requests.

(3) A party receiving an objection to a discovery request, or a party which believes that another party's response to a discovery request is incomplete or entirely absent, may file a motion to compel a response, but such a motion must include a representation that the moving party has tried in good faith, prior to filing the motion, to resolve the matter informally. The motion to compel shall include a copy of each discovery request at issue and the response, if any.

(g) *Failure to make or cooperate in discovery; sanctions.* If a party fails (i) to appear for a deposition, after being served with a proper notice; (ii) to serve answers or objections to interrogatories submitted under 6101.17, after proper service of interrogatories; or (iii) to serve a written response to a request for inspection, production, and copying of any documents and things under 6101.17, the party seeking discovery may move the Board to impose appropriate sanctions under 6101.18.

(h) *Subpoenas.* A party may request the issuance of a subpoena in aid of discovery under the provision of 6101.20.

6101.16 Depositions [Rule 16].

(a) *When depositions may be taken.* Upon request of a party, the Board may order the taking of testimony of any person by deposition upon oral examination or written questions before an officer authorized to administer oaths at the place of examination. Attendance of witnesses may be compelled by subpoena as provided in 6101.20, and the Board may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order may designate the manner of recording, preserving, and filing the deposition and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may, nevertheless, arrange to have a stenographic transcription made at its own expense.

(b) *Depositions: time; place; manner of taking.* The time, place, and manner of taking depositions, including the taking of depositions by telephone, shall be as agreed upon by the parties or, failing such agreement, as ordered by the Board. A deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to him.

(c) *Use of depositions.* At a hearing on the merits or upon a motion or interlocutory proceeding, any part or all of a deposition, so far as admissible and as though the witness were then present and testifying, may be used against a party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by a party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated to testify on behalf of, a public or private corporation, partnership or association, or governmental agency, which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by a party for any purpose in its own behalf if the Board finds that:

(i) The witness is dead;

(ii) The attendance of the witness at the place of hearing cannot be reasonably obtained, unless it appears that the absence of the witness was procured by the party offering the deposition;

(iii) The witness is unable to attend or testify because of illness, infirmity, age, or imprisonment;

(iv) The party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(v) Upon request and notice, exceptional circumstances exist which make it desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to introduce any other part which in fairness ought to be considered with the part introduced.

(d) *Depositions pending appeal from a decision of the Board.* If an appeal has been taken from a decision of the Board, or before the taking of an appeal if the time therefor has not expired, the Board may allow the taking of depositions of witnesses to perpetuate their testimony for use in the event of further proceedings before the Board. In such case, the party that desires to perpetuate testimony may make a motion before the Board for leave to take the depositions as if the action was pending before the Board. The motion shall show:

(1) The names and addresses of the persons to be examined and the substance of the testimony which the moving party expects to elicit from each; and

(2) The reasons for perpetuating the testimony of the persons named.

If the Board finds that the perpetuation of testimony is proper to avoid a failure or a delay of justice, it may order the depositions to be taken and may make orders of the character provided for in 6101.15 and in this section. Thereupon, the depositions may be taken and used as prescribed in this part for depositions taken in actions pending before the Board. Upon request and for good cause shown, a judge may issue or obtain a subpoena, in accordance with 6101.20, for the purpose of perpetuating testimony by deposition during the pendency of an appeal from a Board decision.

6101.17 Interrogatories to parties; requests for admission; requests for documents [Rule 17].

Upon order from the Board permitting such discovery, a party may serve on another party written interrogatories, requests for admission, and requests for production of documents.

(a) *Written interrogatories.* Written interrogatories shall be answered separately in writing, signed under oath or accompanied by a declaration under penalty of perjury, and answered in a protest, within 5 working days after service, and in any other kind of case, within 30 calendar days after service. Objections shall be filed within the time limits set forth in 6101.15(f)(2). An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory may involve an opinion or contention that relates to fact or the application of law to fact, but the Board may order that such an interrogatory need not be answered until after designated discovery has been completed or until a conference has been held, or some other event has occurred.

(b) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of

the party upon which the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries thereof. Such specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(c) *Written requests for admission.* A written request for the admission of the truth of any matter, within the proper scope of discovery, that relates to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents, is to be answered in writing and signed in a protest, within 5 working days after service, and in any other kind of case, within 30 calendar days after service. Objections shall be filed within the time limits set forth in 6101.15(f)(2). Otherwise, the matter therein may be deemed to be admitted.

(d) *Written requests for production of documents.* A written request for the production, inspection, and copying of any documents and things shall be answered in a protest, within 5 working days after service, and in any other kind of case, within 30 calendar days after service. Objections shall be filed within the time limits set forth in 6101.15(f)(2).

(e) *Change in time for response.* Upon request of a party, or on its own initiative, the Board may prescribe a period of time other than that specified in this section.

(f) *Responses.* A party that has responded to written interrogatories, requests for admission, or requests for production of documents, upon becoming aware of deficiencies or inaccuracies in its original responses, or upon acquiring additional information or additional documents relevant thereto, shall, as quickly as practicable, and as often as necessary, supplement its responses to the requesting party with correct and sufficient additional information and such additional documents as are necessary to give a complete and accurate response to the request.

6101.18 Sanctions and other proceedings [Rule 18].

(a) *Standards.* All parties and their representatives, attorneys, and any expert/consultant retained by them or their attorneys, must obey directions and orders prescribed by the Board and adhere to standards of conduct applicable to such parties and persons. As to an attorney, the standards include the rules of professional conduct and ethics of the jurisdictions in which an attorney is licensed to practice, to the extent that those rules are relevant to conduct affecting the integrity of the Board, its process, and its proceedings. The Board will also look to voluntary professional guidelines in evaluating an individual's conduct.

(b) *Sanctions affecting cases.* When a party or its representative or attorney or any expert/consultant fails to comply with any direction or order issued by the Board (including an order to provide or permit discovery), or engages in misconduct affecting the Board, its process, or its proceedings, the Board may make such orders as are just, including the following:

(1) Taking the facts pertaining to the matter in dispute to be established for the purpose of the case in accordance with the contention of the party submitting discovery requests;

(2) Forbidding challenge of the accuracy of any evidence;

(3) Refusing to allow the disobedient party to support or oppose designated claims or defenses;

(4) Prohibiting the disobedient party from introducing in evidence designated documents or items of testimony;

(5) Striking pleadings or parts thereof, or staying further proceedings until the order is obeyed;

(6) Dismissing the case or any part thereof;

(7) Enforcing the protective order and disciplining individuals subject to such order for violation thereof, including disqualifying a party's representative, attorney, or expert/consultant from further participation in the case; or

(8) Imposing such other sanctions as the Board deems appropriate.

(c) *Denial of access to protected material for prior violations of protective orders.* The Board may in its discretion deny access to protected material to any person found to have previously violated the Board's protective order.

(d) *Disciplinary proceedings.* (1) In addition to the above procedures, the Board may discipline individual party representatives, attorneys, and experts/consultants for a violation of any board order or direction or standard of conduct applicable to such individual where the violation seriously affects the integrity of the Board's processes or proceedings. Sanctions may be public or private, and may include admonishment, disqualification from a particular matter, referral to an appropriate licensing authority, or such other action as circumstances may warrant.

(2) The Board in its discretion may suspend an individual from appearing before the Board as a party representative, attorney, or expert/consultant if, after affording such individual notice and an opportunity to be heard, a majority of the members of the full Board determines such a sanction is warranted.

6101.19 Hearings: scheduling; notice; unexcused absences; suspension decision [Rule 19].

(a) *Scheduling of hearings*—(1) *In general.* Hearings will be held at the time and place ordered by the Board and will be scheduled at the discretion of the Board. In scheduling hearings, the Board will consider the requirements of the rules in this part, the need for orderly management of the Board's caseload, and the stated desires of the parties as expressed in their elections filed pursuant to 6101.9 or otherwise. The time or place for hearing may be changed by the Board at any time.

(2) *Protest suspension hearing.* If an interested party in a protest filed either before or after contract award requests a hearing for the Board to determine whether to suspend procurement authority pending a decision on the merits of the protest, such hearing shall be held, whenever practicable, so that the determination whether to suspend will be made before bid opening or the closing date for receipt of initial proposals or, if bids have been opened or initial proposals received, before the anticipated award of the contract, and in any event no later than 10 calendar days after the filing of the protest. A request for a suspension hearing will be denied if the protest is filed more than 10 calendar days after contract award.

(3) *Protest hearing on merits.* Any hearing on the merits of a protest will commence no later than 25 working days after the filing of the protest.

(b) *Notice of hearing.* Notice of hearing will be by written order of the Board, except that it may be oral for a suspension hearing held under paragraph (a)(2) of this section. Notice of changes in the hearing schedule will also be by written order when practicable but may be oral in exigent circumstances. Except as the Board may otherwise order, each party that plans to attend the hearing in an appeal shall,

within 10 working days of receipt of (1) a written notice of hearing or (2) any notice of a change in hearing schedule stating that an acknowledgment is required, notify the Board in writing that it will attend the hearing. Acknowledgement of a notice of hearing in a protest may be written or oral and shall be given within such time as the notice prescribes.

(c) Unexcused absence from hearing. In the event of the unexcused absence of a party from a hearing, the hearing will proceed, and the absent party will be deemed to have elected to submit its case on the record pursuant to 6101.11.

(d) *Suspension decision.* The Board shall suspend the respondent's procurement authority, or a delegation thereof, pending a decision on the merits of the protest, unless the respondent establishes at hearing that: (1) absent suspension, contract award, if not already made, is likely to occur within 30 calendar days; and (2) urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Board. The decision regarding suspension will be by order of the panel chairman and may be oral, to be reduced to writing as soon as practicable.

6101.20 Subpoenas [Rule 20].

(a) *Voluntary cooperation in lieu of subponena.* Each party is expected to:

(1) Cooperate by making available witnesses and evidence under its control, when requested by another party, without issuance of a subpoena; and

(2) Secure voluntary attendance of third-party witnesses and production of evidence by third parties, when practicable, without issuance of a subpoena.

(b) *General.* Upon the written request of any party filed with the Office of the Clerk of the Board, or on the initiative of a judge, a subpoena may be issued that commands the person to whom it is directed to:

(1) Attend and give testimony at a deposition in a city or county where that person resides or is employed or transacts business in person or at another location convenient to that person that is specifically determined by the Board;

(2) Attend and give testimony at a hearing; and

(3) Produce the books, papers, documents, and other tangible things designated in the subpoena.

(c) *Request for subpoena.* A request for a subpoena shall state the reasonable scope and general relevance to the case of the testimony and of any documentary evidence sought. A request for a subpoena shall be filed at least 5 working days in a protest, or 15 calendar days in any other kind of case, before the testimony of a witness or documentary evidence is to be provided. The Board may, in its discretion, honor requests for subpoenas not made within these time limitations.

(d) *Form; issuance.* (1) Every subpoena shall be in the form specified in the appendix to this part. Unless a party has the approval of a judge to submit a subpoena in blank (in whole or in part), a party shall submit to the judge a completed subpoena (save the "Return on Service" portion). In issuing a subpoena to a requesting party, the judge shall sign the subpoena. The party to whom the subpoena is issued shall complete the subpoena before service.

(2) If the person subpoenaed is located in a foreign country, a letter rogatory or a subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781–1784.

(e) *Service.* (1) The party requesting a subpoena shall arrange for service. Service shall be made as soon as practicable after the subpoena has been issued.

(2) A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place. A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personal delivery of a copy to that person and tender of the fees for one day's attendance and the mileage allowed by 28 U.S.C. 1821 or other applicable law; however, where the subpoena is issued on behalf of the Government, money payments need not be tendered in advance of attendance.

(f) *Proof of service.* The person serving the subpoena shall make proof of service thereof to the Board promptly and in any event before the date on which the person served must respond to the subpoena. Proof of service shall be made by completion and execution and submission to the Board of the "Return on Service" portion of a duplicate copy of the subpoena issued by a judge. If service is made by a person other than a United States marshal or his deputy, that person shall make an affidavit as proof by executing the "Return on Service" in the presence of a notary.

(g) *Motion to quash or to modify.* Upon written motion by the person subpoenaed or by a party, made within 14 calendar days after service, but in any event not later than the time specified in the subpoena for compliance, the Board may (1) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown or (2) require the party in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed documentary evidence. Where circumstances require, the Board may act upon such a motion at any time after a copy has been served upon opposing parties.

(h) *Contumacy or refusal to obey a subpoena.* In a case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the Board shall apply to the court through the Attorney General of the United States for an order requiring the person to appear before the Board to give testimony, produce evidence or both. If a person fails to obey such an order, the court may punish that person for contempt of court.

6101.21 Hearing procedures [Rule 21].

(a) *Nature and conduct of hearings.* Except when necessary to maintain the confidentiality of protected material or testimony, or material submitted in camera, all hearings on the merits of cases shall be open to the public and conducted insofar as is convenient in regular hearing rooms. All other acts or proceedings may be done or conducted by the Board either in its offices or at other places.

(b) *Continuances; change of location.* Whenever practicable, a hearing will be conducted in one continuous session or a series of consecutive sessions at a single location. However, the Board may at any time continue the hearing to a future date and may arrange to conduct the hearing in more than one location. The Board may also continue a hearing to permit a party to conduct additional discovery on conditions established by the Board. In exercising its discretion to continue a hearing or to change its location, the Board will give due consideration to the same elements (set forth in 6101.19(a)) that it considers in scheduling hearings.

(c) *Availability of witnesses, documents, and other tangible things.* It is the responsibility of a party desiring to call any witness, or to use any document or other tangible thing as an exhibit in the course of a hearing, to ensure that whoever it wishes to call and whatever it wishes to use is available at hearing.

(d) *Enlargement of the record.* The Board may at any time during the

conduct of a hearing require evidence or argument in addition to that put forth by the parties.

(e) *Examination of witnesses.* Witnesses before the Board will testify under oath or affirmation. A party or the Board may obtain an answer from any witness to any question that is not the subject of an objection that the Board sustains.

(f) *Refusal to be sworn.* If a person called as a witness refuses to be sworn or to affirm before testifying, the Board may direct that witness to do so and, in the event of continued refusal, the Board may permit the taking of testimony without oath or affirmation. Alternatively, the Board may refuse to permit the examination of that witness, in which event it may state for the record the inferences it draws from the witness's refusal to testify under oath or affirmation. Alternatively, the Board may issue a subpoena to compel that witness to testify under oath or affirmation and, in the event of the witness's continued refusal to swear or affirm, may seek enforcement of that subpoena pursuant to 6101.20(h).

(g) *Refusal to answer.* If a witness refuses to answer a question put to him in the course of his testimony, the Board may direct that witness to answer and, in the event of continued refusal, the Board may state for the record the inferences it draws from the refusal to answer. Alternatively, the Board may issue a subpoena to compel that witness to testify and, in the event of the witness's continued refusal to testify, may seek enforcement of that subpoena pursuant to 6101.20(h).

(h) *Issues not raised by pleadings.* If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may nevertheless be admitted by the Board if it is within the proper scope of the case. If such evidence is admitted, the Board may grant the objecting party a continuance to enable it to meet such evidence. If such evidence is admitted, the pleadings may be amended to conform to the evidence, as provided by 6101.12(e).

(i) *Delay by parties.* If the Board determines that the hearing is being unreasonably delayed by the failure of a party to produce evidence, or by the undue prolongation of the presentation of evidence, it may, by written order or by ruling from the bench, prescribe a time or times within which the presentation of evidence must be concluded, establish time limits on the direct or cross-examination of witnesses, and enforce such order or ruling by appropriate sanctions.

6101.22 Admissibility and weight of evidence [Rule 22].

(a) *Admissibility.* Any relevant evidence may be received. The Board may exclude relevant evidence to avoid unfair prejudice, confusion of the issues, undue delay, waste of time, or needless presentation of cumulative evidence. Hearsay evidence is admissible unless the Board finds it unreliable or untrustworthy.

(b) *Federal Rules of Evidence.* As a general matter, and subject to the other provisions of this section, the Board will base its evidentiary rulings on the Federal Rules of Evidence.

(c) *Weight and credibility.* The Board will determine the weight to be given to evidence and the credibility to be accorded witnesses.

(d) *Submission of evidence in camera.* 6101.12(h) governs submissions *in camera.*

6101.23 Exhibits [Rule 23].

(a) *Marking of exhibits.* (1) Documents and other tangible things offered in evidence by a party will be marked for identification by the Board during the hearing or, if it is convenient for the Board and the parties, before the commencement of the hearing. They will be numbered consecutively as the exhibits of the party offering them.

(2) If a party elects to proceed on the record without a hearing pursuant to 6101.11, documentary evidence submitted by that party will be numbered consecutively by the Board as appeal or protest file exhibits.

(b) *Copies as exhibits.* Except upon objection sustained by the Board for good cause shown, copies of documents may be offered and received into evidence as exhibits, provided they are of equal legibility and quality as the originals, and such copies shall have the same force and effect as if they were the originals. If the Board so directs, a party offering a copy of a document as an exhibit shall have the original available at the hearing for examination by the Board and any other party. When the original of a document has been received into evidence as an exhibit, an accurate copy thereof may be substituted in evidence for the original by leave of the Board at any time.

(c) *Withdrawal of documentary exhibits and other papers.* With the permission of the Board, a party may remove an exhibit during the course of a proceeding. Otherwise, except as provided in 6101.37(d), no withdrawal of any papers in the Board's file is permitted. Inspection of the file at the Board's offices is permitted by 6101.12(g).

(d) *Disposition of physical exhibits.* Any physical (as opposed to documentary) exhibit may be disposed of by the Board at any time more than 90 calendar days after the expiration of the period for appeal from the decision of the Board, unless it has been earlier withdrawn by the party that submitted it.

6101.24 Transcripts of proceedings; corrections [Rule 24].

(a) *Transcripts.* Except as the Board may otherwise order, all hearings of appeals or petitions other than those under the small claims procedure prescribed by 6101.13, and all hearings in connection with protests, will be stenographically or electronically recorded and transcribed. Any other hearing or conference will be recorded or transcribed only by order of the Board. Copies or transcriptions of stenographic or electronic recordings not ordered to be transcribed by the Board will be furnished to the parties or other persons only on conditions prescribed by the Board, which may include the payment of the costs of copying or transcription. Each party is responsible for obtaining its own copy of the transcript if one is prepared.

(b) *Corrections.* Corrections to an official transcript will be made only when they involve errors affecting its substance. The Board may order such corrections on motion or on its own initiative, and only after notice to the parties giving them opportunity to object. Such corrections will ordinarily be made either by hand with pen and ink or by the appending of an errata sheet, but when no other method of correction is practicable the Board may require the reporter to provide substitute or additional pages.

6101.25 Briefs and memoranda of law [Rule 25].

(a) *Form and content of briefs and memoranda of law.* Briefs and memoranda of law shall be typewritten on standard size 8½ by 11-inch paper. Otherwise, no particular form or organization is prescribed. Posthearing briefs should, at a minimum, succinctly set forth (1) the facts of the case with citations to those places in the record where supporting evidence can be found and (2) argument with citations to supporting legal authorities. Memoranda of law should generally adhere as closely as practicable to the form and content of briefs.

(b) *Submission of posthearing briefs.* Except as the Board may otherwise order, posthearing briefs shall be filed in an appeal 30 calendar days after the Board's receipt of the transcript and in

a protest 5 working days after the Board's receipt of the transcript; reply briefs in an appeal, if filed, shall be filed 15 calendar days after the parties' receipt of the initial posthearing briefs. The Board will notify the parties of the date of its receipt of the transcript. In the event one party has elected a hearing and any other party has elected to submit its case on the record pursuant to 6101.11, the filing of record submissions in the form of briefs shall be governed by 6101.11.

6101.26 Consolidation; separate hearings; separate determination of liability [Rule 26].

(a) *Consolidation.* When cases involving common questions of law or fact are pending, the Board may:

(1) Order a joint hearing of any or all of the matters at issue in the cases;

(2) Order the cases consolidated; or

(3) Make such other orders concerning the proceedings therein as are intended to avoid unnecessary costs or delay.

(b) *Separate hearings.* The Board may order a separate hearing of any case or cases or of any claims or issues or number of claims or issues therein. The Board may enter appropriate orders or decisions with respect to any claims or issues that are heard separately.

(c) *Separate determinations of liability.* The Board may:

(1) Limit a hearing to those issues of law and fact relating to the right of a party to recover, reserving the determination of the amount of recovery, if any, for other proceedings; and

(2) In its decision of an appeal, irrespective of whether there is evidence in the record concerning the amount of recovery, and whether or not a stipulation or order has been made, reserve determination of the amount of recovery for other proceedings. In any instance in which the Board has reserved its determination of the amount of recovery for other proceedings, its decision on the question of the right to recover shall be final, subject to the provisions of 6101.30 through 6101.33.

6101.27 Stay or suspension of proceedings; dismissals in lieu of stay or suspension [Rule 27].

(a) *Stay of proceedings to obtain contracting officer's decision.* The Board may in its discretion stay proceedings to permit a contracting officer to issue a decision when an appeal has been taken from the contracting officer's alleged failure to render a timely decision.

(b) *Suspension for other cause.* The Board may suspend proceedings in a case for good cause. The order suspending proceedings will prescribe the duration of the suspension or the conditions on which it will expire. The order may also prescribe actions to be taken by the parties during the period of suspension or following its expiration.

(c) *Dismissal in lieu of stay or suspension.* When circumstances beyond the control of the Board prevent the continuation of proceedings in a case, the Board may, in lieu of issuing an order suspending proceedings, dismiss the case without prejudice to reinstatement. Such a dismissal may require reinstatement by a date certain or within a certain period of time after the occurrence of a specified event. If the order of dismissal does not otherwise provide, it will be subject to the provisions of 6101.28(b).

6101.28 Dismissals [Rule 28].

(a) *Generally.* A case may be dismissed by the Board on motion of any party. A case may also be dismissed for reasons cited by the Board in a show cause order to which response has been permitted. Every dismissal shall be with prejudice to reinstatement of the case unless a dismissal without prejudice has been requested by a party or specified in a show cause order.

(b) *Dismissal without prejudice.* When a case has been dismissed without prejudice to its reinstatement and no party has requested, within the period of time specified in this paragraph, that the case be reinstated, the case shall be deemed to have been dismissed with prejudice as of the expiration of 10 working days of the date of dismissal in a protest, 180 calendar days of the date of dismissal in any other kind of case, or such other period as the Board may prescribe.

(c) *Issuance of order.* An order of dismissal shall be issued by the panel of judges to which the case has been assigned if the motion is contested or if the Board is acting consequent to its own show cause order. An order of dismissal may be issued by the panel chairman alone if the motion to dismiss is not contested.

6101.29 Decisions [Rule 29].

(a) *Format; procedure.* Except as provided in 6101.19(d) (protest suspension decision) and 6101.13 (small claims procedure), decisions of the Board will be made in writing upon the record as prescribed in 6101.12. Each of the parties will be furnished a copy of the decision certified by the Office of the Clerk of the Board, and the date of the receipt thereof by each party will be established in the record.

(b) *Timing of protest decisions.* (1) A decision on the merits of a protest will be issued within 45 working days after the filing of the protest, unless the chairman of the Board determines that the specific and unique circumstances of the protest require a longer period. In that event, the Board shall issue a decision within the longer period determined by the chairman of the Board.

(2) In a protest, the Board ordinarily will, within the 45-day period applicable to the original protest, decide all issues, including those raised by amendment or intervention, that are necessary to the resolution of the case. The Board will whenever possible notify the parties prior to the originally scheduled hearing date, or date for record submission, if it believes that because of a new ground of protest raised by an amendment or by an intervention, the protest might not be decided within the original 45-day period.

6101.30 Full Board consideration [Rule 30].

(a) *Requests.* (1) A request for full Board consideration is not favored. Ordinarily, full Board consideration will be ordered only when (i) it is necessary to secure or maintain uniformity of Board decisions, or (ii) the matter to be referred is one of exceptional importance.

(2) A request for full Board consideration may be made by any party at any date on which is both (i) after the panel to which the case is assigned has issued its decision on a motion for reconsideration or relief from decision and (ii) within 10 working days after the date on which that party receives that decision. Any party making a request for full Board consideration shall state concisely in the motion the precise grounds on which the request is based.

(3) The full Board on its own may initiate consideration of a matter (i) at any time while the case is before the Board, (ii) no later than the last date on which any party may file a motion for reconsideration or relief from decision or order, or (iii) if such a motion is filed by a party, within 10 days after a panel has resolved it.

(b) *Consideration.* Promptly after such a request is made, a ballot will be taken among the judges; if a majority of them favors the request, the request will be granted. The result of the vote will promptly be reported by the Board through an order. The concurring or dissenting view of any judge who wishes to express such a view may issue at the time of such order or at any time thereafter.

(c) *Decisions.* If full Board consideration is granted, a vote shall be taken promptly on the pending matter.

After this vote is taken, the Board shall promptly, by order, issue its determination, which shall include the concurring or dissenting view of any judge who wishes to express such a view.

6101.31 Clerical mistakes [Rule 31].

Clerical mistakes in decisions, orders, or other parts of the record, and errors arising therein through oversight or inadvertence, may be corrected by the Board at any time on its own initiative or upon motion of a party on such terms, if any, as the Board may prescribe. During the pendency of an appeal to another tribunal, such mistakes may be corrected only with leave of the appellate tribunal.

6101.32 Reconsideration; Amendment of Decisions; New Hearings [Rule 32]

(a) *Grounds.* Reconsideration may be granted, a decision or order may be altered or amended, or a new hearing may be granted, for any of the reasons stated in 6101.33(a) and the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States. Reconsideration, or a new hearing, may be granted on all or any of the issues. Arguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration. On granting a motion for a new hearing, the Board may open the decision if one has been issued, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions and direct the entry of a new decision.

(b) *Procedure.* Any motion under this rule shall comply with the provisions of 6101.8 and shall set forth:

(1) The reason or reasons why the Board should consider the motion; and

(2) The relief sought and the grounds therefor.

If the Board concludes that the reasons asserted for its consideration of the motion are insufficient, it may deny the motion without considering the relief sought and the grounds asserted therefor. If the Board grants the motion, it will issue an appropriate order which may include directions to the parties for further proceedings.

(c) *Time for filing.* A motion for reconsideration, to alter or amend a decision or order, or for a new hearing shall be filed in an appeal or petition within 30 calendar days and in a protest or application within 7 working days after the date of receipt by the moving party of the decision or order. Not later than 30 calendar days after issuance of a decision or order, the Board may, on its own initiative, order reconsideration or a new hearing or alter or amend a decision or order for any reason that would justify such action on motion of a party.

(d) *Effect of motion.* A motion pending under this section does not affect the finality of a decision or suspend its operation.

6101.33 Relief from decision or order [Rule 33]

(a) *Grounds.* The Board may relieve a party from the operation of a final decision or order for any of the following reasons:

(1) Newly discovered evidence which could not have been earlier discovered, even through due diligence;

(2) Justifiable or excusable mistake, inadvertence, surprise, or neglect;

(3) Fraud, misrepresentation, or other misconduct of an adverse party;

(4) The decision has been satisfied, released, or discharged, or a prior decision upon which it is based has been reversed or otherwise vacated, and it is no longer equitable that the decision should have prospective application;

(5) The decision is void, whether for lack of jurisdiction or otherwise; or

(6) Any other ground justifying relief from the operation of the decision or order.

(b) *Procedure.* Any motion under this section shall comply with the provisions of 6101.8 and 6101.32(b), and will be considered and ruled upon by the Board as provided in 6101.32.

(c) *Time for filing.* Any motion under this section shall be filed as soon as practicable after the discovery of the reasons therefor, but in any event no later than 120 calendar days or, in protests and in appeals under the small claims procedure of 6101.13, no later than 30 calendar days after the date of the moving party's receipt of the decision or order from which relief is sought. In considering the timeliness of a motion filed under this section, the Board may consider when the grounds therefor should reasonably have been known to the moving party.

(d) *Effect of motion.* A motion pending under this section does not affect the finality of a decision or suspend its operation.

6101.34 Harmless error [Rule 34].

No error in the admission or exclusion of evidence, and no error or defect in any ruling, order, or decision of the Board, and no other error in anything done or omitted to be done by the Board will be a ground for granting a new hearing or for vacating, reconsidering, modifying, or otherwise disturbing a decision or order of the Board unless refusal to act upon such error will prejudice a party or work a substantial injustice. At every stage of the proceedings the Board will disregard any error or defect that does not affect the substantial rights of the parties.

6101.35 Award of costs [Rule 35]

(a) *Requests for costs.* An appropriate party in a proceeding before the Board may apply for an award of costs, including if applicable an award of attorney fees, under the Brooks Act, 40 U.S.C. 759(f), the Equal Access to Justice Act, 5 U.S.C. 504, or any other provision that may entitle that party to such an award, subsequent to the Board's decision in the proceeding. For purposes of this section, "decision" includes orders of dismissal resulting from settlement agreements that bring to an end the proceedings before the Board.

(b) *Time for filing.* A party seeking an award may submit an application no later than 30 calendar days after a final disposition in the underlying protest or appeal. In the case of a protest or appeal that is adjudicated, the Board's decision becomes final (for purposes of this section) when it is not appealed to the United States Court of Appeals for the Federal Circuit within the time permitted for appeal or, if the decision is appealed, when the time for petitioning the Supreme Court for certiorari has expired. In the case of a protest or appeal that is resolved as a result of settlement, the Board's disposition becomes final (for purposes of this section) after receipt by the applicant of the order granting or dismissing the protest or appeal.

(c) *Application requirements.* An application for costs shall:

(1) Identify the applicant and the protest or appeal for which costs are sought, and the amount being sought;

(2) Establish that all applicable prerequisites for an award have been satisfied, including a succinct statement of why the applicant is eligible for an award of costs;

(3) Be accompanied by an exhibit fully documenting any fees or expenses being sought, including the cost of any study, analysis, engineering report, test, project, or similar matter. The date and a description of all services rendered or costs incurred shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the particular services performed by specific date, the rate at which each fee has been computed, any expenses for which reimbursement is sought, and the

total amount paid or payable by the applicant on account of the sought-after costs. Except for claims for bid or proposal preparation, and in exceptional circumstances, all exhibits supporting applications for protest or appeal fees or expenses sought shall be publicly available. The Board may require the applicant to provide vouchers, receipts, or other substantiation for any costs claimed and/or to submit to an audit by the Government of the claimed costs; and

(4) Be signed by the applicant or an authorized officer, employee, or attorney of the applicant. The application shall also contain or be accompanied by a written verification under oath or affirmation, or declaration under penalty of perjury, that the information provided in the application is true and correct.

(d) *Proceedings.* (1) Within 30 calendar days after receipt by the respondent of an application under this section, the respondent may file an answer. The answer shall explain in detail any objections to the award requested and set out the legal and factual bases supporting the respondent's position.

(2) Further proceedings shall be held only by order of the Board and only when necessary for full and fair resolution of the issues arising from the application. Such proceedings shall be minimized to the extent possible and shall not include relitigation of the case on the merits. A request that the Board order further proceedings under this section shall describe the disputed issues and explain why additional proceedings are necessary to resolve those issues.

(e) *Decision.* Any award ordered by the Board shall be paid pursuant to 6101.36.

6101.36 Payment of Board awards [Rule 36].

(a) *Generally.* When permitted by law, payment of Board awards may be made in accordance with 31 U.S.C. 1304. Awards by the Board pursuant to the Equal Access to Justice Act shall be directly payable by the respondent agency over which the applicant has prevailed in the underlying appeal.

(b) *Conditions for payment.* Before a party may obtain payment of a Board award pursuant to 31 U.S.C. 1304, one of the following must occur:

(1) All parties must, by execution of a Certificate of Finality, waive their rights to relief under 6101.32 and 6101.33 and also their rights to appeal the decision of the Board; or

(2) The time for filing an appeal must expire.

(c) *Procedure for filing of certificates of finality.* Whenever the Board issues a decision or an order awarding a party any amount of money, it will attach to the copy of the decision sent to each party forms such as those illustrated in the appendix to this part. The conditions for payment prescribed in paragraph (b)(1) of this section are satisfied if each of the parties returns a completed and duly executed copy of this form to the Board. When the form is executed on behalf of an appellant or appropriate interested party by an attorney or other representative, proof of signatory authority shall also be furnished. Upon receipt of completed and duly executed Certificates of Finality from the parties, the Board will forward a copy of each such certificate (together with proof of signatory authority, if required) and a certified copy of its decision to the United States General Accounting Office to be certified for payment.

(d) *Procedure in absence of certificate of finality.* When one or more of the parties fails to submit a duly executed Certificate of Finality, but the conditions for payment have been satisfied as provided in paragraph (b)(2) of this section, any party to which an award has been made may file a written request that the Board forward its decision to the United States General Accounting Office for payment. Thereupon, the Board will forward a copy of that request and a certified copy of its decision to the United States General Accounting Office to be certified for payment.

(e) *Stipulated award.* When an appeal is settled, the parties may file with the Board a stipulation setting forth the amount of the award and stating (1) that they will not seek reconsideration of, or relief, from the Board's decision and (2) that they will not appeal the decision. The Board will adopt the parties' stipulation by decision. The Board's decision under this paragraph is an adjudication of the case on the merits.

6101.37 Record on review of a Board Decision [Rule 37].

(a) *Record on review.* When a party has appealed a Board decision to the United States Court of Appeals for the Federal Circuit, the record on review shall consist of the decision sought to be reviewed, the record before the Board as described in 6101.12, and such other material as may be required by the Court of Appeals.

(b) *Notice.* At the same time a party seeking review of a Board decision files a notice of appeal, that party shall provide a copy of the notice to the Board.

(c) *Filing of certified list of record materials.* Promptly after service upon the Board of a copy of the notice of appeal of a Board decision, the Office of the Clerk of the Board shall file with the Clerk of the United States Court of Appeals for the Federal Circuit a certified list of all documents, transcripts of testimony, exhibits, and other materials constituting the record, or a list of such parts thereof as the parties may designate, adequately describing each. The Board will retain the record and transmit any part thereof to the court upon the court's order during the pendency of the appeal.

(d) *Request by attorney of record to review record.* When a case is on appeal, an attorney of record may request permission from the Board to sign out the record on appeal to review and copy, for a reasonable period of time, if the attorney is unable to gain access to the record from another source.

6101.38 Office of the Clerk of the Board [Rule 38].

(a) *Open for the filing of papers.* The Office of the Clerk shall receive all papers submitted for filing, and shall be open for this purpose from 8:00 a.m. to 4:30 p.m., Eastern Time, on each day that is not a Saturday, Sunday, Federal holiday, a day on which the Office is required to close earlier than 4:30 p.m., or a day on which the Office does not open at all, as in the case of inclement weather.

(b) *Decisions and orders.* The Office of the Clerk shall keep in such form and manner as the Board may prescribe a correct copy of each decision or order of the Board subject to review and any other order or decision which the Board may direct to be kept.

(c) *Docket.* The Office of the Clerk shall keep a docket on which shall be entered the title and nature of all cases brought before the Board, the names of the persons filing such cases, the names of the attorneys or other persons appearing for the parties, and a record of all proceedings.

(d) *Copies and certifications of papers.* Upon the request of any person, copies of papers and documents in a case may be provided by the Office of the Clerk. If making such copies involves more than minimal costs to the Board, reimbursement will be required. When required, the Office of the Clerk will certify copies of papers and documents as a true record of the Board. Except as provided in 6101.23(c) and 6101.37(d), the Office of the Clerk will not release original records in its possession to any person.

6101.39 Seal of the Board [Rule 39].

The Seal of the Board shall be a circular boss, the center portion of which shall depict the Seal of the General Services Administration. The outer margin of the seal shall bear the legend "Board of Contract Appeals." The Seal shall be the means of authentication of all records, notices, orders, dismissals, opinions, subpoenas, and certificates issued by the Board.

6101.40 Forms [Rule 40].

The forms contained in the appendix to this part are sufficient under this part and are intended to indicate the simplicity and brevity of statement which this part contemplates. The subpoena form is a required form, and it may not be altered.

Appendix—Form Nos. 1–5

Form Index

BILLING CODE 6820-RW-M

NOTICE OF APPEAL	DATE	OMB APPROVAL NO. 3090-0221

TO: Board of Contract Appeals
General Services Administration
Washington, DC 20405

I/We hereby appeal the final decision of _____ (Name of Contracting Officer), issued _____ (Date),

in connection with a dispute under Contract No. _____. This contract was awarded _____ (Date),

for _____ (Type of commodity, service, or construction)

by _____ (Name of agency and organizational unit), _____ (City and State).

1. DESCRIBE THE NATURE OF THE DISPUTE INVOLVED IN THE FINAL DECISION AND ANY OTHER CIRCUMSTANCES GIVING RISE TO THIS APPEAL:

2. DESCRIBE THE RELIEF WHICH YOU SEEK INCLUDING AN ESTIMATE OF THE AMOUNT OF MONEY IN CONTROVERSY, IF ANY, AND IF KNOWN:

APPELLANT			ATTORNEY FOR APPELLANT		
NAME			NAME		
TITLE			FIRM		
STREET			STREET		
CITY			CITY		
STATE	ZIP CODE	TELEPHONE NUMBER ( )	STATE	ZIP CODE	TELEPHONE NUMBER ( )
APPELLANT'S SIGNATURE			ATTORNEY'S SIGNATURE		

GENERAL SERVICES ADMINISTRATION

GSA FORM 2465 (REV. 6-85)

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

Form 7

_____ :
_____ : GSBCA _____
_____ :
Contract/Solicitation No. :
_____ :

NOTICE OF APPEARANCE

To: _____
Board Judge
Board of Contract Appeals

Please enter my appearance as counsel for / representative of

_____ in the above captioned case.

_____ _____
(Name) Date

_____ _____
(Title) (Phone)

_____ _____
(Address) (Facsimile)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appearance was mailed postage paid/delivered this _____ day of _____, 19___, to _____

_____
Signature

Note This format shall not be printed reproduced, or stocked by the Central Office or regional offices and shall be used only as a guide for individual preparation

Board of Contract Appeals

General Services Administration
Washington, DC 20405

SUBPOENA	OMB APPROVAL NO. 3090-0221

_____ GSBCA _____

_____

_____

Contract/Solicitation No.

_____

TO: _____

_____

_____

YOU ARE HEREBY COMMANDED to appear at _____ _____
(Room Number) (Building)

_____
(Street Number) (City) (State)

at _____ o'clock ____ .m., on the _____ day of _____, 19 _____,

to testify at a (deposition/hearing) in this case; and to bring with you[1] _____

_____

_____

_____

and to stay there until given permission to leave. This subpoena is issued at the request of (Appellant/Petitioner/Protester/Intervenor/Applicant/Respondent).

Your appearance as ordered by this subpoena will entitle you to receive the fees and mileage provided by 28 U.S.C. § 1821 or other applicable law.

[1] *Strike the words "and bring with you" unless the subpoena is to require the production of documents or tangible things, in which case the documents and things should be designated in the blank space provided for that purpose. If testimony by an organization representative or designee is requested, describe with reasonable particularity the matters on which examination is requested.*

Upon written request to this Board by you or by a party to this case, which request should be made within 10 days after service but in any event no later than the time specified in the subpoena for attendance, the Board may (i) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or (ii) require the party in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed books, papers, documents, or tangible things.

(Board Judge)	*(Date)*
(Representative for Appellant/Petitioner/Protester/ Intervenor/Applicant)	*(Representative for Respondent)*
(Address)	*(Address)*
(Telephone Number)	*(Telephone Number)*
(Date)	*(Date)*

RETURN ON SERVICE

Summoned the above-named witness by delivering a copy to h____ and tendering to h____ the fees for one day's attendance and mileage allowed by law, on the _____ day of _____, 19 ____ , at _____

Subscribed and sworn to before me, a _____ this _____ day of _____ , 19 _____.

_____

NOTE: Affidavit not required if service is made by U.S. Marshall or Deputy. Service may also be made by any other person who is not a party and is not less than 18 years of age. Service shall be made by personally delivering a copy to the person named and tendering the fees for one day's attendance and the mileage allowed by law; however, where the subpoena is issued on behalf of the Government, money payments need not be tendered in advance of attendance.

GSA FORM 9534 BACK (Rev. 11-93)

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

Form 4

_____ :
_____ : GSBCA _____
_____ :
:
Contract/Solicitation No. :
:
_____ :

GOVERNMENT CERTIFICATE OF FINALITY

A. Date claim(s) filed with the contracting officer:

B. Amount to be paid: $ _____.

C. Agency address (regional office if other than central office):

D. Agency Certification

_____ hereby certifies that:

(1) it has not initiated and will not initiate any proceeding at the Board for the reconsideration of, or relief from, this award;

(2) it has not initiated and will not initiate any appeal of this award to the United States Court of Appeals for the Federal Circuit or to the United States Claims Court (if applicable).

Government Agency

_____ By _____
Date Signature and Title

Note This format shall not be printed reproduced, or stocked by the Central office or regional offices and shall be used only as a guide for individual preparation

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

Form 5

_____ :
_____ : GSBCA _____
_____ :
Contract/Solicitation No. :
_____ :

APPELLANT/PROTESTER/INTERVENOR/APPLICANT CERTIFICATE OF FINALITY

A. Address to which check should be sent (if check is to be sent to counsel, enclose a power of attorney):

B. Appellant/Protester/Intervenor/Applicant certification

_____ hereby certifies that:

(1) it has not initiated and will not initiate any proceeding at the Board for the reconsideration of, or relief from, this award;

(2) it has not initiated and will not initiate any appeal of this award to the United States Court of Appeals for the Federal Circuit or to the United States Claims Court (if applicable); and

(3) it agrees to accept the amount awarded, plus any interest awarded, in accordance with the Board's decision in this case, in full and final satisfaction of its case.

Appellant/Protester/Intervenor/Applicant

_____ By _____
Date Signature and Title

Note: This format shall not be printed, reproduced, or stocked by the Central office or regional offices and shall be used only as a guide for individual preparation.

BILLING CODE 6820-RW-C

Dated: December 22, 1993.

Stephen M. Daniels,

Chairman.

[FR Doc. 93-31711 Filed 12-29-93; 8:45 am]

BILLING CODE 6820-RW-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 642

[Docket No. 930234-3218; I.D. 121693C]

Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Emergency interim rule, extension of effective date.

SUMMARY: An emergency interim rule is in effect through January 3, 1994, that divides the eastern zone commercial quota for the Gulf migratory group of king mackerel into equal sub-quotas for the Florida east and west coast fisheries. NMFS extends the emergency interim rule because conditions justifying the emergency action remain unchanged. The intended effect is to respond to social and economic emergencies in the commercial fishery for Gulf group king mackerel off the east coast of Florida.

EFFECTIVE DATES: Effective December 30, 1993, the effective dates for the emergency interim rule published at 58 FR 51789 are extended from January 4, 1994, through March 31, 1994.

ADDRESSES: Copies of documents supporting this action may be obtained from Mark F. Godcharles, Southeast Regional Office, NMFS, 9450 Koger Boulevard, St. Petersburg, FL 33702.

FOR FURTHER INFORMATION CONTACT: Mark F. Godcharles, 813-893-3161.

SUPPLEMENTARY INFORMATION: The fishery for coastal migratory pelagic resources (king mackerel, Spanish mackerel, cero, cobia, little tunny, dolphin, and, in the Gulf of Mexico only, bluefish) is managed under the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP). The FMP was prepared by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils), and is implemented through regulations at 50 CFR part 642 under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act).

Under section 305(c) of the Magnuson Act, NMFS published an emergency interim rule (58 FR 51789, October 5, 1993) that divided the eastern zone commercial quota for the Gulf migratory group of king mackerel into equal sub-quotas for the Florida east and west coast fisheries. The Councils requested extension of the emergency interim rule because conditions justifying the emergency action remain unchanged and will remain unchanged through March 31, 1994. NMFS concurs and extends the emergency interim rule through March 31, 1994, in accordance with section 305(c)(3)(B) of the Magnuson Act.

Details concerning the basis for this action and the classification of the rulemaking are contained in the initial emergency interim rule and are not repeated here.

List of Subjects in 50 CFR Part 642

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 21, 1993.

Nancy Foster,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 93-31948 Filed 12-29-93; 8:45 am]

BILLING CODE 3510-22-M

50 CFR Part 675

[Docket No. 921185-3021; I.D. 122293E]

Groundfish of the Bering Sea and Aleutian Islands Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Closure.

SUMMARY: NMFS is closing the directed fishery for pollock by the offshore component in the Bering Sea subarea (BS) of the Bering Sea and Aleutian Islands management area (BSIA). This action is necessary to prevent exceeding the allowance of the total allowable catch (TAC) of pollock for the offshore component in the BS.

EFFECTIVE DATE: 12 noon, Alaska local time (A.l.t.), December 29, 1993, until 12 midnight, A.l.t., December 31, 1993.

FOR FURTHER INFORMATION CONTACT: Andrew N. Smoker, Resource Management Specialist, Fisheries Management Division, NMFS, 907-586-7228.

SUPPLEMENTARY INFORMATION: The groundfish fishery in the BSAI exclusive economic zone is managed by the Secretary of Commerce according to the Fishery Management Plan for the Groundfish Fishery of the BSAI (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson Fishery Conservation and Management Act. Fishing by U.S. vessels is governed by regulations implementing the FMP at 50 CFR parts 620 and 675.

In accordance with § 675.20(a)(2), the final 1993 initial specifications for groundfish in the BSAI (58 FR 8703, February 17, 1993), and a subsequent reserve release (58 FR 44136, August 19, 1993), established the allowance of pollock TAC for vessels catching pollock for processing by the offshore component in the BS as 781,625 metric tons (mt).

The Director of the Alaska Region, NMFS (Regional Director), has determined, in accordance with § 675.20(a)(8), that the allowance of pollock TAC for the offshore component in the BS soon will be reached. Therefore, the Regional Director has established a directed fishing allowance of 778,625 mt, with 3,000 mt to be taken as incidental catch in directed fishing for other species in the BS. Consequently, NMFS is prohibiting directed fishing for pollock by vessels catching pollock for processing by the offshore component in the BS, effective from 12 noon, A.l.t., December 29, 1993, until 12 midnight, A.l.t., December 31, 1993.

Directed fishing standards for applicable gear types may be found in the regulations at § 675.20(h).

Classification

This action is taken under § 675.20.

List of Subjects in 50 CFR part 675

Fisheries, Reporting and recordkeeping requirements.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: December 27, 1993.

Richard H. Schaefer,

Director of Office of Fisheries Conservation and Management, National Marine Fisheries Service.

[FR Doc. 93-31947 Filed 12-27-93; 3:07 pm]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 58, No. 249
Thursday, December 30, 1993

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Farmers Home Administration

7 CFR Parts 1910, 1924, 1941, 1943, 1945, 1951, 1962, and 1980

RIN 0575–AB45

Loan Assessments and Market Placement

AGENCY: Farmers Home Administration, USDA.

ACTION: Proposed rule.

SUMMARY: The Farmers Home Administration (FmHA) proposes to amend its direct and guaranteed farm loan regulations to implement changes to the Consolidated Farm and Rural Development Act (CONACT) by the Food, Agriculture, Conservation, and Trade Act of 1990 (FACT Act), and the Agricultural Credit Improvement Act of 1992 (1992 Act). These amendments are to propose a means of implementing and coordinating "loan assessment," "market placement," and the "graduation of seasoned direct loan borrowers to the loan guarantee program." The intended effect is to improve the success rate of borrowers receiving FmHA assistance and to expedite their transitions to commercial credit.

DATES: Comments must be submitted by February 28, 1994.

ADDRESSES: Submit written comments, in duplicate, to the Office of the Chief, Regulations Analysis and Control Branch, USDA, Farmers Home Administration, room 6348–S, 14th Street and Independence Avenue SW., Washington, DC 20250–0700. Written comments made pursuant to this notice will be available for public inspection during regular working hours at the above address.

FOR FURTHER INFORMATION CONTACT: Steven R. Bazzell, Senior Loan Officer, USDA, Farmers Home Administration, Farmer Programs Loan Making Division, room 5424–S, 14th Street and Independence Avenue, SW., Washington, DC 20250–0700, Telephone (202) 720–3889.

SUPPLEMENTARY INFORMATION:

Classification

We are issuing this proposed rule in conformance with Executive Order 12866, and we have determined that it is not a "significant regulatory action." Based on information compiled by the Department, we have determined that this proposed rule:

(1) Would have an effect on the economy of less than $100 million;

(2) Would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(3) Would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(4) Would not alter the budgetary impact of entitlements, grants, user fees, or loan programs or rights and obligations of recipients thereof; and

(5) Would not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or principles set forth in Executive Order 12866.

Intergovernmental Consultation

1. For the reasons set forth in the final rule related to Notice 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983) and FmHA Instruction 1940–J, "Intergovernmental Review of Farmers Home Administration Programs and Activities" (December 23, 1983), Farm Ownership Loans, Farm Operating Loans, and Emergency Loans are excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

2. The Soil and Water Loan Program is subject to the provisions of Executive Order 12372 and FmHA Instruction 1940–J.

Programs Affected

These changes affect the following FmHA programs as listed in the Catalog of Federal Domestic Assistance:

10.404—Emergency Loans
10.406—Farm Operating Loans
10.407—Farm Ownership Loans
10.416—Soil and Water Loans

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, Subpart G, "Environmental Program." FmHA has determined that this action does not significantly affect the quality of the human environment, and in accordance with the National Environmental Policy Act of 1969, Public Law 91–190, an Environmental Impact Statement is not required.

Civil Justice Reform

This document has been reviewed in accordance with Executive Order (E.O.) 12778. FmHA has determined that this action does not unduly burden the Federal Court System since it meets all applicable standards provided in section 2 of the E.O.

Paperwork Reduction Act

The information collection requirements contained in these regulations have been approved by the Office of Management and Budget (OMB) under the provisions of 44 U.S.C. Chapter 35 and have been assigned OMB control numbers 0575–0134, 0575–0141, 0575–0085, 0575–0083, 0575–0090, and 0575–0079 in accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. 3507). The revised information collections contained in 0575–0061, 0575–0093, and 0575–0111 will be submitted to OMB for review under section 3504(h) of the Paperwork Reduction Act of 1980. Public reporting for this collection of information is estimated to vary from five minutes to twenty minutes per response, with an average of ten minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The reporting and/or recordkeeping requirements contained in these regulations will not become effective until approved by OMB. Please send written comments to the Office of Information Regulatory Affairs, OMB, Attention: Desk Officer for USDA, Washington, DC 20503. Please send a copy of your comments to Jack Holston, Agency Clearance Officer, USDA, FmHA, AG Box 0743, Washington, DC 20250.

Discussion of Proposed Rule

The impetus for this proposed rule was provided by the FACT Act and the 1992 Act. These proposed amendments are intended primarily to implement loan assessment, market placement, and the graduation of seasoned direct loan borrowers to the loan guarantee program. FmHA is also proposing numerous other administrative changes, such as removing many internal supervisory procedures and placing them in a handbook, which will be available to the public. This latter change is part of a long term effort to reduce the volume of administrative items in the Agency's regulations and make the future implementation of legislative requirements easier. The obsolete term "insured" loans is being replaced with "direct" loans wherever it appears in the parts of the Code of Federal Regulations affected by this proposed rule. This is in accordance with the terminology changes required by the Credit Reform Act of 1990. The 1992 Act required that section 14 be promulgated as an interim rule. However, the Act also stipulated that section 14 be coordinated with loan assessment and market placement activities. Since there is an interrelationship between these three activities and an unforeseen timing conflict for implementation (proposed versus interim rule), section 14 has been included with the proposed rules for loan assessment and market placement so that the public can better evaluate the implementation of the programs.

FmHA's farm loan programs mission is to provide temporary financial and supervisory assistance to farmers and ranchers who have realistic chances to achieve and maintain a farming operation, but who are temporarily unable to secure commercial credit at prevailing rates and terms in their local community. FmHA direct loan assistance is presently approved and serviced in FmHA County Offices and provides lower interest rates and longer repayment periods than is normally be found in the private lending sector. FmHA's goal is to assist farmers in becoming financially viable through the combination of its more favorable lending terms, borrower supervision, measuring and monitoring of progress, and training. The 1992 Act imposed a general limit of 15 years (not more than 10 for direct OL loans) on FmHA's direct and guaranteed operating loan assistance to borrowers. Steady financial progress, therefore, is essential in order for borrowers to obtain commercial credit within these time limits.

FmHA guaranteed assistance is provided in conjunction with loans made and serviced by commercial lenders. As a group, FmHA's guaranteed loan borrowers are financially stronger than the direct borrowers, but nonetheless are still perceived as unacceptable credit risks by the lenders without the loss protection afforded by FmHA's loan guarantee. Since guaranteed borrowers exhibit fewer of the financial and management problems that beset direct loan borrowers, fewer supervisory controls and less intensive monitoring are typically needed for guaranteed borrowers. Commercial lenders are responsible for properly servicing the guaranteed borrower's loan with FmHA oversight.

In broad terms, the foregoing describes FmHA's long-standing mission to assist farmers, with the most intensive supervision and assistance dedicated to its direct loan borrowers. Concerns have arisen, however, as to the effectiveness of these efforts to guide borrowers from the direct program through the guaranteed program and on to commercial credit. Senate Report 101–357 (Report) in discussing the FACT Act loan assessment and market placement provisions, cites the need for FmHA to improve analysis, training and supervision of its borrowers to assist them in establishing a financially viable operation. Cited in the Report is a General Accounting Office (GAO) report titled—*Farmers Home Administration, Farm Loan Programs Have Become a Continuous Source of Credit (GAO/RCED –89–3).* This GAO report states that 42 percent of FmHA's borrowers had received assistance for more than 10 years. There are many factors outside the scope of FmHA's control that contribute to this statistic and the Agency's ability to help restore them to financial viability. Such factors include cyclical economic downturns and the financial condition of farmers when they first seek FmHA assistance.

Loan Assessment

Section 1819 of the FACT Act (CONACT section 360) requires FmHA to evaluate the farming plan and financial condition of each farmer or rancher applicant determined eligible by the County Committee. In the evaluation, FmHA will consider: The necessity of assistance, loan amount and rate of interest required by applicants to cover expenses and build an adequate equity base, goals set by applicants, and the prospects for applicants' plans of operation to culminate in a financially viable operation. A semi-annual review of direct loans and a periodic review of guaranteed loans is required. In addition, all delinquent borrowers are required to be assessed under these provisions. Specifically, FmHA must determine the cause of and action necessary to cure the delinquency. FmHA was provided authority to contract for loan assessments with entities eligible to provide "Borrower Training," under Section 1818 of the FACT Act (CONACT section 359). Passage of the 1992 Act subsequently necessitated the coordination of Loan Assessment, Market Placement, and Borrower Training provisions of the FACT Act with the Graduation of Seasoned Direct Borrowers provision of the 1992 Act as discussed below.

With these statutory requirements in mind, FmHA understands that it must upgrade its assessment of each farming operation to achieve, for example: more meaningful credit counseling and overall communication, appropriate numbers of farm visits and inspections, and better utilization of outside professionals such as the Extension Service and farm managers. All applicants and borrowers will be assessed, but if an applicant does not receive FmHA assistance, the supervisory aspects of the loan assessment regulations, such as performing chattel inspections will obviously not be applicable. While FmHA has always analyzed farming operations and provided credit supervision, it is now attempting to provide a more comprehensive assessment process, primarily for direct applicants and borrowers, to better:

(1) Establish the precise financial position of the farming operation,

(2) Determine the management's critical strengths and weaknesses,

(3) Identify the goals of the operator,

(4) Assist FmHA and the farmer to develop a short, intermediate and long-term strategy to make critical financial and management improvements,

(5) Help identify training and educational needs of the operator,

(6) Provide a means to measure progress over time,

(7) Determine appropriate controls and supervision on an individualized basis,

(8) Establish accountability on the part of FmHA and the borrower by providing a well-documented account of strategies and the quality of results achieved,

(9) Improve cooperation and understanding by emphasizing face-to-face communications,

(10) Involvement of applicants and borrowers in the analysis and supervision process, and

(11) Enable borrowers to graduate to commercial credit with FmHA loan

guarantee assistance and ultimately without FmHA assistance.

In the more comprehensive assessment process, professional farm managers will be utilized to the fullest extent based on the complexity of the operation, the expertise of the FmHA County Supervisor, and the amount of funds appropriated by Congress for contracting. The components common to all agricultural operations will be evaluated by the FmHA County Supervisor (and any contracted professional farm managers). Common components include: The real estate and facilities available, the amount and type of financing needed to carry out the operation, conservation measures, personal and business goals of the farm operator, and the farm business organization and key personnel involved in the operation. Specific material weaknesses or obstacles to long-term financial viability will be identified and prioritized from most to least critical. The projected farm plan will be analyzed in light of the strengths and weaknesses identified in the operation. If a plan will not work as developed, the County Supervisor will suggest alternative approaches.

Individualized supervision and training strategies will be developed based on the specific needs identified in the assessment, with the most critical needs addressed first. Ideally, the borrower training requirements (mandated by the FACT Act) would be derived as part of the loan assessment process. However, the borrower training requirements are mandated to be established at the time of certification by the FmHA County Committee, while loan assessment is mandated to occur after the County Committee certification. Therefore, borrower training needs identified by the loan assessment will be recommended, but not required, for the borrower.

At the end of the normal production cycle the progress of the borrower will be measured and the effectiveness of the supervisory strategy reevaluated and revised, as appropriate. On a semi-annual basis, County Supervisors will review the written goals and agreements established as part of the loan assessment process. If problems or major changes with the operation are expected, the borrower and County Supervisor will meet to determine what corrective actions are appropriate. It will be mandatory that a year-end analysis be performed for (1) first time borrowers, (2) borrowers with annual operating loans, (3) borrowers who are currently, or who are anticipated to be, delinquent, and (4) borrowers who are receiving limited resource interest rates. These are the highest risk borrowers who can benefit most from close supervision. A year-end analysis is already required under subpart A of part 1951 of this chapter for limited resource borrowers. Other borrowers will receive a year-end analysis at the discretion of the County Supervisors as determined and documented in their assessments of the borrowers. An example of a borrower who may not need the year-end analysis would include a borrower with a term loan only who has performed as agreed. However, FmHA will obtain an annual balance sheet and projected cash flow so that the borrower can be classified or reclassified in accordance with FmHA Instruction 2006–W. This is needed to implement the provisions of the 1992 Act requiring the Graduation of Seasoned Direct Borrowers to the Loan Guarantee Program. Regulatorily mandated numbers of field visits and inspections will be eliminated, for example. Instead, the number will be determined on an individual basis as part of the loan assessment process. Borrowers require different levels of supervision and monitoring, and this change will allow FmHA to assess each farming operation and apply attention and resources to its customers based on their individual needs. FmHA's requirements regarding 5-year averages for determining production and financial capabilities also will be revised to clarify that historical information is used to establish a baseline against which positive or negative adjustments can be made with proper justification. Greater discretion in this area is expected to yield more accurate determinations. Production records from an operation to be taken over by an applicant will also be considered when deriving the baseline production capabilities. If an applicant or borrower is affected by disasters and an accurate projection cannot be made, county or state averages will continue to be used. However, if applicants or borrowers have never produced yields at the county or state average, their actual yields will be used. FmHA is proposing this change to eliminate assistance to applicants who receive loans by virtue of an unintended regulatory loophole, but who in fact have no reasonable prospects for repaying the loan as set forth in the promissory note(s).

For guaranteed loans, FmHA will add items pertaining to loan assessment to the already required loan narrative submitted by lenders requesting a loan guarantee. Also, to comply with the statutory monitoring provisions of loan assessment, County Supervisors will be required to monitor borrower progress as part of FmHA's routine lender monitoring responsibilities. If a delinquency occurs, FmHA will assist the lender in developing available options. However, FmHA's capacity in this regard will be strictly as a consultant and the lender is under no obligation to follow FmHA advice or suggestions.

FmHA will also remove many administrative provisions from 7 CFR part 1924, subpart B, which is the primary implementing regulation for loan assessment. This is proposed to reduce the volume of FmHA regulations, provide simpler guidance to field staff, and expedite implementation of future regulatory changes.

FmHA proposes to make further administrative changes to give FmHA personnel greater flexibility in carrying out assessment and supervision.

Market Placement

Section 1821 of the FACT Act (CONACT section 362) requires creation of a process whereby direct farm loan borrowers who have reasonable chances to qualify for commercial credit can be placed with commercial lenders using FmHA loan guarantees.

As proposed by FmHA, the loan assessment process will identify the loan amounts, interest rates, and level of supervision needed by applicants and borrowers to carry out their operations. Those applicants and borrowers who meet the requirements of local commercial lenders, taking into consideration the risk mitigating effect of FmHA's loan guarantees, then will be handled under Market Placement procedures (7 CFR, part 1980, subpart B). After a lender has examined a case referred to them by FmHA and agrees to provide the financing with an FmHA guarantee, FmHA will use the assessment data to prepare all the documents needed for the lender and FmHA to consummate the loan and/or line of credit guarantee. FmHA believes this will provide much better service to lenders and farm customers by eliminating paperwork requirements and virtually eliminating waiting periods. FmHA will modify its County Committee certification so that a loan applicant may be determined eligible for FmHA assistance, but receipt of direct loan assistance will be contingent upon the unavailability of financing through the loan guarantee program. At present, the County Committee certification is tied specifically to either the direct or guaranteed program, which requires time-consuming reconsideration by the County Committee whenever an applicant moves between these two

programs. The Market Placement program will also be utilized to implement section 14 of the 1992 Act regarding the Graduation of Seasoned Direct Borrowers to the Loan Guarantee Program as discussed below. Interest assistance will be considered as needed for the borrower to obtain a guaranteed loan as required by section 14 of the 1992 Act (CONACT section 333A) discussed below. No regulation changes are needed to effect this rule.

Graduation of Seasoned Direct Borrowers to the Loan Guarantee Program

CONACT section 333A requires an annual review of direct borrowers within the loan assessment context to determine whether they meet FmHA's definition of "commercial" or "standard." Commercial or standard classified borrowers will, with the borrower's approval, be referred to local "Approved Lenders" by means of a prospectus. FmHA must provide interest assistance in accordance with CONACT section 351 as needed for the borrower to obtain a guaranteed loan. If no offer is made by the approved lender to provide financing, the borrower would continue to be eligible to receive direct loan assistance.

FmHA proposes to implement this provision in subpart F of part 1951 of this chapter by adopting the commercial and standard classification criteria for the graduation of all its direct borrowers, not only those graduating to commercial credit with a loan guarantee. This will avoid a regulatory process for borrower graduation. The classification and reclassification of applicants and borrowers will be accomplished annually in conjunction with the loan assessment process. The proposed rule will also reduce the current process of conducting four quarterly graduation reviews down to one annual review and expand the current definition of graduation to include those borrowers refinancing direct loans via the loan guarantee program.

FmHA also will expand the scope of lenders provided prospectus information from the statute's "certified" and "approved" lenders to include other "eligible" lenders. This expansion is necessary because of the phasing-out of the approved lender program due to the new certified and preferred lender programs, which were created by the 1992 Act. In accordance with the 1992 Act, written permission will be requested from borrowers before prospectus information is provided to lenders. Permission is not needed from new loan applicants for FmHA to approach lenders about the possibility of guaranteed financing, since information provided with a loan application is routinely referred to creditors in order to determine repayment ability and eligibility in accordance with the Privacy Act. For those borrowers who refuse permission to FmHA to provide prospectus information to lenders, FmHA will notify those borrowers when they meet the commercial or standard classification criteria, provide them with any information needed in FmHA's case files, and allow them 60 days within which to formally apply for guaranteed or non-guaranteed commercial credit and respond to FmHA. For good cause, the County Supervisor may extend additional time to the borrower beyond the 60-day period. Cases of borrowers who fail to cooperate with a graduation request will be referred for legal action after written notice to the borrower and a 10-day response period.

An annual reminder letter regarding FmHA's graduation requirement will be sent to operating loan borrowers, which will also notify them of the number of years they are eligible to receive FmHA operating loan assistance. FmHA's Exhibits A, B, and C, which are for internal administrative purposes by FmHA staff will no longer published under 7 CFR, part 1951, subpart F. Subpart F of part 1951 is being published in its entirety as a convenience to aid in reading and understanding how the above-described changes fit into existing procedure. Existing sections have been retitled and other administrative revisions have been made; however, the substantive changes to that subpart affect only farmer programs loans and comments are solicited on these changes only.

Miscellaneous

In addition to the statutorily mandated changes, FmHA is proposing to update its chattel security regulations to reflect the Central Filing System (CFS) authorized by the Food Security Act of 1985 and since adopted in several States. In States with a CFS, filing will be made in accordance with the CFS system and any State Uniform Commercial Code (UCC) system. In States without a CFS, filing will be according to the State system with actual notice given to potential purchasers of farm products. In addition, the list of specific items to be addressed by lenders in the guaranteed loan or line of credit (LOC) agreement will be changed to eliminate restrictions on consolidations, mergers, etc., since this provision is seldom applicable to FmHA farm borrowers. Limits on living expenses, loan purposes, special credit conditions, and collateral requirements, however, will be added as new items to be addressed in the guaranteed loan/LOC agreement. These are more applicable to farm borrowers and are needed to avoid misunderstandings between lenders and FmHA on existing rules. Finally, "current balance sheet" will be defined as one that is less than 90 days old on the date of application. An application for a loan guarantee must include a current balance sheet from all entity members.

List of Subjects

7 CFR Part 1910

Applications, Credit, Loan programs—Agriculture, Loan programs—Housing and community development, Low and moderate income housing, Marital status discrimination, Sex discrimination.

7 CFR Part 1924

Agriculture, Construction management, Construction and repair, Energy conservation, Housing, Loan programs—Agriculture, Loan programs—Housing and community development, Low and moderate income housing.

7 CFR Part 1941

Crops, Livestock, Loan programs—Agriculture, Rural areas, Youth.

7 CFR Part 1943

Credit Loan Programs—Agriculture, Recreation and recreation areas, Water Resources.

7 CFR Part 1945

Agriculture, Disaster assistance, Loan programs—Agriculture.

7 CFR Part 1951

Account servicing, Credit, Loan programs—Agriculture, Loan programs—Housing and community development, Low and moderate income housing loans—Servicing, Debt restructuring.

7 CFR Part 1962

Crops, Government property, Livestock, Loan programs—Agriculture, Rural areas.

7 CFR Part 1980

Agriculture, Loan programs—Agriculture.

Therefore, chapter XVIII, title 7, Code of Federal Regulations is proposed to be amended as follows:

PART 1910—GENERAL

1. The authority citation for part 1910 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart A—Receiving and Processing Applications

2. Section 1910.4 is amended by redesignating paragraphs (c) through (k) as (d) through (l), respectively, and adding new paragraphs (b)(25) and (c) to read as follows:

§ 1910.4 Processing applications.

* * * * *

(b) * * *

(25) Completion of the assessment in accordance with § 1924.55 of subpart B of part 1924 of this chapter.

* * * * *

(c) *Notifying applicants that direct loan eligibility for current borrowers is subject to the unavailability of guaranteed financing.* If the County Supervisor assessment, completed in accordance with § 1924.55 of subpart B of part 1924 of this chapter, concludes that guaranteed assistance may be available, with or without interest assistance, a prospectus will be sent to area lenders in accordance with § 1951.262(h) or (i) of subpart F of part 1951 of this chapter, as appropriate. If a lender(s) indicates interest in providing financing with an FmHA loan guarantee, refer to § 1980.113(c) of subpart B of part 1980 of this chapter for handling as a Market Placement application. No direct loan to a current borrower will be approved until the process outlined in this paragraph has been concluded.

* * * * *

3. Section 1910.6 is amended by revising paragraph (a) to read as follows:

§ 1910.6 Notification of applicant.

* * * * *

(a) *Favorable eligibility decision.* If the decision of eligibility is favorable, the County Supervisor will notify the applicant within 5 calendar days of the County Committee determination. For OL, FO, and SW loans, the notification will include the exact dates of the period of eligibility, in accordance with § 1910.4 (h) of this subpart. For Farmer Programs, if the County Supervisor has determined the operation is feasible, the loan will be promptly processed in accordance with the applicable regulations. Care should be exercised that the applicant clearly understands a decision of eligibility does not constitute approval of the loan and that a direct loan cannot be approved until a determination is made through the assessment process (§ 1924.55 of subpart B of part 1924 of this chapter) that guaranteed loan financing is unavailable to the applicant. However, the timeframes set forth in § 1910.4 of this subpart must be adhered to in accomplishing the assessment. In notifying the applicant of a favorable decision on eligibility, the County Supervisor will, when necessary, schedule a meeting with the applicant to proceed with developing the loan docket. When the applicant has been determined eligible for assistance and additional information becomes available that indicates the original eligibility determination may be in error, the County Committee will reconsider the applicant, taking the new information into account. The County Committee will then recertify whether or not the applicant still meets eligibility requirements, by the use of Form FmHA 440–2. Written notification as to the action taken will be sent to the applicant within 5 calendar days of the County Committee determination.

* * * * *

4. Section 1910.7 is amended by revising paragraph (b) to read as follows:

§ 1910.7 Counseling.

* * * * *

(b) *Farm and Home Plan.* When information on the Farm and Home Plan indicates that:

(1) The applicant has insufficient income to repay the requested loan, pay other debts and provide a reasonable standard of living, alternative plans of farm operation will be considered to attempt to overcome the problem. If the application request is from a delinquent borrower for OL assistance, the County Supervisor will consider the borrower for assistance under section 1941.14 of subpart A of part 1941 of this chapter.

(2) The applicant has sufficient income to repay a guaranteed loan, with or without interest assistance, pay other debts, and provide for a reasonable standard of living, the County Supervisor will refer to § 1910.4 (c) of subpart B for guidance.

* * * * *

5. Section 1910.8 is amended by revising paragraph (d) (1) to read as follows:

§ 1910.8 Reaching an understanding.

* * * * *

(d) * * *

(1) Farm business planning.

* * * * *

PART 1924—CONSTRUCTION AND REPAIR

6. The authority citation for part 1924 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart B—Management Advice to Individual Borrowers and Applicants

7. Sections 1924.51, 1924.56 through 1924.61, 1924.71 and 1924.73 are revised; § 1924.100 is removed; and §§ 1924.54 and 1924.55 are added to read as follows:

§ 1924.51 General.

This sets forth policies for providing management advice to all Farmer Programs direct loan applicants and borrowers. Farmers Home Administration (FmHA) forms and supervisory handbooks are available in any FmHA County Office.

§ 1924.54 Definitions.

As used in this subpart, the following definitions apply:

Commercial. These are FmHA's highest quality Farmer Programs accounts. The financial condition of the borrowers is strong enough to enable them to absorb the normal adversities of agricultural production and marketing. There is ample security for all loans, there is sufficient cash flow to meet the expenses of the agricultural enterprise and the financial needs of the family, and to service debts. The account is of such quality that commercial lenders would view the loans as a profitable investment. This is the same definition as found in FmHA Instruction 2006–W (copy available in any FmHA County Office).

Farm Assessment and Supervision Reference. This reference communicates FmHA National Office administrative policy and guidance to field staff on conducting assessments, year-end analyses, and general borrower supervision.

Farm business plan. The automated or manual Farm and Home Plan system, which contains an annual, typical (if different than annual plan), and a 5-year budget plan. FmHA may accept other farm business plans if they provide at least the same information as the FmHA system to enable FmHA officials to render a sound credit decision. The annual plan may cover a period of more or less than 12 months.

Farmer Programs loan. Includes Farm Ownership (FO), Soil and Water (SW), Operating (OL), Emergency (EM), Economic Emergency (EE), Recreation (RL), Special Livestock (SL), Economic Opportunity (EO), and Softwood Timber

(ST) loans. Also included are Rural Housing loans for farm service buildings (RHF), and Rural Housing (RH) loans where the borrower is also indebted for an FmHA direct farm loan(s) that is not a collection only or judgment account. Non-program loans, which are defined in § 1965.7 of subpart A of part 1965 of this chapter, are excluded.

Individual. The term "individual" is used throughout this subpart to refer to the person(s) receiving FmHA supervision and management advice. If an applicant or borrower applies(ied) to FmHA as an individual applicant, the term "individual" means the operator. In the case of an eligible corporation, cooperative, partnership or joint operation, the term "individual" means the person(s) with the primary responsibility for making management decisions and carrying out the day-to-day physical tasks.

Financially viable operation. A financially viable operation projects that it can generate sufficient income to meet annual operating expenses and debt payments as they become due, meet basic family living expenses to the extent they are not met by dependable non-farm income, provide for the replacement of capital items, and provide for long-term financial progress to enable the operator to obtain commercial credit. Special beginning farmer OL borrowers will be considered financially viable for loan approval purposes if their 10-year farm plan projects an FmHA classification of "commercial."

Prospectus. Consists of a transmittal letter similar to FmHA Guide Letter 1951–F–3 with the "Historical Performance Worksheet" and "Summary of the Year's Business" generated by the Automated Farm and Home Plan system attached. When the applicant is not an existing borrower, the historical performance information (for example, tax returns) submitted with the FmHA application may substitute for the latter two documents. The prospectus is used to determine lender interest in financing or refinancing specific FmHA direct loan applicants and borrowers.

Standard. These loan accounts are fully acceptable by FmHA standards. Loan risk and potential servicing costs are higher than would be acceptable to other lenders, but are adequately secured. Repayment ability is adequate, and there is a high probability that all loans will be repaid as scheduled and in full. This is the same definition as found in FmHA Instruction 2006–W (copy available in any FmHA County Office).

Typical year plan. A projected farm business plan most representative of an operation's normal income, expenses, and capital debt payments.

§ 1924.55 Assessment of the agricultural operation.

Assessments will be completed for direct Farmer Programs loan applicants as required by subpart A of part 1910 of this chapter. Assessments also are required for Farmer Programs borrowers who are requested to graduate under subpart F of part 1951 of this chapter and at the time of their year-end analyses if no assessment has been performed under this section. An assessment is a comprehensive evaluation of the components of an operation, the identification of training and supervisory needs, and the resulting strategy to help the borrower achieve financial viability. Since FmHA is a temporary source of credit, it is important that the time spent with FmHA be used as productively as possible so that the borrower derives the greatest benefit. The assessment is intended to provide a more accurate determination of the kind and amount of FmHA assistance needed by the borrower. The assessment will more thoroughly identify positive and negative trends and conditions in management, earnings, capital position, productivity, and physical assets. Based on the assessment, the County Supervisor will prioritize the needs of the borrowers so that attention can be focused on the most critical areas first. The assessment is the central foundation upon which to build strategies for planning, credit and management counseling, loan controls, analysis, borrower training, and all other needed supervision. The assessment is a baseline, or starting point, against which the effectiveness of FmHA's assistance and the borrower's progress can be measured. Cooperation and communication between FmHA and the borrower is essential, and an assessment will include thorough inspections of the operation and face-to-face meetings with all key individuals. The borrower's actual progress and the effectiveness of FmHA supervision will be evaluated at the year-end analysis. Semi-annual reviews of the assessment will be performed in accordance with paragraph (f) of this section.

(a) *County Supervisor evaluation.* The County Supervisor will evaluate or assess each of the areas described in paragraph (b) of this section. As part of that assessment, the County Supervisor will determine whether the proposed budget is feasible on a direct/guaranteed loan basis, the type and nature of any material financial or production management weaknesses in the operation, and the specific strategy needed, including timeframes, to effect improvements and control risks. Material weaknesses are those that, if ignored, will have a high probability of causing the business to suffer losses that will jeopardize repayment, contribute to losses to the Government, result in practices considered imprudent by the general agricultural and financial community, and/or that hinder graduation and financial viability. If the County Supervisor concludes an applicant for a direct loan, or a borrower for any servicing action, may qualify for guaranteed credit, refer to § 1951.262 (h) of subpart F of part 1951 of this chapter for providing a prospectus to lenders. If a lender(s) expresses interest in providing financing or refinancing, refer to § 1980.113(c) of subpart B of part 1980 of this chapter for handling as a Market Placement application.

(b) *The assessment must take into consideration the following components:*

(1) Type of operation.

(2) Real estate, including facilities.

(i) Location and size.

(ii) Proposed and existing improvements.

(iii) Presence of environmental hazards.

(iv) Conservation practices and measures.

(v) Adequacy and continued availability of real estate.

(vi) External factors, such as urban encroachment and zoning changes.

(3) Chattel property used in the operation.

(4) Farm business organization and key personnel.

(5) Goals.

(6) Historical financial data.

(7) Projected budget.

(8) Planned changes.

(9) Ability to obtain guaranteed credit.

(c) *Supervision and training.* Appropriate supervisory oversight and training recommendations will be developed based on the County Supervisor's evaluation of the strengths and weaknesses of the operation in accordance with paragraphs (a) and (b) of this section and § 1924.59 of this subpart. Borrowers not abiding by the supervisory agreements reached will be notified promptly in writing that noncompliance will be considered by the County Committee on future FmHA loan eligibility determinations.

(d) *Performing the year-end analysis.* A year-end analysis will be completed for all first-time borrowers, borrowers with annual operating loans, borrowers who are currently, or who are anticipated to be, delinquent, and borrowers who are receiving limited

resource interest rates. Other borrowers will receive a year-end analysis at the discretion and judgment of the County Supervisors as determined and documented in their assessments of the borrowers. An example of a borrower who may not need the year-end analysis would include a borrower with a term loan only who has performed as agreed. However, FmHA will obtain an annual balance sheet and projected cash flow so that the borrower can be classified for graduation purposes in accordance with subpart F of part 1951 of this chapter. The year-end analysis should coincide with the borrower's production/marketing cycle and will serve as an opportunity to assess financial performance, goals attainment, the effectiveness of supervision and training. The County Supervisor's prior assessment of the operation should always be reviewed and changes made as appropriate. The County Supervisor will:

(1) Schedule the year-end analysis within the 60-day period after completion of the borrower's production cycle.

(2) With the borrower's Assistance, complete the "actual" columns on the farm business plan and Form FmHA 1962–1, "Agreement for the Use of Proceeds/Release of Chattel Security."

(3) Record financial and production results in the FmHA Automated Farm and Home Plan system, and review projected farm business planning for the next production cycle.

(4) Make a complete entry in the case file running record, or other worksheet, of the key management problems which were identified and discussed and all agreements reached with the borrower. Future supervisory actions will be tracked and monitored on the Management Records System.

(e) *Action to take when year-end analysis is completed.* When the analysis of the production/marketing cycle has been completed and the Farm and Home Plan and Form FmHA 1962–1 are developed for the next production/marketing cycle, the County Supervisor will take the following actions:

(1) *Borrower situation number 1.* Loans requested by eligible borrowers can be approved if the annual plan is feasible and the borrower will be current after all proceeds from the sale of assets are applied to scheduled FmHA and non-FmHA payments. If possible, advances of any loan funds will be scheduled to be available before the beginning of the normal production cycle. If loan funds will not be available to the borrower in time to begin the normal production cycle, release of normal income as set forth in § 1962.17 of subpart A of part 1962 of this chapter will be considered to meet essential family living and operating expenses.

(2) *Borrower situation number 2.* If the next production cycle plan is not feasible but the borrower would be current if the available proceeds were applied on FmHA payments, then a meeting will be held with the borrower within 5 working days of completing the analysis to discuss solutions to the problem. The borrower will be advised of possible options such as, primary loan servicing in accordance with § 1951.908 of subpart S of part 1951 of this chapter, releases of proceeds from the sale of normal income security, and additional loan funds. Requested loans can be approved if the borrower is found eligible and can present a feasible plan under appropriate loan making regulations. Advances of loan funds to eligible borrowers, if available, should be scheduled to be available in time to begin the normal farming season. If loan funds will not be available to the borrower in time to begin the normal production/marketing cycle, release of normal income as set forth in § 1962.17 of subpart A of part 1962 of this chapter will be considered to meet essential family living and farm operating expenses.

(3) *Borrower situation number 3.* If a non-delinquent borrower cannot show a feasible plan without debt writedown in accordance with subpart S of part 1951 of this chapter, release of normal income as set forth in § 1962.17 of subpart A of part 1962 of this chapter will be considered to meet essential family living and operating expenses. If the account later becomes delinquent, the borrower may be eligible for a Distressed Farmer Programs loan in accordance with § 1941.14 of subpart A of part 1941 of this chapter and debt writedown in accordance with § 1951.909 (e)(4) of subpart S of part 1951 of this chapter.

(f) For all borrowers, the assessment described under this section will be reviewed on a semi-annual basis. The County Supervisor will document the case file as to whether the borrower is progressing in accordance with the goals and agreements reached as part of the assessment. The County Supervisor may consult with the borrower in person, by telephone, or by written correspondence. However, a meeting must be scheduled as soon as practicable to determine the corrective options if the borrower is delinquent, the County Supervisor expects the borrower to become delinquent, or significant changes have occurred with the operation.

§ 1924.56 Farm business planning.

The Automated Farm and Home Plan system is the primary tool used by FmHA to evaluate loan feasibility and prospects for achieving financial viability. Other manual or automated business planning systems may be used with the consent of FmHA. County Supervisors should also refer to subpart A of part 1962 of this chapter for further guidance on using Form FmHA 1962–1.

(a) *Responsibility of County Supervisor.* The County Supervisor will refer to subpart A of part 1962 of this chapter regarding chattel security and:

(1) At least 60 days prior to the end of the production cycle, send borrowers with loans secured by chattels a letter similar to exhibit A, attachment 1 of this subpart along with blank Forms FmHA 431–2, "Farm and Home Plan," and FmHA 1962–1. Form FmHA 1962–1 does not expire until final disposition of the listed chattel property has been accomplished, or the remaining chattel property has been transferred to a new Form FmHA 1962–1.

(2) Verify that farm business plans are consistent with the applicable highly erodible land and wetland conservation requirements of exhibit M of subpart G of part 1940 of this chapter.

(b) *Documentation and revision of plans.* Farm business plans will be revised by the County Supervisor when information submitted by the borrower is unrealistic and/or cannot be verified, or when there are changes in the farming operation or in the planned or actual use of loan funds.

(1) When there are major revisions which cannot be easily accommodated on the borrower's farm business plan, a new plan will be completed and attached to the original. When a major revision is made, the plan must be marked, "REVISION I, II or III, etc.," to reflect the latest revision under consideration.

(2) When revisions are made to the farm business plan, a new or revised printout will be provided to the borrower. The County Supervisor will meet with the borrower to discuss, date and sign the revised plan. Each revision must be circled, dated and initialed by the borrower and County Supervisor.

(3) Farm business plans must be based on data that can be supported and verified, and then documented in the case file. Projected income and expenses must be based on the historical performance unless justification exists and the reason for the deviation is documented in the case file. Production will be based on the production trend as supported by the 5-year production history. Consideration may also be given to the influence of FmHA's supervision.

The implementation of a proven management technique, such as Integrated Pest Management, or the successful completion of specific training, such as animal husbandry, are examples of where positive adjustments to historical production might be justified.

(i) For existing farmers, the immediately preceding 5-year production and financial history will be obtained.

(ii) For those farmers with less than a 5-year history, the applicant's available production and financial history will be obtained. Actual production records from an operation to be taken over by the farmer may also be considered.

(iii) For those farmers whose historical data is less than 5 years or otherwise insufficiently reliable to provide an accurate estimate, the County Supervisor will utilize other data sources in the order of priority as follows:

(A) Agriculture Stabilization and Conservation Service (ASCS) actual yield records, for that particular farm;

(B) County averages;

(C) State averages;

(D) Extension Service data; or

(E) Other reliable sources of data to develop the projections.

(iv) When an accurate projection cannot be made because the applicant's production history has been affected by a disaster(s) declared by the President or designated by the Secretary of Agriculture, and for those farmers who would have had a qualifying loss from the disaster, as defined in § 1945.154 (a)(31) of subpart D of part 1945 of this chapter, but were not located in a designated/declared disaster area, the following applies:

(A) If the applicant's disaster year(s) yields are less than the County average yields, County average yields will be used for that year(s). If County average yields are not available, State average yields will be used. However, if the applicant's actual yields/production have never equaled the County/State averages, the applicant's actual yields will be used.

(B) To calculate a historical average yield to be used as a base for developing a projected plan of operation, the applicant may exclude the crop year with the lowest actual or County average yield, providing the applicant's yields were affected by disasters during at least 2 of the past 5 years immediately preceding the planned year. Once the yield base has been established, plus or minus adjustments may be made as discussed under paragraph (b)(3) of this section.

(4) Unit prices for all agricultural commodities produced commercially in each State will be established on a statewide basis by all FmHA State Directors each year and published in a State supplement which will be issued annually to coincide with the farm planning season. State Directors may establish regional unit prices for different regions of a State when there are transportation costs or other significant factors that establish a regional difference for unit prices within the State. During development of unit prices, the State Director will consult with adjoining FmHA State Offices and other State and Federal agricultural agencies before establishing the commodity prices. Farmers who have proven accurate records to support a premium price for a commodity and/or contracts with well established markets will be allowed to use those higher prices. In addition, the supplement required in this section for commodity prices will also contain the 5-year history of disaster declarations/designations for all counties in the State, indicating the type of disaster(s) and incidence period(s). The information will be used to determine whether any particular year(s) should be considered as a disaster year for the applicant.

(5) Form FmHA 1962–1 will be revised whenever changes in the borrower's operation occur during the year. It is the borrower's responsibility to notify FmHA of any changes that are necessary. Prior to the disposition of any security, Form FmHA 1962–1 will be marked "Revision" and changes noted by crossing out any original estimates and inserting new estimates immediately above. The borrower and the County Supervisor will initial and date revisions to the Form FmHA 1962–1. Also, if the changes would result in a major change in the operation, a new farm plan must be developed. If the borrower and the County Supervisor cannot agree on a revision, the borrower will be given the opportunity to appeal in accordance with subpart B of part 1900 and § 1962.17 (a)(2) of subpart A of part 1962 of this chapter. The notice to the borrower must identify the items on which the County Supervisor and the borrower cannot agree and must explain why the County Supervisor does not agree with the borrower's planned use of proceeds. While any appeal is pending, FmHA must make releases of normal income security for essential family living and farm operating expenses in accordance with § 1962.17 of subpart A of part 1962 of this chapter. After the appeal is concluded, the County Supervisor and borrower will sign a Form FmHA 1962–1 which complies with the hearing (or any review) officer's decision. If the borrower refuses, the County Supervisor will give the borrower a copy of the form and will explain that it is considered binding by FmHA. Borrowers who do not abide by the form will be handled under § 1962.18 of subpart A of part 1962 of this chapter. If the borrower does not appeal, the County Supervisor will mail the borrower a copy of the completed form along with a cover letter explaining that FmHA considers the planned releases documented in Form FmHA 1962–1 binding.

§ 1924.57 Credit counseling.

The County Supervisor will provide credit counseling to individuals by advising them of productive ways to use credit to increase profitability and achieve business goals.

§ 1924.58 Recordkeeping.

(a) *Purpose.* The type of accounting/bookkeeping system used on the operation must be acceptable to FmHA and documented as part of the assessment under § 1924.55 of this subpart.

(b) *Responsibilities.* (1) The selected recordkeeping system must, as a minimum, provide at least the amount of information needed to complete Forms FmHA 431–2, FmHA 432–1, "Farm Family Record Book," and FmHA 432–2, "Five Year Inventory Record."

(2) Accurate financial records and reporting are the cornerstone to farm business planning. The County Supervisor must counsel the borrower and notify them in writing that noncompliance will result in ineligibility for future FmHA financing. Borrowers who fail to maintain records as agreed will be denied further FmHA loan and loan servicing assistance.

§ 1924.59 Supervision.

The County Supervisor's supervision should be based on the information and evaluation resulting from the assessment of the operation. Such evaluations will be translated into planning strategies, credit and management counseling, loan assistance, analysis, training, and all other appropriate supervision. County Supervisors must tailor strategies on a case-by-case basis using individualized supervision that is based on the defined needs of borrowers. The most efficient use of the County Supervisor and borrower's time and resources will be

achieved by focusing only on the areas needing improvement.

(a) *Borrower responsibilities.* FmHA cannot carry out its supervised credit objectives effectively unless borrowers cooperate with FmHA. When loans or servicing actions are approved, borrowers will be advised by copy of exhibit C to subpart A of part 1910 of this chapter (available in any FmHA County Office) of responsibilities including the following:

(1) Keeping all written agreements reached with FmHA which includes making payments as scheduled consistent with the farm business plan and Form FmHA 1962–1, and abiding by written supervisory requirements covering such items as recordkeeping, farm inspections, inventories, financial reporting agreements, and implementation of specific farm and financial management practices.

(2) Prompt notification to FmHA of any significant change in the business or family expenses or the development of problem situations.

(3) Prompt submission of all information and records when requested in writing by the FmHA.

(4) Maintenance and protection of the collateral for FmHA loans and prompt reporting to FmHA of any losses or other significant changes in the collateral.

(b) *Farm visits.* Periodic supervisory farm visits and reviews of progress being made are an essential part of an effective supervised credit program. Supervisory visits will be made as deemed necessary by the County Supervisor based on their assessment of the overall operation and past experience with the borrower and thoroughly documented. The County Supervisor will determine the field visit schedule for each borrower in their assessment and record on the Management Records System.

§ 1924.60 Nonfarm enterprises.

This is any business enterprise which supplements farm income by providing goods or services for which there is a need and a reasonably reliable market. The same general policies covered in this subpart for giving management assistance to an applicant or borrower on farm loans will be followed in dealing with an applicant or borrower on nonfarm enterprise loans. The appropriate plans and record book will be used for the nonfarm enterprise. Forms FmHA 431–4, "Business Analysis-Nonagriculture Enterprise," and FmHA 432–10, "Business and Family Record Book," available at most FmHA offices can be used for these purposes. The borrower responsibilities in § 1924.59(a) of this subpart also apply to nonfarm enterprises.

§ 1924.61 State supplements.

State supplements will be issued as necessary to implement this subpart and assist field personnel.

§ 1924.71 Delinquent borrowers.

The Finance Office will send each FmHA County Office a status report (Status Report of Farmer Program Accounts, 540) of Farmer Programs borrower accounts monthly. Farmer Programs accounts that are shown as delinquent will be serviced in accordance with subpart S of part 1951 of this chapter.

§ 1924.73 Follow-up supervisory actions by District Directors and State Office staff.

(a) *Follow-up by the District Directors.* The District Director is responsible for seeing that the County Office staff correctly assesses agricultural operations in accordance with § 1924.55 of this subpart, and develops and adheres to a supervisory plan leading to borrower graduation, with or without FmHA guarantee assistance. The District Director is responsible for assuring that a good supervised credit program is being carried out in an effective and timely manner. The District Director or designee will record in the borrower's case file any visits or borrower consultations made by the District Director or designee. This responsibility requires visits to evaluate a sufficient number of such cases to determine what additional training is needed by the County Supervisor to improve the quality of assessments and supervision described in this subpart. The District Director should continue follow-up actions periodically as needed to obtain the desired results in each County Office area. The State Director will be informed at least annually of the adequacy of the supervised credit program in each County Office through the District Director's "Oversight Visit Report" required by FmHA Instruction 2006–M (available in any FmHA office).

(b) *Follow-up by State Office staff.*

(1) State Directors, or their designees, are responsible for seeing that actions prescribed by this subpart are carried out by the County Supervisors and District Directors.

(2) Program chiefs and specialists should review a representative sample of cases during each visit to a county office to ensure that assessments are being made as required, and that proper supervisory plans are developed, followed, and revised as appropriate to eliminate barriers to financial viability. Any deficiencies found in the County Office review will be reported in writing to the State Director along with recommendations for correction.

(3) On an annual basis, the State Director will review with the District Director the effectiveness of the supervision being provided to borrowers in the Districts. A report of the review will be included in the annual State Evaluation Review (SER) report to the National Office as set forth in FmHA Instruction 2006–M (available in any FmHA office).

8. Exhibit A to subpart B is amended by revising the first paragraph after the closure "County Superviser" to read as follows:

Exhibit A—Letter to Borrower Regarding Releases of Farm Income to Pay Family Living and Farm Operating Expenses

* * * * *

Periodically, you will be asked to complete Form FmHA 1962–1, "Agreement for the Use of Proceeds/Release of Chattel Security," which will document the agreement between you and FmHA as to how proceeds from the sale of chattel property which serves as security for your FmHA loans will be released to you by FmHA. You will also need to list those buyers to whom you plan to sell your farm products. This plan will give you and FmHA a clear idea of what income you expect from your operation and how those proceeds will be used. The plan will set forth the amount of money required for paying essential family living, farm operating expenses and debt service payments. You and FmHA must agree on how much money will be released from your crop proceeds. Such releases must be in accordance with FmHA regulations.

* * * * *

PART 1941—OPERATING LOANS

9. The authority citation for part 1941 continues to read as follows:

Authority: 7 U.S.C. 1989; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart A—Operating Loan Policies, Procedures and Authorizations

10. Section 1941.19 is amended by adding a new paragraph (f)(6) to read as follows:

§ 1941.19 Security.

* * * * *

(f) * * *

(6) Provisions of § 1962.13 (b) of subpart A of part 1962 of this chapter will be implemented when FmHA has farm products as security.

* * * * *

Subpart B—Closing Loans Secured by Chattels

11. Section 1941.57 is amended by revising paragraph (c)(1) to read as follows:

§ 1941.57 Security instruments.

* * * * *

(c) * * *

(1) Forms FmHA 440–25, "Financing Statement," or FmHA 440A–25, "Financing Statement (Carbon-Interleaved)", and FmHA 440–4, "Security Agreement (Chattels and Crops)," will be used to obtain security interests in chattel property in States which have adopted the Uniform Commercial Code (UCC), unless a State supplement requires the use of other forms.

* * * * *

PART 1943—FARM OWNERSHIP, SOIL AND WATER AND RECREATION

12. The authority citation for part 1943 continues to read as follows:

Authority: 7 U.S.C. 1989; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart A—Direct Farm Ownership Loan Policies, Procedures and Authorizations

13. Section 1943.32 (a) is amended under the list of forms by removing the entry beginning with "1431–1."

Subpart B—Direct Soil and Water Loan Policies, Procedures and Authorizations

§ 1943.82 [Amended]

14. Section 1943.82 (a) is amended under the list of forms by removing the entry beginning with "1431–1."

PART 1945—EMERGENCY

15. The authority citation for part 1945 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1980; 5 U.S.C. 301; 7 CFR 2.23; 7 CFR 2.70.

Subpart D—Emergency Loan Policies, Procedures and Authorizations

16. Section 1945.163 is amended by removing paragraph (a)(1)(iii), redesignating current paragraph (a)(1)(ii) as (a)(1)(iii), adding new paragraph (a)(1)(ii), and revising paragraph (a)(1)(i), newly redesignated paragraph (a)(1)(iii) and paragraph (a)(1)(iv) to read as follows:

§ 1945.163 Determining qualifying losses, eligibility for EM loan(s) and the maximum amount of each.

* * * * *

(a) * * *

(1) * * *

(i) *The applicant's actual reliable farm records.* If actual yields are not available for all of the 5 crop year(s), the applicant will use a combination of actual records which are available and County or State averages, as specified in paragraph (a)(1)(ii) of this section.

(ii) *The County or State average yields.* These average yields are located in the FmHA State supplement. However, these production figures can be substituted only when an applicant has insufficient records for certain commodities and/or years.

(iii) *The ASCS "established yields."* When this production record source is used, the applicant must obtain the information from ASCS and submit it with the application to FmHA. The disaster year established yield, as provided by ASCS for any given crop, will be used as the yield for those years for which the applicant has no production records to determine the normal year's yields.

(iv) When an applicant's production loss is on new land being developed, or to young perennial crops such as fruits and nuts, which have not reached their mature production potential, the State Director will establish the normal yields to be used.

* * * * *

§ 1945.167 [Amended]

17. Section 1945.167 is amended by removing paragraph (g) and redesignating paragraphs (h) through (k) as (g) through (j), respectively.

18. Section 1945.169 is amended by revising paragraph (n)(4) to read as follows:

§ 1945.169 Security.

* * * * *

(n) * * *

(4) In UCC states, an assignment of income constitutes a security agreement and should be treated accordingly. Also, § 1962.13(b) of subpart A of part 1962 of this chapter will be implemented when FmHA has farm products as security.

PART 1951—SERVICING AND COLLECTIONS

19. The authority citation for part 1951 continues to read as follows:

Authority: 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart F—Analyzing Credit Needs and Graduation of Borrowers

20. Sections 1951.251 through 1951.255 and 1951.261 through 1951.266 are revised; § 1951.300 is removed; and §§ 1951.260, 1951.267 and 1951.268 are added to read as follows:

§ 1951.251 Purpose.

This subpart prescribes the policies to be followed when analyzing a direct borrower's needs for continued Farmers Home Administration (FmHA) supervision, further credit and graduation. All loan accounts will be reviewed for graduation in accordance with this subpart, with the exception of Guaranteed, Watershed, Resource Conservation and Development, Rural Development Loan Funds, and Rural Rental Housing loans made to build or acquire new units made pursuant to contracts entered into on or after December 15, 1989, and Intermediary Relending Program loans.

§ 1951.252 Definitions.

Commercial. These are FmHA's highest quality Farmer Programs accounts. The financial condition of the borrowers is strong enough to enable them to absorb the normal adversities of agricultural production and marketing. There is ample security for all loans, there is sufficient cash flow to meet the expenses of the agricultural enterprise and the financial needs of the family, and to service debts. The account is of such quality that commercial lenders would view the loans as a profitable investment. This is the same definition as found in FmHA Instruction 2006–W (copy available in any FmHA County Office).

Farmer Programs loans. Farm Ownership (FO), Operating (OL), Soil and Water (SW), Recreation (RL), Emergency (EM), Economic Emergency (EE), Economic Opportunity (EO), Special Livestock (SL), Softwood Timber (ST) loans, and/or Rural Housing loans for farm service buildings (RHF).

Graduation, Farmer Programs. The payment in full of all Farmer Programs (FP) loans or all FP loans of one type (*i.e.*, all loans made for chattel purposes or all loans made for real estate purposes) by refinancing with other credit sources either with or without an FmHA loan guarantee. A loan made for both chattel and real estate purposes, for example an EM loan, will be classified according to how the majority of the loan's funds were expended. Borrowers must continue with their farming operations to be considered as graduated.

Graduation, other programs. The payment in full of a l FmHA direct loans, before maturity, by refinancing with other credit sources. Graduated housing borrowers must continue to hold title to the property. Graduation

does not include credit which is guaranteed by the United States.

Prospectus, Farmer Programs. Consists of a transmittal letter similar to FmHA Guide Letter 1951–F–3 with the attached "Historical Performance Worksheet" and "Summary of the Year's Business" generated by the Automated Farm and Home Plan system (available in any FmHA Office). Any other historical performance analysis and business summary that is acceptable to FmHA may be substituted for the latter two documents. The prospectus is used to determine lender interest in financing or refinancing specific FmHA direct loan applicants and borrowers.

Reasonable rates and terms. Those commercial rates and terms which borrowers are expected to meet when borrowing for similar purposes and similar periods of time. The "similar periods of time" of available commercial loans will be measured against, but need not be the same as, the remaining or original term of the FmHA loan. In the case of Multi-Family Housing (MFH) loans, "reasonable rates and terms" would be considered to mean financing that would allow the units to be offered to eligible tenants at rates consistent with other FmHA multi-family housing.

Servicing official. The District or County Office official responsible for the immediate servicing functions of the borrower.

Standard. These loan accounts are fully acceptable by FmHA standards. Loan risk and potential servicing costs are higher than would be acceptable to other lenders, but are adequately secured. Repayment ability is adequate, and there is a high probability that all loans will be repaid as scheduled and in full. This is the same definition as found in FmHA Instruction 2006–W (copy available in any FmHA County Office).

Trial referral. A program whereby lenders voluntarily participate in reviewing selected financial information supplied by servicing officials on non-Farmer Programs borrowers who have been selected for graduation.

§ 1951.253 Objectives.

(a) The FmHA credit programs will be administered in a manner that will assure they do not supplant or compete with credit available to rural families and groups from other reliable credit sources.

(b) Borrowers must graduate to other credit at reasonable rates and terms when they are able to do so.

(c) If a borrower refuses to graduate, FmHA will liquidate their account under the following conditions:

(1) The borrower has the legal capacity and financial ability to obtain other credit.

(2) Other credit is available from a commercial lender at reasonable rates and terms. In the case of Labor Housing (LH), Rural Rental Housing (RRH), and Rural Cooperative Housing (RCH) Programs, reasonable rates and terms must also permit the borrowers to continue providing housing for low and moderate income persons at rental rates tenants can afford considering the loss of any subsidy which will be cancelled when the FmHA loan is paid in full. The District Director will do a comparative analysis of rents and incomes of tenants living in the FmHA project(s) eligible for graduation and conventionally financed projects of the local area.

(d) The FmHA has the legal ability to enforce borrower graduation. It must be recognized that most, but not all, FmHA notes, security instruments and/or loan agreements contain clauses requiring a borrower to graduate when other credit can be obtained. The clause may say "upon reasonable terms and conditions," "on terms prevailing in the area for loans for similar periods or time and purpose," or "at reasonable rates and terms for loans for similar purposes and periods of time." These three provisions are all construed to mean the borrower agrees to, and FmHA can take, legal action to enforce graduation when FmHA has evidence that commercial credit can be obtained at reasonable rates and terms.

§ 1951.254 Responsibility.

(a) State Directors are responsible for:

(1) Monitoring the review of the graduation process to ensure this subpart is complied with in each State under their jurisdiction.

(2) Meeting with members of the financial community to discuss the FmHA graduation requirements.

(3) The Business and Industry (B&I) Chief is responsible for the graduation review and follow-up on all direct B&I loans.

(b) The District Director, except for B&I loans, is responsible for:

(1) Monitoring the County Office graduation process for compliance with this subpart.

(2) Meeting with local lenders to discuss borrower graduation, underwriting criteria, and to assess general interest in refinancing community program and multiple housing borrowers.

(3) Graduation reviews and follow-up on all community program (except B&I) and multiple housing borrowers.

(4) Follow-up to ensure that County Supervisors are in compliance with this subpart. District Directors will report their findings as set forth in FmHA Instruction 2006–M (available in any FmHA office).

(c) The County Supervisor is responsible for:

(1) Performing graduation reviews and following up on all affected Farmer Programs and Rural Housing accounts.

(2) Meeting with the representatives of the financial community such as insurance and mortgage companies, commercial banks, savings and loan associations, Farm Credit System institutions, and State lender agencies to stay informed of current lending activities, practices, and standards to facilitate borrower graduation.

(d) FmHA may use private contractors to assist in FmHA graduation activities. See FmHA Instruction 2024–A, exhibit D (available in any FmHA office) for contracting program authority guidance.

§ 1951.255 Nondiscrimination.

All loan servicing actions described in this subpart will be conducted without regard to race, color, religion, sex, familial status, national origin, age, or physical or mental handicap.

§ 1951.260 Reaching an understanding with applicants and borrowers.

(a) Prior to loan closing, the FmHA official will thoroughly discuss the graduation requirements, along with those items contained in exhibit C of subpart A of part 1910 of this chapter (available in any FmHA office), if applicable, with the applicant and document the discussion in the running case record or other form provided for this purpose. For Farmer Programs, County Supervisors must discuss FmHA's use of prospectus information to assist in graduation, the contents of FmHA Guide Letter 1951–F–9 (available in any FmHA office), and have the applicant or borrower sign the attachment to Guide Letter 1951–F–9. During the discussion, the applicant will also be informed that:

(1) FmHA loans are a temporary source of credit; and that borrowers are required to refinance their loans when credit is available at prevailing rates and terms.

(2) FmHA expects them to comply with FmHA's graduation requirements, evidenced by the legally binding graduation clauses in the FmHA promissory note, security instrument and/or loan agreement.

(3) Borrowers accounts are periodically reviewed for graduation.

(4) The borrower will be required to provide financial information upon request.

(5) In certain cases, prepayment restrictions and/or other limiting conditions will be considered in the graduation process.

(6) Requests for an additional loan, subordination, or consent to incur additional indebtedness will not normally be approved until an outstanding graduation request is resolved. (See § 1951.265 of this subpart.)

(b) The servicing official will periodically discuss graduation requirements with borrowers during routine field visits, office, and servicing contacts.

§ 1951.261 Survey of lender criteria and policies.

Borrower graduation efforts are more effective if FmHA officials understand the commercial credit environment. During routine lender contacts and meetings, FmHA officials should explain the graduation requirements and solicit lender underwriting criteria, as well as advice and assistance as to how FmHA borrowers can obtain financing at their institution. Information gathered from these contacts will be summarized in narrative form for each FmHA program and placed with the graduation review list in the District or County Office operational file on other credit. (The servicing official, in lieu of writing a narrative for all programs, may use exhibit A of this subpart for Farmer Programs loans and exhibit B of this subpart for Rural Housing loans.) For Community Program borrowers, the State Director will provide Statewide information to the servicing official pursuant to § 1942.2 (a)(2)(i) of subpart A of part 1942 of this chapter to supplement that obtained at the District level. At a minimum, the narrative for each loan program will contain the following:

(1) Lenders' interest in refinancing FmHA borrowers.

(2) Lenders' rates, terms, fees, loan conditions and policies.

(3) The amount of estimated credit available to FmHA borrowers.

(4) Lenders' interest in screening borrowers under the trial referral provisions of § 1951.263 (d) of this subpart.

1951.262 Farmer Programs—graduation of borrowers.

(a) *Annual notice.* All direct Farmer Programs OL borrowers will be sent FmHA Guide Letter 1951–F–8 (available in any FmHA office) on or before October of each year. This letter will remind borrowers of FmHA graduation requirements, and the lifetime OL eligibility limitations, and encourage them to graduate as soon as possible. Information regarding a borrower's OL eligibility status is available through the Finance Office Current/Past Debts Inquiry Screen.

(b) *Create list of prospective lenders.* During routine contacts with local lenders (but at least annually), inquire whether the institutions would be interested in receiving routine prospectus information on FmHA commercial and standard classified borrowers. A list of all lenders will be maintained in the County Office operational file as required under FmHA Instruction 2033–A (available in any FmHA office).

(c) *Graduation review period.* The Finance Office will furnish each County Office, by each January, a loan classification report identifying all direct Farmer Programs borrowers. Graduation reviews should be completed by March 1 of each year.

(d) *Graduation candidates.* Borrowers classified "commercial" or "standard" are considered graduation candidates.

(e) *Perform year-end analysis/assessment.* The borrower must be reviewed as described under § 1924.55 of subpart B of part 1924 of this chapter.

(f) *Screen out obvious borrowers unable to graduate.* If there is an obvious reason(s) that the borrower will be unable to graduate, *e.g.*, example recent bankruptcy, limited resource rate borrower or other extenuating circumstances, the reasons will be documented in the case file and the prospectus *will not* be sent. Borrower Classification Reports must be retained as part of the County Office operational file for graduations.

(g) *Determine borrower eligibility.* If Form FmHA 440–2, "County Committee Certification or Recommendation" has expired, the County Committee will reconsider the applicant's eligibility and execute Form FmHA 440–2. Lenders will be notified in the transmittal letter discussed in paragraph (h) of this section whether an FmHA loan guarantee will be available.

(h) *Send borrower's prospectus to interested lenders.* For those borrowers who do not agree to permit FmHA to distribute their prospectus see paragraph (i) of this section. For borrowers who give FmHA permission on FmHA Guide Letter 1951–F–9 (available in any FmHA office) to send prospectus information to lenders, the following applies:

(1) If the County Supervisor's assessment under § 1924.55 of subpart B of part 1924 of this chapter indicates a borrower would cash flow at commercial interest rates, with or without guaranteed loan interest assistance, the borrower's prospectus will be sent to prospective lenders on the list maintained in the County Office.

(2) The County Supervisor will send the lender(s) a transmittal letter similar to FmHA Guide Letter 1951–F–3 (available in any FmHA office) asking them if they are interested in refinancing the borrower on a guaranteed or non-guaranteed basis. A stamped, self-addressed envelope will be included for the lender(s) to respond.

(i) In cases of a positive lender response(s) to a borrower prospectus:

(A) If the lender indicates a willingness to refinance the borrower without an FmHA guarantee, the borrower will be notified in writing and the lender will be provided with information from the FmHA case file to facilitate the graduation.

(B) If the lender indicates an interest in refinancing the borrower with an FmHA guarantee, refer to Market Placement Applications under § 1980.113 of subpart B of part 1980 of this chapter.

(C) If more than one lender indicates an interest in providing credit, the borrower will select a lender. Refer to § 1951.264 (c) of this subpart for handling borrowers who refuse to cooperate with FmHA graduation requirements following notice of lender interest in refinancing.

(ii) In the case of a negative lender response(s) to a borrower prospectus:

(A) If no lender indicates interest in refinancing the borrower, the graduation review will be concluded for that year.

(B) Note the lender's reason(s) for declining to refinance FmHA in the margin of the borrower classification report. This report is to be retained as part of the County Office operational file for graduations. The borrower's case file must also be documented.

(C) Attempt to determine the obstacle(s) to graduation and reevaluate the supervision and training strategy, performed as part of the assessment process under subpart B of part 1924 of this chapter.

(i) *Borrowers who elect not to permit FmHA to send prospectus information directly to lenders.* (1) Provide each borrower with a copy of their updated prospectus information.

(2) Remind and explain to the borrower that they have refused FmHA permission to contact lenders directly on their behalf. Therefore, the borrower must apply to at least two local lenders who typically finance operations similar to that of the borrower. The borrower must make formal application with each lender and is responsible for any application fees. Letters of denial or

rejection from lenders without formal application being made cannot be accepted by FmHA.

(3) County Supervisors will allow borrowers 60 days from the date the borrower receives the prospectus information to make application and receive a response from lenders. For good cause, the borrower may be granted a reasonable amount of additional time at the discretion of the County Supervisor. The extension must be justified in the borrower's case file.

(4) If a borrower is unable to graduate, the County Supervisor will verify that a formal application was made. The reason(s) for loan disapproval will be noted in the margin of the Borrower Classification Report, and documented in the borrower's case file. The County Supervisor's supervisory strategy should be reexamined in light of the reasons for lender loan disapproval. The County Supervisor must ensure these deficiencies are factored into the supervisory assistance strategies for that borrower, in accordance with the assessment process under subpart B of part 1924 of this chapter.

(5) All borrowers eligible for commercial credit must graduate. If a borrower refuses to graduate or cooperate with FmHA, their case will be handled in accordance with § 1951.264 (c) of this subpart.

§ 1951.263 Graduation of non-Farmer Programs borrowers.

(a) *The graduation review period.*

(1) Graduation review lists will be prepared as follows:

(i) By October 1 of each year, the Finance Office furnishes the County Office a list of active program borrowers, excluding Farmer Programs borrowers, who are to be considered for graduation.

(A) For single family housing borrowers, the list will contain the names of borrowers who meet the criteria in exhibit C of this subpart (available in any FmHA office). Length of time of the indebtedness will not be a determining factor on single family housing borrowers.

(B) The County Supervisor will, upon receipt of the list, divide RH borrowers identified in paragraph (a)(1)(i)(A) of this section into four groups in such a manner that approximately one-fourth will be reviewed each quarter.

(ii) For Community Programs except for B&I loans which are handled by the B&I Chief, the District Director, using the Rural Community Facilities Tracking System (RCFTS) will generate a list by June 1 of each year, indicating borrowers who have been indebted for at least 5 years.

(iii) By March 1 of each year the State Office will furnish each District Office a list of Multiple Family Housing (MFH) Program borrowers and MFH Program transferees who have assumed loans on new terms and who have been indebted for 15 years in the case of an unsubsidized project and 20 years in the case of a subsidized project. The State Office will compile the list using the Multi-Family Housing Information Status Tracking and Retrieval System (MISTR).

(iv) By October 1 of each year, the County Supervisor, using the Management Records System, will prepare a graduation review list indicating borrowers who have been indebted for at least 6 years under the RL Program.

(A) Borrowers' names with all outstanding loans will appear on the graduation review lists in accordance with the following:

(*1*) Single Family Housing borrowers are first selected for review based on the outstanding loan with the earliest closing date. The graduation review lists compiled in odd-numbered years will include the names of all borrowers whose oldest outstanding loan was closed during odd-numbered calendar years. The same procedure will apply to borrowers whose oldest outstanding loan closed during even-numbered calendar years. Once a borrower has appeared on the graduation review list, the borrower will automatically reappear on the list every 2 years unless screened out by the criteria in exhibit C of this subpart (available in any FmHA office).

(*2*) For Community and Business Programs, graduation review lists will be compiled on the basis of the year in which the initial loan or transfer was closed. The graduation review lists compiled in odd-numbered years will include the names of all borrowers whose loans were closed during odd-numbered calendar years. The same procedure will apply to borrowers whose loans were closed during even-numbered calendar years.

(*3*) If the servicing official or County Committee has knowledge of any other borrower whose financial circumstances have changed sufficiently to warrant consideration, that borrower will also be included in the graduation review.

(B) The servicing official will manage the graduation of borrowers throughout the year to accomplish graduation prior to receiving a new graduation list. The State Director through the issuance of a State supplement will establish program timetables. The National Office will establish reporting requirements to monitor the administration of this subpart.

(2) [Reserved]

(b) *The initial screening.* Upon receipt of the graduation review list, the servicing official will screen the list for borrowers who are clearly unable to graduate. This initial screening will focus upon information immediately available in the borrower's case file and in the operational file on other credit.

(1) The servicing official will not review borrowers who are clearly unable to meet minimum lending criteria.

(2) It will not be necessary to review borrowers with a specified interest rate refinancing ceiling clause in their loan instruments, as long as credit at the specific interest rate is not available from other sources. It will also not be necessary to review borrowers who have notes, security instruments, or loan agreements which do not contain a graduation clause. However, the servicing official will encourage either type of borrower to graduate voluntarily.

(3) A borrower's ability to accept other credit may be limited by factors over which the borrower has little or no control, such as a referendum required by a public body borrower. However, the existence of such factors will not preclude FmHA from requesting a borrower to graduate nor the borrower from making a diligent effort to seek other credit should such a request be made. The prepayment restrictions contained in section 502(c)(1) of title V of the Housing Act of 1949, as amended, for RRH, RCH, and LH loans are factors which must be considered. These prepayment restrictions are found in exhibit A–1 of subpart E of part 1965 of this chapter for LH loans and § 1944.238 of subpart E of part 1944 of this chapter for RRH and RCH loans. Tenant notification requirements and restrictive use provisions, as outlined in § 1965.215 of subpart E of part 1965 of this chapter must also be addressed.

(4) MFH borrowers whose projects have rental assistance (RA) which is being utilized by eligible tenants will not be required to graduate.

(5) The decision reached by the servicing official during the screening process will be briefly documented next to each borrower's name on the graduation review list. If the borrower is eliminated from further review due to an inability to meet established minimum lending criteria and/or policies (see paragraph (b)(1) of this section), specific reasons will be included in the borrower's case file.

(c) *The thorough review.* For borrowers who are not eliminated from the graduation review list by the initial

screening, the servicing official will conduct a thorough review of financial information already in the borrower's case file or request additional information. Borrowers, upon request by FmHA, are required to supply such financial information as is necessary to determine whether they are able to graduate to other credit.

(1) For borrowers who are required to submit annual financial statements and for which a copy of the most recent fiscal year's statements are in the borrower's case file, the servicing official will review these statements in accordance with paragraph (c)(4) of this section.

(2) In cases where copies of the most recent year's financial statements are not in the borrower's case file, FmHA Guide Letter 1951–F–1 (available in any FmHA office), or a letter of similar format, will be used by the servicing official to request the borrower to provide such financial statements within 60 days for group type loans and 30 days for individual type loans. At a minimum, the financial statements requested from the borrower will be a balance sheet and a statement of income and expense. Ordinarily, the financial statements will be those normally required of a particular borrower at the end of that borrower's fiscal year. For borrowers who are not requested to furnish audited financial statements, the balance sheet and statement of income and expense may be of the borrower's own format if the borrower's financial situation is accurately reflected. The following FmHA forms may also be used:

(i) Form FmHA 1944–3, "Budget and/or Financial Statement;" and Form FmHA 431–4, "Business Analysis—Nonagricultural Enterprise," as appropriate.

(ii) Community Programs: Form FmHA 442–2, "Statement of Budget, Income and Equity;" and Form FmHA 442–3, "Balance Sheet."

(iii) Multiple Family Housing: Form FmHA 1930–7, "Multiple Family Housing Project Budget," and Form FmHA 1930–8, "Year End Report and Analysis for Fiscal Year Ending _____."

(3) FmHA Guide Letter 1951–F–2 (available in any FmHA office), or letter of similar format, will be used if the borrower fails to respond to the first request.

(4) The servicing official, with the assistance of the County Committee when applicable, will conduct a thorough review of the borrower's financial and repayment position. For loans to individuals this review is based on the financial position of only the borrower, meaning the person indebted to FmHA as evidenced by the signature on the Promissory Note, Mortgage and/or other security instrument, and not of any other household member, not even a spouse, who is not indebted to FmHA. The thorough review will eliminate borrowers on the graduation review list who are unable to meet the established minimum lending criteria and/or policies. Additional factors to be considered during the thorough review will include:

(i) The borrower's present and potential income to meet the rates, terms, loan fees and conditions of other credit (*i.e.*, debt repayment ability.)

(ii) The borrower's liquid and nonessential assets.

(iii) The borrower's equity in real property (including consideration of any subsidy recapture) and personal property.

(iv) The borrower's repayment history.

(v) The impact graduation would have on typical user costs. User costs, rental rates, lease fees, or other charges, when borrowers rely on collection from these sources for debt repayment, should be reasonable for the area served.

(vi) The Federal, State or local statutory constraints, which may limit the borrower's ability to refinance, such as a referendum required of a public body.

(5) Those borrowers who will not be requested to graduate, as a result of the thorough reviews, will be so noted on the graduation review list and handled in the same manner as those borrowers eliminated during the initial screening process. (See paragraph (b)(5) of this section.)

(6) When a borrower has been requested to provide financial information in accordance with FmHA Guide Letter 1951–F–1 (available in any FmHA office), or letter of similar format, and the subsequent review process (including the trial referrals) determines the borrower will not be requested to graduate, the borrower will be informed in writing that no further action will be considered for this year. FmHA Guide Letter 1951–F–7 (available in any FmHA office) may be used for this purpose.

(7) The servicing official, following the thorough review, will prepare Form FmHA 1951–24, "Results of Borrower Graduation Review," listing only borrowers who will be requested to graduate. Separate Forms FmHA 1951–24 will be prepared for Community Program and Multiple Family Housing borrowers. The servicing official will obtain the advice and written concurrence of the State Director prior to making the request for a borrower to graduate.

(d) *Trial referral.* The servicing official, prior to actually requesting a borrower to graduate as described in paragraph (e) of this section, may make a trial referral. This trial referral can be either verbal or written with individual lenders or by group method and could include all or part of those borrowers selected for graduation in accordance with paragraph (c)(7) of this section. Prospectus information will be obtained from the borrower's file and will be submitted to the lender using FmHA Guide Letter 1951–F–4 (available in any FmHA office) for Rural Housing borrowers, or a letter of similar format. Other data may be added if requested by lenders. The non-Farmer Programs' prospectus will contain the borrower's name, address, original loan amount, date of the loan, the interest rate, and the unpaid loan balance. For borrowers selected for a trial referral, a prospectus will be prepared and provided to each lender who chooses to participate, whose lending area would include the borrower's location and whose criteria the borrower appears to meet. Lenders, following receipt and review of a prospectus, will be encouraged to indicate their willingness to contact the borrower and accept an application for further consideration. If one or more lenders express interest in a particular borrower, the borrower will be provided the lenders' names as possible sources of other credit when the servicing official requests the borrower to graduate. If the lenders participating in the trial referral represent the most likely sources of other credit in a given lending area, and if these lenders fail to show interest in a particular borrower, this is evidence that there is no credit available for that particular borrower and no further effort needs to be made to effect graduation at this time. This information will be noted next to the borrower's name on the graduation review list and the name will be removed from Form FmHA 1951–24 by the servicing official. The lender's participation in the trial referral provision of this paragraph will be optional. Normally, the lender's interest will be determined at the time of the servicing official's survey of lender criteria and policies (see § 1951.261 of this subpart). If one or more lenders indicate a willingness to participate, the servicing official should use the trial referral provision if one or more of the following factors exists:

(1) When the servicing official is not sure that local lenders would be interested in a particular borrower due to such factors as low unpaid balance, location of the security within the

lending area or other factors not made clear at the time of the servicing official's contact with the local lender.

(2) When there is a substantial cost imposed by the lender on the FmHA borrower for filing a loan application.

(3) When the servicing official has reason to believe borrowers will not actively seek, on a voluntary basis, refinancing credit from those lenders believed to be most willing to consider such credit.

(4) When failure to employ this system would make it difficult or time consuming for the servicing official to identify potential willing lenders in the event the borrower refuses to voluntarily contact lenders.

(e) *Requesting the borrower to graduate.* Borrowers who are to be requested to graduate will be listed on Form FmHA 1951–24. In selecting borrowers who will be required to graduate, the servicing official will give full consideration to the financial strength, income capability, and debtor characteristics which appear to meet lender criteria.

(1) FmHA Guide Letter 1951–F–5 (available in any FmHA office), or a letter of similar format, will be used to request the borrower to graduate. The approximate date by which the borrower will provide evidence of the borrower's ability or inability to graduate will be shown in the Management Records System for appropriate follow-up action. That date, determined by the number of days following the date on which the FmHA Guide Letter 1951–F–5 (available in any FmHA office), or letter of similar format, is mailed to the borrower, will be as follows:

(i) 30 days for Rural Housing borrowers.

(ii) 90 days for group type borrowers.

(iii) Additional time may be allowed, for example, when a borrower expects to receive income in the near future for the payment of FmHA account(s) which would substantially reduce the amount required for refinancing, or when a borrower is a public body and must issue bonds to accomplish graduation.

(2) In applying for other credit, FmHA Guide Letter 1951–F–5 (available in any FmHA office), or a letter of similar format, will inform the borrower to seek a loan only in the amount necessary to repay the unpaid balance of the FmHA debt.

(3) If a borrower is unable to graduate the loan in full, written evidence must be furnished to FmHA by the borrower, showing:

(i) the name(s) of other lender(s) contacted.

(ii) the amount of loan requested by the borrower and the amount, if any, offered by the lender(s),

(iii) the rates and terms offered by the lender(s) or the specific reason(s) why other credit is not available, and

(iv) the purpose of the loan request.

(4) The District Director with the advice of the State Director, or the County Supervisor in consultation with the County Committee, when applicable, will consider new information submitted by the borrower or obtained from other reliable sources following a graduation request. The servicing official must verify all information submitted by the borrower or obtained from other sources to determine the information's reliability and reevaluate the borrower's financial circumstances. If the information submitted is not adequate and/or reliable, the servicing official will contact other sources of credit in the area and document the findings in the borrower's case file. The difference in interest rates between FmHA and other lenders will not be sufficient reason for failure to graduate if that other credit is available at rates and terms which the borrower can reasonably be expected to pay. An exception is made where there is an interest rate ceiling imposed by Federal law or contained in the note or mortgage.

(5) The servicing official may offer to meet with the borrower.

(i) If additional information confirms the borrower will be unable to graduate, the servicing official will notify the borrower in writing that the request to graduate has been withdrawn. The specific reasons for withdrawing the request will be recorded on Form FmHA 1951–24, in the borrower's case file and noted briefly on the graduation review list.

(ii) If the additional information confirms the borrower can graduate, the servicing official will inform the borrower using FmHA Guide Letter 1951–F–6 (available in any FmHA office), or letter of similar format, that legal action will be recommended if positive steps to graduate are not taken in 15 days for individual loans and 60 days for group loans. However, a longer period may be granted by the servicing official if conditions warrant such action.

§ 1951.264 Action when borrower fails to cooperate, respond and/or graduate.

(a) When a borrower with other than Farmer Programs loans fails to:

(1) Provide information following receipt of both FmHA Guide Letters 1951–F–1 and 1951–F–2 (available in any FmHA office), or letters of similar format, such borrowers will not be asked to graduate. They are, at that point, in default of their security instruments, which require the borrower to comply with all future regulations not inconsistent with the security instruments. The servicing official will, based on the borrower's failure to supply information in accordance with § 1951.263(e) of this subpart, prepare the required documents recommending legal action and submit them together with the borrower's case file to the official authorized in § 1955.15 of subpart A of part 1955 of this chapter to approve foreclosure of the loan type involved (approval official) with a written report outlining credit sources contacted by FmHA and the borrower, the reasons given by the borrower for failure to graduate, action taken by FmHA to verify the availability of credit, and the borrower's available financial resources along with any other data pertinent to the case. The approval official may, with the concurrence of the Office of the General Counsel (OGC), when appropriate, accelerate the account based on the borrower's failure to perform as required by this subpart and the loan and security instruments. For Single Family Housing loans, written concurrence of the OGC is required before accelerating an account.

(2) Apply for or accept other credit following receipt of both FmHA Guide Letters 1951–F–5 and 1951–F–6 (available in any FmHA office), or letters of similar format, such borrowers will not be given further notice to graduate but at that point are in default under the graduation requirement of their security instruments. The servicing official will prepare the required documents to recommend legal action and submit them to the approval official as outlined in paragraph (a)(1) of this section.

(b) For borrowers with other than Farmer Programs loans, the official authorized to approve foreclosure will review those cases submitted to his or her office and determine what action must be taken on the basis of FmHA notes, security instruments, and/or loan agreements signed by the borrower and the facts and recommendations provided by the servicing official.

(1) If the approval official determines the borrower is unable to graduate, the graduation request may be withdrawn. The approval official will request the servicing official to notify the borrower and withdraw the graduation request in accordance with § 1951.263(e)(5)(i) of this subpart.

(2) If the approval official determines the borrower is able to graduate, foreclosure action will be initiated in

accordance with § 1955.15(d)(2)(ii) of subpart A of part 1955 of this chapter. If the borrower's account is accelerated, the borrower will be given the right to appeal the decision in accordance with subpart B of part 1900 of this chapter. The advice of the OGC is required before accelerating the account. For Single Family Housing loans, written concurrence of the OGC is required before accelerating the account.

(c) When a Farmer Programs loan borrower fails to cooperate with FmHA and the commercial lender following notification in writing of a lender's willingness to seriously consider their loan application for refinancing FmHA, the County Supervisor will refer the case to the District Director. If the District Director concurs with the County Supervisor, the District Director will also notify the borrower that failure to cooperate will cause their account to be referred for legal action. If the District Director receives no satisfactory response from the borrower within 10 days of written notification, the case will be forwarded to OGC through the State Office for concurrence.

(1) If the District Director or the OGC do not concur with the County Supervisor's decision to take legal action to liquidate the account, the District Director after consultation with the Farmer Programs staff will return the case to the County Supervisor with appropriate instructions for future loan eligibility and servicing.

(2) If the District Director and OGC concur with the County Supervisor's decision to take legal action to liquidate the account, the case will be returned to the County Supervisor. The County Supervisor should use the appropriate statement on exhibit B–2 to subpart B of part 1900 of this chapter and use it to notify the borrower of FmHA's intent to accelerate the account and to foreclose for failure to graduate or failure to provide requested information. Any appeal will be conducted in accordance with the regulations in subpart B of part 1900 of this chapter. If the borrower does not appeal the notice of intent to accelerate or if the adverse decision is upheld, the County Supervisor will send the case to the District Director for acceleration of the account in accordance with subpart A of part 1955 of this chapter. Exhibit D of subpart A of part 1955 of this chapter (available in any FmHA office) will be completed in accordance with the exhibit to delete the statement regarding deferrals.

(3) If the borrower appeals the County Supervisor's decision to accelerate and liquidate the account and the decision is reversed, the District Director after consultation with the Farmer Programs staff will provide the County Supervisor appropriate instructions on the borrower's eligibility for future FmHA financing and servicing.

§ 1951.265 Application for subsequent loan, subordination, or consent to additional indebtedness from a borrower who has been requested to graduate.

(a) Any borrower who appears to meet the local commercial lending standards, taking into consideration FmHA's loan guarantee program, will not be considered for a subsequent loan, subordination, or consent to additional indebtedness until the borrower's ability or inability to graduate has been confirmed. An exception may be made where the proposed action is needed to alleviate an emergency situation, such as meeting applicable health and/or sanitary standards which require immediate attention.

(b) In situations where the borrower has been requested to graduate and has also been denied a request for a subsequent loan, subordination, or consent to additional indebtedness, appeal rights should be given simultaneously for both issues.

(c) When FmHA's graduation request has been upheld through the appeals process, any request for additional assistance under this section may be denied without further appeal rights.

§ 1951.266 Special requirements for MFH borrowers.

All requirements of subpart E of part 1965 of this chapter must be met prior to graduation and acceptance of the full payment from an MFH borrower. The State Director will provide the National Office with a report as described in §§ 1965.215(e)(1) and 1965.219 of subpart E of part 1965 of this chapter. The original report and documentation for the report will be retained indefinitely in the State Office.

§ 1951.267 Documents for the Office of the General Counsel (OGC) review.

When the State Director requests advice pertaining to a graduation request, the borrower's case file will be sent to the OGC and will include:

(a) Organizational documents;

(b) Debt instruments;

(c) Security instruments, including loan agreements and/or resolutions;

(d) Recent financial data;

(e) The servicing official's survey of lender criteria and policies.

(f) The servicing official's narrative outlining factors considered and specific reasons for making graduation request of the borrower.

(g) Copies of the letter requesting borrower to graduate and all subsequent correspondence between servicing official and borrower relative to the graduation request;

(h) Any other pertinent information, including copies of any Federal, State, or local statutory constraints which may impact on the borrower's ability to refinance.

§ 1951.268 State supplements and guides.

State Directors may supplement this subpart to meet State and local laws, regulations, and practices in accordance with FmHA Instruction 2006–B (available in any FmHA office).

Supart F—[Amended]

20A. Exhibit A of Subpart F is removed and reserved.

PART 1962—PERSONAL PROPERTY

21. The authority citation for part 1962 continues to read as follows:

Authority: 7 U.S.C. 1989; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart A—Servicing and Liquidation of Chattel Security

22. Section 1962.5 is amended by revising the last sentence of paragraph (c)(3) and adding a new paragraph (e) to read as follows:

§ 1962.5 Security instruments.

* * * * *

(c) * * *

(3) * * * Such additional security agreement usually will be taken at the time of inspections of the security; or

* * * * *

(e) *Filing.* Financing Statements must be filed in all Uniform Commercial Code (UCC) States. In those States where a Central Filing System (CFS) has been adopted and certified by the Packers and Stockyards Administration, FmHA must file under both the UCC (or other applicable State law) and the CFS to protect a security interest in farm products chattel property.

§ 1962.8 [Amended]

23. Section 1962.8 (b) is amended by revising the reference "Form FmHA 427–1," to read "Form FmHA 1927–1."

24. Section 1962.9 is revised as follows:

§ 1962.9 Lien on chattel property as security for a real estate loan.

Form FmHA 440–15, "Security Agreement (Insured Loans to Individuals)," and Form FmHA 440–A25, "Financing Statement (carbon-interleaved)," or Form FmHA 440–25, "Financing Statement," as appropriate, will be used in UCC States. State supplements may provide for use of other forms in Puerto Rico, Guam,

American Samoa and the Northern Mariana Islands.

25. Section 1962.13 is amended by revising the section heading, redesignating the introductory text and paragraphs (a) and (b) as paragraphs (b) introductory text, (b)(1) and (b)(2), respectively; and adding a new paragraph (a) to read as follows:

§ 1962.13 Notification to potential purchasers.

(a) *In States without CFS, the County Supervisor or designee will require all FmHA borrower(s) prior to loan closing or prior to any servicing actions which require taking a lien on farm products, such as crops and livestock, to provide the names and addresses of potential purchasers.* A written notice will be sent by FmHA, certified mail, return receipt requested, to these potential purchasers and will contain the following:

(1) The name(s) and address of the debtor, with signature.

(2) The name(s) and address of the secured party.

(3) The Social Security number or tax ID number of the debtor.

(4) A description of the farm products given as security by the debtor, including the amount of such products where applicable, the crop year, the county in which the products are located, and a reasonable description of the farm products.

(5) Any payment obligation imposed on the potential purchaser buyer by the secured party as a condition for waiver or release of lien. The original or a copy of the written notice also must be sent to the purchaser within one year before the sale of the farm products. The written notice will lapse on either the expiration period of the financing statement or the transmission of a letter signed by the FmHA County Supervisor and showing that the statement has lapsed or the borrower has performed all obligations to the FmHA.

* * * * *

26. Section 1962.16 is amended by revising the introductory text of paragraph (a) to read as follows:

§ 1962.16 Accounting by County Supervisor.

(a) *County Supervisor's responsibility.* The County Supervisor is responsible for maintaining a current record of each borrower's FmHA security and inspecting it as deemed necessary by the County Supervisor in accordance with § 1924.55 of subpart B of part 1924 of this chapter. All inspections will be recorded in the running record of the borrower's file. More frequent inspections should be made for delinquent borrowers or borrowers that have been indebted for less than one full crop year. Whenever an inspection is performed, the County Supervisor will discuss the provisions of §§ 1962.17 and 1962.18 of this subpart with the borrower, and the borrower and County Supervisor will complete and sign Form FmHA 1962–1, in accordance with § 1924.57 of subpart B of part 1924 of this chapter if it has not been previously completed for the year. If a borrower does not plan to dispose of any chattel security, the form should be completed to show this and should be signed. When the County Supervisor has other contacts with the borrower, the County Supervisor should also check for dispositions and acquisitions of security. Changes will be recorded on the form, dated and initialed by the borrower and the County Supervisor. The purpose of all inspections is to:

* * * * *

§ 1962.40 [Amended]

27. Section 1962.40 is amended in paragraph (d) by revising the words "an insured" to read "a direct" in the first sentence, and by revising the word "insured" to read "direct" in the second sentence.

§ 1962.44 [Amended]

28. Section 1962.44 is amended by removing paragraph (a)(4)(i)(B) and redesignating paragraph (a)(4)(i)(C) as (a)(4)(i)(B).

§ 1962.46 [Amended]

29. Section 1962.46 is amended by revising the words "an insured" to read "a direct" in the introductory text of paragraph (c).

§ 1962.47 [Amended]

30. Section 1962.47 is amended by revising the words "an insured" to read "a direct" in paragraph (b)(2)(iv).

31. Exhibit F of subpart A is revised to read as follows:

BILLING CODE 3410-07-M

EXHIBIT F 84a

Position 1

USDA-FmHA
Form FmHA 1962-1
(Rev. 12-93)

AGREEMENT FOR THE USE OF PROCEEDS/RELEASE OF CHATTEL SECURITY

FORM APPROVED
OMB No. 0575-0111

Name _____ Crop Year _____ Page _____ of _____

Date of Security Instrument _____ Beginning Date of this Agreement _____

Property Description

Are any listed items from a previous Form FmHA 1962-1? If so, indicate below with an asterisk (*), and what was the beginning date of that Agreement. _____ (Date)

PLANNED					ACTUAL					
Disposition			Expected Amt. of Proceeds	Use of Proceeds	Disposition			Amt. of Proceeds	Use of Proceeds	Appr'd Yes/No *(initial)*
Quan.	How	Mo.			Quan.	How	Date			

Property Description

PLANNED					ACTUAL					
Disposition			Expected Amt. of Proceeds	Use of Proceeds	Disposition			Amt. of Proceeds	Use of Proceeds	Appr'd Yes/No *(initial)*
Quan.	How	Mo.			Quan.	How	Date			

Public reporting burden for this collection of information is estimated to average 20 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Agriculture, Clearance Officer, OIRM, AG Box 7630, Washington, D.C. 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB No. 0575-0111), Wasington, D.C 20503. Please DO NOT RETURN this form to either of these addresses. Forward to FmHA only

Property Description

84b

PLANNED

Disposition			Expected Amt. of Proceeds	Use of Proceeds
Quan.	How	Mo.		

ACTUAL

Disposition			Amt. of Proceeds	Use of Proceeds	Appr'd Yes/No *(initial)*
Quan.	How	Date			

Property Description

PLANNED

Disposition			Expected Amt. of Proceeds	Use of Proceeds
Quan.	How	Mo.		

ACTUAL

Disposition			Amt. of Proceeds	Use of Proceeds	Appr'd Yes/No *(initial)*
Quan.	How	Date			

Property Description

PLANNED

Disposition			Expected Amt. of Proceeds	Use of Proceeds
Quan.	How	Mo.		

ACTUAL

Disposition			Amt. of Proceeds	Use of Proceeds	Appr'd Yes/No *(initial)*
Quan.	How	Date			

84c

AGREEMENT FOR THE USE OF PROCEEDS/RELEASE OF CHATTEL SECURITY

In this Agreement the Farmers Home Administration (FmHA) is referred to as *you* and *your*. _____

and _____, the borrower(s), is referred to as *I*, *me*, and *my*. My contact with you will be through the County Supervisor.

In exchange for loans received from the FmHA, I signed Security Agreements with the United States of America. By signing the Security Agreements, I have given you a security interest in all the property described in the Security Agreements. This property has been listed on this form. This property is called collateral. This Form FmHA 1962-1 will expire when all the listed collateral is disposed of, or when any remaining collateral is transferred to a new Form FmHA 1962-1

Do I Have Written Consent To Sell?

I understand that I must obtain written consent before I can sell, exchange, feed to livestock, consume, or in any way dispose of collateral. This Agreement explains how the money or property received from the sale, exchange, or other disposition of collateral may be used. So long as I meet the terms of this Agreement, this Agreement acts as your written consent to dispose of collateral listed on this Agreement. I understand that this Agreement is not intended to restrict my ability to operate my farm or ranch efficiently. It is intended to describe how I will dispose of collateral and to record the sales, exchanges, or other dispositions of collateral.

What Collateral Will Be Sold?

I have listed on this form all collateral that I expect to sell, exchange, feed to livestock, consume, or otherwise dispose of beginning on _____. I understand that you do not expect me to list each animal, bushel, bale or pound of property I plan to dispose of, but that you expect me to list an approximate number.

What is the Projected Date and Price of Sale?

I have listed the approximate date on which I will dispose of collateral. I understand this can be listed by month, quarter, or whatever period best suits my operation. I have also listed the price I expect to receive, and a description of how I plan to use the proceeds. I agree that I will dispose of collateral for its fair market value.

How Do I Project Dates and Prices?

I understand that all dates and figures listed on this form are projections only. You also acknowledge this as part of the Agreement. The figures reflect the crop yields, livestock production numbers, operating expenses, income, and marketing practices that I can reasonably expect, based on my farm records and experience.

The figures are based on my past income, expense, and production levels. You do not require a strict averaging of my past income, expense, and production levels when calculating these projections, and may permit adjustment of those averages to reflect unusually low or high yields, income or expenses that I have had in the past due to circumstances beyond my control. In reaching these figures, you will consider planned changes in my operation.

I understand that the dates and figures used on this form must be consistent with any current Farm and Home Plan or other plan of operation to which you and I have agreed.

When Can Collateral Be Sold to Pay Essential Family Living and Farm Operating Expenses?

You agree to allow me to sell or exchange crops, livestock, and livestock products planned to be marketed in the regular course of business so that I can pay essential family living and farm operating expenses. Essential expenses are those which are basic, crucial, or indispensable.

You also agree to allow me to feed crops to livestock, if the livestock or livestock products are collateral for the FmHA loan(s).

You also agree to alow me to use livestock for food for my family.

What Happens if Someone Else Has a Security Interest in the Collateral I Sell?

I understand that the money from the sale of collateral must always be used to pay anyone who has a security interest that comes before FmHA's security interest.

What Changes Require Your Prior Approval?

I understand that If I want to sell, exchange, or dispose of collateral that is not listed on this form, I must obatain permission from you before I dispose of the collateral.

If I want to dispose of collateral in a way not listed in the "How" section of this form, I must obtain permission from you before disposing of the collateral. For example, if I have listed that all crops will be sold and later decide that some crop is needed for feed, I must obtain permission from you before feeding the crop to the livestock. You must grant permission if this action is necessary to meet essential family living or farm operating needs and if the livestock and livestock products are collateral for the FmHA loan(s).

If I want to use proceeds in a wat not shown on the "Use of Proceeds" section of this form, I must obtain permission from you before the proceeds are used. For example, if I listed that the proceeds from the sale of the crop would be used to pay on my FmHA debt and later find that the money is needed to pay another farm operating expense, I must obtain your permission before that expense is paid. You must grant permission and change the form if the proceeds will be used for essential farm living or operating expenses.

What Changes Do Not Require Your Prior Approval?

I am not required to obtain your permission before I sell, exchange, or dispose of collateral even if the sale will require a change in the "Quantity","Month", or "Expected Amount of Proceeds" sections on this form. However, is the sale does result in changes to the "Quantity" section of this Agreement due to higher or lower than expected crop yields or livestock production numbers, I must promptly report this to the County Supervisor. I must also promptly report to the County Supervisor any sale that results in a change to the "Month" or "Expected Amount of Proceeds" section of this form. The County Supervisor will the change this form accordingly.

How Do I Request and Report Changes and How are Changes Made?

I may request and report changes on the form by telephone, letter, or visit to the county FmHA office. A trip to county FmHA office is not always necessary. I understand that when an agreement is reached on a requested change or when I report changes, the County Supervisor must revise the form, initial and date the change, and mark the form "revised". I will also initial the change.

My initials may be obtained by either (1) mailing a copy to me, or (2) asking me to initial the revised form during my next visit to the FmHA office.

If my requested or reported changes would result in a major change in my operation, the County Supervisor may request that I attend a conference. At that conference, the County Supervisor and I will develop a new Farm and Home Plan and revise this form.

What if You and I Do Not Agree?

If you and I disagree on how to complete or make changes on this form, you must send me a letter which describes the items on which we do not agree. The letter must explain why we do not agree. The letter must also tell me how I may appeal your decision.

Until the appeal is decided, you must release any other proceeds on which you and I have agreed.

When my appeal is decided, the County Supervisor will ask me to sign a new Farm and Home Plan and Form FmHA 1962-1, which reflects then decision on the appeal.

If I do not sign the new agreement, the County Supervisor will give me a copy of the forms and tell me that the Government considers this Agreement to be binding. If I violate this Agreement, the Government will take the actions described below in the section entitled "What Happens if I Violate This Agreement?".

What Happens if I Do Not Cooperate?

I understand that if I do not appeal or if I refuse to cooperate in completing this Agreement, the County Supervisor will complete the form, sign it, and send it to me, The County Supervisior must send a letter with the completed form explaining that the Government will consider the form to be binding on me. I understand that if I violate the new agreement, the Government will take the actions described below in the section entitled "What Happens if I Violate This Agreement?".

Who Are the Potential Purchasers of My Farm Products?

This is a list of purchasers who often buy farm products from me. I have included grain elevators, auction barns, and others who I expect might buy from me.

Farm Product	*Potential Purchasers*	*Business Address*

I understand that you realize that I do not always know in advance who will buy my product. If I cannot identify specific, potential purchasers, I have described below how the farm products will be sold. For example, if I sell farm products at a roadside stand, by advertising in the newspaper, or to neighbors, the exact method of sale is described below.

Description and Method for Sale

Can I Sell to Purchasers Not Listed on This Form?

I understand that I may sell collateral to purchasers other than those listed on this form. If I do this, then I must immediately notify the County Supervisor of what has been sold and the name and business address of the purchaser. I do not need your prior approval.

84e

Does FmHA's Name Have to be on the Check I Receive?

Both FmHA and my name must be listed on all checks, drafts, or money orders which I receive for the sale of collateral listed on this form unless all FmHA installments for the period of this Agreement have been paid; this includes all past-due installments.

Checks made in accordance with an assignment agreement do not have to include both names.

What Records Must I Keep?

I must keep records of how I actually dispose of collateral and how I use the proceeds. I must provide these records to the County Supervisor on request and at the end of the period covered by this Agreement.

Has FmHA Released its Security Interest?

You consent to all sales, exchanges, and other dispositions of collateral listed on this form, so long as I meet the terms of this Agreement. You agree to release your security interest as agreed above. You will provide a formal, written release of Form FmHA 462-12, "Statement of Continuation, Partial Release, Assignment, Etc.", of Form FmHA 460-1, "Partial Release", or other appropriate forms approved by your attorneys when I request it.

What Happens if I Violate This Agreement?

If I sell, exchange, or dispose of collateral and use the money in a way not listed in this Agreement without your permission, I will have violated this loan Agreement and the Government's security interest in the collateral will not be released. You will ask me to pay FmHA an amount equal to the value I received for the collateral involved. I understand that if I pay as requested by FmHA or provide enough information to allow the County Supervisor to approve the sale and use of proceeds, this will cure my violation if it is a first offense. I understand that if I do not so cure a first offense, or if I commit a second offense, you may bring legal action against me. I realize that you may start legal procedures to sell all of my other collateral and refer my case for possible criminal action against me. I understand that if I do not pay as requested, FmHA may also request the purchaser of the collateral to pay FmHA.

Who Can See This Agreement?

Unless you are required to do so by law or court order, you will not release this Agreement or information taken from it outside the United States Government to anyone other than me or my representative.

What Happens if my FmHA Loan Accounts are Accelerated?

I understand that your current regulations say that if I receive an Acceleration Notice from you, this Agreement automatically ends and that you will not afterwards release any proceeds from the disposition of collateral. However, by signing this form, I do not give up the right to challenge your regulations in court and may claim in court that I am entitled to the release of proceeds after acceleration.

This signature is tyo acknowledge that I(we) understand this Agreement and will keep to it.

Date:_____ _____

(Borrower)

Date:_____ _____

(County Supervisor)

BILLING CODE 3410-07-C

PART 1980—GENERAL

32. The authority citation for part 1980 continues to read as follows:

Authority: 7 U.S.C. 1989; 42 U.S.C. 1480; 5 U.S.C. 301; 7 CFR 2.23 and 2.70.

Subpart B—Farmer Programs Loans

33. Section 1980.101 is amended by adding paragraphs (c)(1) and (c)(2) and revising paragraph (e)(2) to read as follows:

§ 1980.101 Introduction.

* * * * *

(c) * * *

(1) *Office of the General Counsel (OGC).* In performing administrative functions with respect to Farmer Programs Loans, FmHA may ask for the advice and assistance of OGC on any legal matter. However, it is the responsibility of the lender to ascertain that all requirements for making, securing, and servicing the loan are met. If FmHA officials have questions concerning a lender's performance or compliance regarding these matters, OGC should be consulted.

(2) *Delegation of Authority.* State Directors should delegate to appropriate staff members the duties and responsibilities stipulated in the Administrative sections of this subpart.

* * * * *

(e) * * *

(2) *Contract of Guarantee* (Operating Loans—Line of Credit only). Lenders desiring a guarantee on a "line of credit" will use the method contained in subpart A of this part. Line of credit loans are guaranteed by Form FmHA 1980–27, "Contract of Guarantee (Line of Credit)." Line of credit notes and agreements may not be sold to a holder(s) by the originating lender, but the originating lender may use participating lenders in accordance with § 1980.119 of this subpart. Any amount advanced by the lender in excess of the line of credit ceiling set forth in the contract is not guaranteed by FmHA.

34. Section 1980.108 (a)(1)(i) is revised to read as follows:

§ 1980.108 General provisions.

(a) * * *

(1) * * *

(i) The lender is responsible for seeing that security is obtained and maintained to protect the interests of the lender and FmHA.

* * * * *

35. Section 1980.109 is amended by revising the introductory text of paragraph (b) to read as follows:

§ 1980.109 Promissory notes, line of credit agreements, security instruments, and financing statements.

* * * * *

(b) *Financing statements.* Commercial financing statement forms that comply with State laws and regulations may be used. If the financing statement does not already contain the following provisions, they must be inserted to meet FmHA requirements:

* * * * *

36. Section 1980.113 is amended by revising the words "cash flow" in the third sentence in the introductory text of paragraph (a)(7) to read "case file"; revising paragraphs (a)(6), (a)(7)(ii)(B) and (C), (a)(7)(ii)(D)(*1*), and (a)(11)(ii); and adding new paragraphs (a)(12) and (c) to read as follows:

§ 1980.113 Receiving and processing applications.

* * * * *

(a) * * *

(6) Proposed loan agreement or line of credit agreements between the applicant and lender. Loan Agreements or Line of Credit Agreements will address at least the following:

(i) Any improved management or production practices to be implemented.

(ii) Requirements for accounting, recordkeeping and financial reporting.

(iii) Limitations on the purchase or sale of assets.

(iv) Prohibitions against incurring additional debt or cosigning for the liabilities of others.

(v) Limits on family living expenses.

(vi) Insurance requirements and collateral inspections.

(vii) Purposes for which loan or line of credit funds can be used.

(viii) Interest rate; how and when the rate may fluctuate.

(ix) Credit ceiling, special limitations and/or conditions precedent to annual readvancement or continuation of loans/lines of credit.

(x) Limitations on salaries paid to entity members, hired labor, or consultants. Limitations on living expenses and/or cash withdrawals in the case of sole proprietorships, joint operations, and partnerships.

(7) * * *

(ii) * * *

(B) For those farmers with less than a 5-year production/yield history, the applicant's available production history will be utilized.

(C) For those farmers whose actual history is insufficient to provide an accurate estimate, consider the use of ASCS actual records for specific farms, county averages, State averages, Cooperative Extension Service data, or any other reliable sources of information that are acceptable to the lender, applicant and FmHA.

(D) * * *

(*1*) County average yields will be used for the disaster year(s) in developing a historical base yield. If the applicant's disaster year(s) are less than the County average yields, County average yields will be used for that year(s). If County average yields are not available, State average yields will be used. However, if the applicant's actual yields/production have never equaled the County/State averages, the applicant's actual yields will be used. Once the yield base has been established, plus or minus adjustments may be made to reflect recent or proposed changes that will impact expected yields during the projected budget period. All adjustments must be realistic and supportable by an independent, objective and knowledgeable source.

* * * * *

(11) * * *

(ii) A current, personal balance sheet from all members of a cooperative, joint operators of a joint operation, partners of a partnership, or stockholders of a corporation. A current balance sheet means one that is less than 90 days old at the time of application.

* * * * *

(12) A concise narrative summary of the following items:

(i) The agricultural and nonagricultural enterprises comprising the operation, including any proposed to be added or dropped.

(ii) The real estate used in the operation including significant planned and existing improvements, conservation plans in effect, adequacy of facilities, external factors of negative or positive impact.

(iii) Chattel property, including the adequacy of machinery, equipment, and foundation livestock to carry out the existing or proposed operation.

(iv) The farm business organization and key personnel. For example, the legal business structure, roles, functions and backgrounds of key individuals, the accounting and record keeping system, and agreements for transferring or dissolving the business.

(v) Goals. The short- and long-term business goals of the operation.

(vi) Historical financial data. Significant aspects of the operation's historical performance and current condition.

(vii) Planned changes. Changes to overcome negative trends or other aspects of the operation. Consider such items as improved production techniques or management practices.

* * * * *

(c) *Market Placement applications.* This paragraph explains the requirements for market placement applications for lenders that have expressed interest in financing or refinancing specific direct loan applicants described under § 1910.4(c) of subpart A of part 1910 of this chapter, as well as for "commercial" or "standard" borrowers defined under § 1951.262 of subpart F of part 1951 of this chapter. If more than one lender is interested in providing financing, the direct loan applicant or borrower will rank the lenders in order of preference, and FmHA will present the market placement applications in that order. A market placement application should be certified by the County Committee and be ready for immediate acceptance by the lender and approval by FmHA, subject to the terms and conditions of the Request for Obligation of Funds and Conditional Commitment. The items needed for a market placement application are to be packaged by the County Supervisor and consists of the following:

(1) Assessment of items described under § 1924.55 (b) of subpart B to part 1924 of this chapter.

(2) Environmental requirements in accordance with this subpart and subpart G to part 1940 of this chapter.

(3) The following information must be completed on Form FmHA 1980–25, "Farmer Programs Application":

(i) Type of assistance requested.

(ii) Applicant's name, Social Security number, and mailing address.

(iii) Loan applicant certifications.

(iv) Loan amount, loan type(s), interest rate, percent guarantee requested by lender, loan purpose(s), and proposed security. The County Supervisor will have to adjust the budget projections based on interest rates and terms.

(v) Request for Interest Assistance, if needed.

(vi) Lender certifications.

(4) Form FmHA 1940–3, "Request for Obligation of Funds—Guaranteed Loans."

37. Section 1980.114 is amended by removing the introductory text; by redesignating paragraphs (c) and (d) as paragraphs (d) and (e), respectively; by adding a new paragraph (c); and by revising the section heading, newly redesignated paragraph (d) and paragraphs A. and C. of the ADMINISTRATIVE section to read as follows:

§ 1980.114 FmHA evaluation/assessment of applications.

* * * * *

(c) *Upon receipt of a complete application, the County Supervisor must perform an analysis and document the conclusions in the case file. The County Supervisor must address:*

(1) Whether the proposed loan or line of credit is for authorized purposes, and whether the amounts of borrowed capital are appropriate to successfully carry on the agricultural operation.

(2) The operation's capital position; strengths and weaknesses.

(3) The adequacy of repayment and the operation's outlook for securing non-FmHA guaranteed commercial credit in the future. If a guarantee request cannot be approved because of inadequate repayment, the County Supervisor will assist lenders in determining whether there are practical alternatives that the loan applicant should consider to make the plan acceptable. However, the farm plan remains the responsibility of the lender and its farm borrower. County Supervisors will only act in a consulting capacity.

(4) The adequacy of security and whether values are reasonable in the County Supervisor's judgement. Also, whether the loan terms are consistent with the useful life of the security and FmHA regulations.

(5) The reasonableness of the projected budget in light of the stated goals of the loan applicant.

(d) *Indication of unacceptability.* If the application for a guarantee cannot be approved for reasons that would not be affected by the County Committee certification, the County Supervisor will so inform the lender and the loan applicant in writing within 5 calendar days of the decision. If the County Supervisor concludes that there may be practical alternatives to help achieve a positive cash flow, those alternatives will be provided to the lender and loan applicant. This is in addition to the factual reasons for the adverse decision that must be clearly stated along with notice of the opportunity for an appeal as set out in subpart B of part 1900 of this chapter.

* * * * *

Administrative:

* * * * *

A. Determine if the information submitted is complete. Document in the case file all assumptions, observations, data, and any other factual information used to arrive at conclusions and final decisions regarding the application.

* * * * *

C. Determine if the proposed collateral is adequate, the repayment plan is realistic, the loan agreement is satisfactory, and any significant loan and management controls are needed. These must be based on prudent lending principles, but with consideration to local lending practices. Special requirements that are to be made an approval condition will be discussed with the lender and listed on the Conditional Commitment and the loan/line of credit agreement between the lender and loan applicants.

* * * * *

38. Section 1980.129 is amended by removing the ADMINISTRATIVE section and revising the introductory text to read as follows:

§ 1980.129 Planning and performing development.

The lender is responsible for seeing that any buildings or other improvements or major land development to be paid for with loan funds are properly completed within a reasonable period of time. The lender is responsible for perfecting the required lien in the security, which includes ensuring that the security property is free of any mechanic's, materialmen's or other liens which would affect lien priority. All major construction, major repairs, and major land development must be performed by qualified parties under conditions considered standard and prudent by commercial lenders and their financial regulators. Form FmHA 449–11, "Certificate of Acquisition or Construction" must be completed and submitted to FmHA. In connection with construction, the lender is responsible for:

* * * * *

39. Section 1980.130 ADMINISTRATIVE is amended by revising paragraph C. to read as follows:

§ 1980.130 Loan servicing.

* * * * *

Administrative:

* * * * *

C. The County Supervisor is responsible for monitoring the borrower's activities to ensure the borrower's goal achievement as follows:

1. As part of the County Supervisor's review of case files selected for review under paragraph B of this Administrative Section, progress made in attaining business goals will be discussed with the lender and noted in the FmHA case files.

2. When a loan becomes delinquent, updated financial information will be obtained and analyzed by the lender. The County Supervisor will review both the lender's report and borrower's case file to assist in determining the nature of the delinquency and to suggest a course of action that will eliminate the delinquency and correct the underlying problem(s). However, FmHA's capacity in this regard is one of a consultant and the lender is under no obligation to follow FmHA advice or suggestions in choosing servicing options.

* * * * *

§ 1980.153 [Amended]

40. In § 1980.153, General-Administrative section is removed.

§ 1980.1751 [Amended]

41. Section 1980.175 is amended in the first sentence of paragraph (b)(1)(i) by revising the reference "§ 1980.106 (b)(21)" to read "§ 1980.106 (b)."

Dated: December 9, 1993.

Bob J. Nash,

Under Secretary for Small Community and Rural Development.

[FR Doc. 93-31294 Filed 12-29-93; 8:45 am]

BILLING CODE 3410-07-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 93-ANE-73]

Airworthiness Directives; Hamilton Standard Models 14RF-9 and 14RF-21 Propellers

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to Hamilton Standard Models 14RF-9 and 14RF-21 propellers. This proposal would require replacing composite propeller blade retaining rings with aluminum retaining rings. This proposal is prompted by a report of failure of the propeller blade composite retaining rings under extreme inflight loading conditions, which resulted in propeller blades exiting the hub. The actions specified by the proposed AD are intended to prevent cracking and failure of propeller blade composite retaining rings, which can result in propeller blade separation.

DATES: Comments must be received by February 28, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), New England Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 93-ANE-73, 12 New England Executive Park, Burlington, MA 01803-5299. Comments may be inspected at this location between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Hamilton Standard, One Hamilton Road, Windsor Locks, CT 06096-1010. This information may be examined at the FAA, New England Region, Office of the Assistant Chief Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Francis X. Walsh, Aerospace Engineer, Boston Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803-5299; telephone (617) 238-7158, fax (617) 238-7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 93-ANE-73." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, New England Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 93-ANE-73, 12 New England Executive Park, Burlington, MA 01803-5299.

Discussion

On April 29, 1993, an Embraer EMB-120 commuter aircraft experienced a severe inflight upset during climb-out to a cruise altitude of 20,000 feet. The inflight upset resulted in extreme aircraft maneuvers that greatly exceeded the normal flight envelope. The loads imposed by these maneuvers resulted in the loss of two engine mounts and three Hamilton Standard Model 14RF-9 propeller blades on the left engine of the aircraft. The Federal Aviation Administration (FAA) conducted an investigation and determined that the propeller blades exited the propeller hub after the failure of the propeller blade composite (Rynite) retaining rings due to the extreme loads imposed by these maneuvers. In addition, the FAA has determined that the Hamilton Standard Model 14RF-21 propellers installed on Construcciones Aeronauticas, SA (CASA) CN-235 series aircraft also utilize the propeller blade composite retaining rings, though there have been no reported failures to date on this model. This condition, if not corrected, could result in cracking and failure of propeller blade composite retaining rings, which can result in propeller blade separation.

The FAA has reviewed and approved the technical contents of Hamilton Standard Service Bulletin (SB) No. 14RF-9-61-25, Revision 3, dated December 15, 1991, applicable to Hamilton Standard Model 14RF-9 propellers installed on Embraer EMB-120 series aircraft, and SB No. 14RF-21-61-34, Revision 2, dated June 10, 1993, applicable to CASA CN-235 series aircraft. These SB's describe procedures for replacing propeller blade composite retaining rings with aluminum retaining rings. Earlier revisions of these two SB's differ only by minor editorial and typographical changes and do not impact the technical content of the procedures. Replacement of propeller blade composite retaining rings with aluminum retaining rings accomplished in accordance with previous revisions of Hamilton Standard SB No. 14RF-9-61-25 and SB No. 14RF-21-61-34 constitutes an acceptable alternate means of compliance to the requirements of this AD.

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require replacing propeller blade composite retaining rings with aluminum retaining rings. Due to limited parts availability, a compliance end date of one year after the effective date of this AD has been established to ensure timely compliance without adversely affecting flight safety. The actions would be required to be accomplished in accordance with the service bulletins described previously.

The FAA estimates that 170 Hamilton Standard Model 14RF-9 propellers installed on Embraer EMB-120 series aircraft of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per propeller to accomplish the proposed actions, and that the average labor rate is $55 per work hour.

Required parts would cost approximately $3415 per propeller. The FAA estimates that there are 250 Hamilton Standard Model 14RF-21 propellers installed on Construcciones Aeronauticas, SA (CASA) CN-235 series aircraft worldwide, but currently none are installed on CASA CN-235 series aircraft of U.S. registry. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $589,900.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Hamilton Standard: Docket No. 93-ANE-73.

Applicability: Hamilton Standard Models 14RF-9 and 14RF-21 propellers, installed on but not limited to Embraer EMB-120 series and Construcciones Aeronauticas, SA (CASA) CN-235 series aircraft.

Compliance: Required as indicated, unless accomplished previously.

To prevent cracking and failure of propeller blade composite retaining rings, which can result in propeller blade separation, accomplish the following:

(a) Within one year after the effective date of this AD, accomplish the following:

(1) For Hamilton Standard Model 14RF-9 propellers installed on Embraer EMB-120 series aircraft, replace propeller blade composite (Rynite) retaining rings with aluminum retaining rings in accordance with Hamilton Standard Service Bulletin No. 14RF-9-61-25, Revision 3, dated December 15, 1991.

(2) For Hamilton Standard Model 14RF-21 propellers, installed on CASA CN-235 aircraft, replace propeller blade composite (Rynite) retaining rings with aluminum retaining rings in accordance with Hamilton Standard Service Bulletin No. 14RF-21-61-34, Revision 2, dated June 10, 1993.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Boston Aircraft Certification Office. The request should be forwarded through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Boston Aircraft Certification Office.

Note: Information concerning the existence of approved alternative methods of compliance with this airworthiness directive, if any, may be obtained from the Boston Aircraft Certification Office.

(c) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Burlington, Massachusetts, on December 22, 1993.

Mark Fulmer,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 93-31906 Filed 12-29-93; 8:45 am]

BILLING CODE 4910-13-P

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14 CFR Part 39

[Docket No. 93-CE-27-AD]

Airworthiness Directives: Luscombe Model 8 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to supersede AD 79-25-05, which currently requires repetitively inspecting the existing aluminum vertical stabilizer forward attach fitting for cracks on Luscombe Model 8 series airplanes, and replacing any cracked parts. Steel fittings are now available that would eliminate repeated removal and inspection of the aluminum fitting, which could result in damage to the fastener holes. The proposed action would require replacing the existing aluminum fitting with a steel vertical stabilizer forward attach fitting. The actions specified by the proposed AD are intended to prevent failure of the vertical stabilizer as a result of a cracked fitting, which could result in loss of control of the airplane.

DATES: Comments must be received on or before March 11, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 93-CE-27-AD, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106. Comments may be inspected at this location between 8 a.m. and 4 p.m., Monday through Friday, holidays excepted.

Service parts that are referenced in the proposed AD may be obtained from the Univair Aircraft Corporation, 2500 Himalya Road, Aurora, Colorado 80001; telephone (303) 375-8882. Information that relates to the proposed AD may be examined at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Ms. Lirio Liu, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, 3229 E. Spring Street, Long Beach, California 90806; telephone (310) 988-5229; facsimile (310) 988-5210.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this

proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 93–CE–27- AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Central Region, Office of the Assistant Chief Counsel, Attention: Rules Docket No. 93–CE–27–AD, room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

Discussion

The FAA has received several reports of Luscombe Model 8 series airplanes having a cracked vertical stabilizer forward attach fitting, part number (P/N) 28444 or P/N 28453. AD 79–25–05, Amendment 39–3630, currently requires repetitively inspecting the existing aluminum vertical stabilizer forward attach fitting for cracks on these Luscombe Model 8 series airplanes, and replacing any cracked parts.

The initial inspection (dye penetrant) of AD 79–25–05 is the only inspection that requires removal of the attach fitting. The 100-hour repetitive inspection only requires a visual inspection without requiring removal of the attach fitting. In order to consistently detect cracks, the fitting should be removed for each inspection. Repeatedly removing the vertical stabilizer forward attach fitting could result in damage to the fastener holes. FAA policy is that long-term continued operational safety is better assured by design changes to remove the source of the problem, rather than by repetitive inspections.

The Univair Aircraft Corporation has manufactured steel fittings, P/N U28444, under a parts manufacturer approval (PMA).

After examining the circumstances and reviewing all available information related to the incidents described above, the FAA has determined that (1) replacing the existing aluminum attach fitting with a steel fitting on Luscombe Model 8 series airplanes will prevent failure of the vertical stabilizer as a result of a cracked fitting; and (2) AD action should be taken to ensure that the aluminum fitting is replaced.

Since an unsafe condition has been identified that is likely to exist or develop in other Luscombe Model 8 series airplanes of the same type design, the proposed AD would supersede AD 79–25–05 with a new AD that would require replacing the existing aluminum vertical stabilizer forward attach fitting, P/N 28444 or P/N 28453, with a steel fitting manufactured by the Univair Aircraft Corporation (P/N U28444) or FAA-approved equivalent part.

The FAA estimates that 2,029 airplanes in the U.S. registry would be affected by the proposed AD, that it would take approximately 4 workhours per airplane to accomplish the proposed action, and that the average labor rate is approximately $55 an hour. Parts cost approximately $121 per airplane. Based on these figures, the total cost impact of the proposed AD on U.S. operators is estimated to be $1,097,689. This figure is based on the assumption that none of the affected airplane operators have accomplished the proposed action.

The regulations proposed herein would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action has been placed in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption "ADDRESSES".

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by removing AD 79–25–05, Amendment 39–3630, and by adding the following new airworthiness directive:

Luscombe: Docket No. 93–CE–27–AD. Supersedes AD 79–25–05, Amendment 39–3630.

Applicability: Model 8 Series airplanes (all serial numbers), certificated in any category.

Compliance: Required within the next 100 hours time-in-service after the effective date of this AD, unless already accomplished.

To prevent failure of the vertical stabilizer as a result of a cracked fitting, which could result in loss of control of the airplane, accomplish the following:

(a) Replace the aluminum vertical stabilizer forward attach fitting, part number (P/N) 28444 or P/N 28453, with a welded steel fitting manufactured by the Univair Aircraft Corporation, P/N U28444, or an FAA-approved equivalent part. Accomplish this replacement in accordance with the procedures in Figure 1 of this AD.

Figure 1—Installation Instructions

Tools required: 1/8 box end wrench, 3/8 socket with >6-inch extension (wobble preferred), 7/16 box end wrench and 7/16 socket, long drift or punch, 6 ounce hammer, a 6-inch by 8-inch scrap of .020 or .025 aluminum, a small flashlight, an inspection mirror, a small screwdriver, and pliers. A drill and 90-degree adapter, drill sizes No. 30 and No. 21, a rivet hammer, and appropriate sets will also be needed.

1. If installed, disconnect the battery ground lead or mark the master and navigation light switches so that they will not operate.

2. Locate and disconnect the navigation light wire. This wire is just above the tailwheel, between the rudder and vertical stabilizer. Tape the loose end on the fuselage side so that it does not slip into the tailcone.

3. Count the number of washers, locate the washers on the rudder hinge pins, and record this information to use during re-assembly and rigging.

4. Use a screwdriver to remove both triangular fairings between the vertical and horizontal stabilizer.

5. Remove the rudder control and tailwheel control mounting hardware.

Note 1: This is an opportune time to inspect the rudder horn holes for wear and elongation.

6. Remove the lower rudder hinge pin bolt and nut from the lower rudder hinge.

7. Remove the upper rudder hinge pin bolt and nut from the upper rudder hinge. Have an assistant secure the rudder and use the small screwdriver and gently pry loose the rudder from the hinge pins. The pins and washers may drop out so be prepared to catch them. Remove the rudder and set it aside in a safe place.

8. Loosen the three mounting bolts at the rear vertical stabilizer attach fitting. Using

the scrap aluminum to protect the elevator fairings and horizontal rear spar area, drive and pull the top (long) mounting bolt out and set it aside.

9. Move to the front vertical stabilizer fitting and loosen all four of the mounting bolts. Use the screwdriver and pliers to remove them. Note and record the number of shims between the fitting and bulkhead No. 7.

10. Move to the rear fitting of the vertical stabilizer and remove the two lower (short) mounting bolts. The vertical stabilizer should be free of the airplane and ready for the fitting replacement operation.

11. Mounting of the vertical fin to remove the front attachment fitting is best done by supporting the rear spar on the bench or in a vice with ½-inch plywood supporting the skins on each side.

12. Using a small square or piece of cardboard, measure from the center of the first spar side rivet to the centerline of the tubing in the old fitting. Note this dimension since it will be the same when installing the new fitting.

Note 2: Although not required, it is recommended that you accomplish an inspection in the areas of bulkhead Nos. 7 and 8 for cracks using a flashlight and mirror. This may be accomplished by removing the lower rudder hinge bracket and closely inspecting the bulkhead for cracks using your flashlight and mirror. Cracks can occur in the bulkhead No. 8 area from tailwheel shimmy and improperly adjusted rudder cables. When inspecting the bulkhead No. 7 area, pay particular attention to cracks near and around the steel reinforcement horseshoe that is in the top section where the front fin fitting bolts up. Use your flashlight in the tail cavity between bulkhead Nos. 7 and 8. Closely inspect the front horizontal stabilizer bracket for cracks and corrosion. Remount the lower rudder hinge bracket after the inspection is complete.

13. After firmly mounting the fin, center punch the bottom six rivets on both sides of the front spar and the four mounting rivets that are accessible from under the leading edge or behind the rear of the fitting.

14. Remove the side rivets in the spar that pass through the front fitting with a No. 30 drill.

15. Remove the four larger rivets in the spar web utilizing a No. 21 drill. An angle drill attachment is the best tool for this procedure; however, it can be accomplished with a regular drill or small cold chisel on the fitting side.

16. Locate the new fitting in the spar and measure the dimension from the tube centerline to the first rivet hole as noted in step No. 12 during disassembly. Drill two holes, one on each side of the spar/fitting and locate the fitting with a screw or cleco temporarily.

17. Using the temporary mounting, refit the stabilizer to the airplane as a trial and install shims to ensure that there is little or no preload on the rear spar mounting attachment holes. Shimming the fitting with 2024 T3 sheet stock is permitted in order to align the holes and avoid preload on the fittings at the rear spar.

18. When the installation fit is accomplished, remove the fin and locate the remaining mounting holes.

19. Corrosion proof the fitting to the spar attachment area with a dielectric tape, epoxy primer, or other corrosion deterrent.

20. Install rivets on the sides of the spar. One-eighth (1/8)-inch rivets (dimplehead) or AN3–2 bolts with elastic stop nuts in the four rivet holes located in the spar web may be utilized for this procedure.

21. Complete the installation of the vertical fin by accomplishing procedures 1 through 10 in reverse order (10, 9, 8, etc.)

22. Reinstall the fin using enough shims to reduce preload on the fittings and fin side skins. They should not pull or ripple.

23. When rigging the rudder, ensure that TC data sheet limits are met. Rig so that a side load in the lower hinge point does not occur.

(b) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

(c) An alternative method of compliance or adjustment of the compliance time that provides an equivalent level of safety may be approved by the Manager, Los Angeles Aircraft Certification Office (ACO), 3229 E. Spring Street, Long Beach, California 90806. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

(d) Information that relates to this document may be examined at the FAA, Central Region, Office of the Assistant Chief Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

(e) This amendment supersedes AD 79–25–05, Amendment 39–3630.

Issued in Kansas City, Missouri, on December 22, 1993.

Barry D. Clements,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 93–31900 Filed 12–29–93; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 175

Receipt of Domestic Interested Party Petition Concerning the Classification of Flat Goods With Outer Surface of Reinforced or Laminated Plastics

AGENCY: Customs Service, Treasury.

ACTION: Notice of receipt of domestic interested party petition; solicitation of comments.

SUMMARY: Customs has received a petition submitted on behalf of a domestic interested party concerning the tariff classification of flat goods with outer surface of reinforced or laminated plastics.

Under our prior tariff schedule, the Tariff Schedules of the United States (TSUS), reinforced and laminated plastics were defined so as to include only rigid plastics. However, Customs has held in certain rulings that the tariff provision for reinforced or laminated plastics in the Harmonized Tariff Schedule of the United States (HTSUS) includes articles with outer surface of plastic sheeting backed or combined with textile materials.

Because this interpretation has the effect of enlarging the scope of the provision for reinforced or laminated plastics to encompass non-rigid plastics, certain flat goods formerly dutiable at 20 percent *ad valorem* under the TSUS now enter the U.S. under the provision for reinforced or laminated plastics of the HTSUS, which is dutiable at a rate of 12.1 cents per kilogram + 4.6 percent *ad valorem*. The petitioner challenges Customs interpretation of reinforced or laminated plastics under the HTSUS. This document invites comments regarding the correctness of Customs interpretation and its resulting classification of the flat goods with outer surface of reinforced or laminated plastics.

DATES: Comments must be received on or before February 28, 1994.

ADDRESSES: Comments (preferably in triplicate) may be submitted to the U.S. Customs Service, Office of Regulations and Rulings, Regulations Branch, Franklin Court, 1301 Constitution Avenue, NW., Washington, DC 20229. Comments may be viewed at the Office of Regulations and Rulings, Franklin Court, 1099 14th Street, NW., suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Carlos Halasz, Commercial Rulings Division, U.S. Customs Service, (202) 482–7050.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), a petition has been filed by a domestic interested party concerning the classification of flat goods with outer surface of reinforced or laminated plastics in subheading 4202.32.1000, HTSUS.

Flat goods is a term used to describe small containers designed to be carried on the person, such as wallets, billfolds, coin purses and spectacle cases. These articles may be composed of reinforced or laminated plastics. Schedule 7, Part

12, Subpart A, Headnote 2, TSUS, provided that flat goods of reinforced or laminated plastics were limited to articles composed of rigid plastic materials.

Under the TSUS, item 706.42 provided for flat goods of reinforced or laminated plastics, dutiable at 5.5 cents/pound + 4.6 percent *ad valorem*. The analog to this provision under the HTSUS is subheading 4202.32.1000, which provides for containers of a kind normally carried in the pocket or in the handbag: with outer surface of plastic sheeting: of reinforced or laminated plastics. Subheading 4202.32.1000 is subject to a Column 1 rate of duty of 12.1 cents/kilogram + 4.6 percent *ad valorem*.

After the HTSUS became effective, Customs initially concluded that the definition of "reinforced or laminated plastics" contained in the TSUS continued to be applicable under the HTSUS. See Headquarters Ruling Letter (HRL) 083261, dated September 14, 1989; HRL 084020, dated June 7, 1989; HRL 083415, dated May 18, 1989. In these decisions, Customs recognized that the term was not defined in the HTSUS. However, Customs determined that the definition of this phrase as set forth in the TSUS represented its common and commercial meaning. Hence, only rigid plastics were classifiable in subheading 4202.32.1000.

However, in HRL 950048, dated March 2, 1992, Customs revisited this issue. In that ruling, Customs observed that the classification of a container under heading 4202, HTSUS, is made with reference to its outer surface. The merchandise which is the subject of this notice are flat goods with outer surface of plastic sheeting.

Articles classified as plastics are subject to Chapter 39, HTSUS. Heading 3921, HTSUS, when read in conjunction with heading 3920, encompasses plastic sheets reinforced, laminated, or similarly combined with other materials. The terms "reinforced" and "laminated" plastic sheeting under these headings describe plastics which are combined or backed with other materials. See also Section XI, note 1(h); Chapter 56, note 3; Chapter 59, note 2. Plastics which are combined or backed with other materials are not restricted to rigid plastics.

As reinforced or laminated plastic sheeting of heading 3921 is not restricted to rigid plastics, Customs concluded that flat goods of reinforced or laminated plastics cannot be limited to rigid plastics. Accordingly, Customs found that the definition of "reinforced or laminated plastics" found in the TSUS was not applicable under the HTSUS. This determination has been affirmed and further explained in subsequent Headquarters rulings. See HRL 953130, dated January 6, 1993; HRL 953128, dated January 6, 1993; HRL 951905, dated January 6, 1993; HRL 950983, dated June 15, 1992; HRL 950567, dated March 2, 1992.

Petitioner contends that the term "reinforced or laminated plastics" has a common and commercial meaning distinct from the reinforced or laminated plastic sheeting described in heading 3921. As the phrase "reinforced and laminated plastics" is not specifically defined in the HTSUS, petitioner states that it must be carried over to the HTSUS. Therefore, the subheading for flat goods with outer surface of plastic sheeting, of reinforced or laminated plastics, is limited to articles which have an outer surface of rigid plastics. Consequently, flat goods with outer surface of non-rigid plastics are properly classified under subheading 4202.32.2000, HTSUS. In support of this proposition, petitioner cites the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100–418, which states that the conversion from the TSUS to the HTSUS was intended to be essentially revenue-neutral.

Comments

Pursuant to § 175.21(a), Customs Regulations (19 CFR 175.21(a)), before making a determination on this matter, Customs invites written comments from interested parties on this issue. The petition of the domestic interested party, as well as all comments received in response to this notice, will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs Service, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, NW., suite 4000, Washington, DC.

Authority: This notice is published in accordance with § 175.21(a), Customs Regulations (19 CFR 175.21 (a)).

George J. Weise,

Commissioner of Customs.

Approved: December 6, 1993.

John P. Simpson,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 93–31794 Filed 12–29–93; 8:45 am]

BILLING CODE 4820–02–P

Internal Revenue Service

26 CFR Part 1

[EE–6–93]

RIN 1545–AR54

Limitation on Annual Compensation for Qualified Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of hearing.

SUMMARY: This document contains proposed amendments to the final regulations relating to the compensation limit for tax-qualified retirement plans under section 401(a)(17) of the Internal Revenue Code of 1986. These regulations reflect changes made by the Tax Reform Act of 1986, the Technical and Miscellaneous Revenue Act of 1988, and the Omnibus Budget Reconciliation Act of 1993. These regulations provide guidance necessary to comply with the law and affect sponsors of, and participants in, tax-qualified retirement plans. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written comments must be received by February 28, 1994. Requests to speak (with outlines of oral comments) at a public hearing scheduled for Thursday, March 17, 1994, at 10 a.m. must be received by Thursday, March 3, 1994.

ADDRESSES: Please send submissions to: CC:DOM:CORP:T:R (EE–6–93), room 5228, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered to: CC:DOM:CORP:T:R (EE–6–93), Internal Revenue Service, room 5228, 1111 Constitution Avenue, NW., Washington, DC 20224. The public hearing will be held in the IRS Auditorium, Seventh Floor, 7400 Corridor, Internal Revenue Service, 1111 Constitution Ave., NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the hearing, Carol Savage, Regulations Unit, Assistant Chief Counsel (Corporate), at (202) 622–8452 (not a toll-free number). Concerning the proposed regulations, David Munroe or Marjorie Hoffman at (202) 622–4606 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Proposed regulations under section 401(a)(17) of the Internal Revenue Code (Code) were published in the **Federal**

Register May 14, 1990 (55 FR 19947). Written comments were received from the public on the proposed regulations. In addition, a public hearing on the proposed section 401(a)(17) regulations was held September 26, 27, and 28, 1990. After consideration of all of the written comments received and the statements made at the public hearing, the proposed regulations under section 401(a)(17) were adopted as modified by final regulations (TD 8362) published in the **Federal Register** on September 19, 1991, (56 FR 47603). On August 10, 1992, the Internal Revenue Service published in the **Federal Register** (57 FR 35536) regulations proposing to extend the effective date of the final regulations under section 401(a)(17) (and related regulations), generally to plan years beginning on or after January 1, 1994.

Statutory Authority

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 401(a)(17) of the Code. These regulations reflect the enactment of section 401(a)(17) by section 1106 of the Tax Reform Act of 1986 (TRA '86), and subsequent statutory changes made by section 1011(d)(4) of the Technical and Miscellaneous Revenue Act of 1988 (TAMRA) and section 13212 of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93). These regulations are issued under the authority contained in section 7805 of the Code.

Explanation of Provisions

1. Overview

Section 401(a)(17) of the Code provides an annual compensation limit for each employee under a qualified plan. This limit applies to a plan in two ways. First, a plan may not base contributions or benefits on compensation in excess of the annual limit. Thus, a plan does not satisfy section 401(a)(17) unless it provides that an employee's compensation in excess of the annual limit is not used in determining allocations or accruals for a plan year to which the annual limit applies. Second, the amount of an employee's annual compensation that may be taken into account in applying certain specified nondiscrimination rules under the Code is subject to the annual compensation limit. Thus, for example, an employee's compensation in excess of the annual limit is disregarded in determining the accrual rates for defined benefit plans under those nondiscrimination rules. The annual compensation limit applies separately to each group of plans that is treated as a single plan for purposes of the applicable nondiscrimination requirement.

2. Changes made by OBRA '93

a. Lower Limit

Prior to its amendment by OBRA '93, the annual compensation limit was $200,000 adjusted for cost of living increases ($235,840 for 1993). Section 401(a)(17) was amended by OBRA '93 to reduce the annual compensation limit to $150,000 and to modify the manner in which cost of living adjustments are made to the limit.

b. Annual Adjustment of Compensation Limit

Prior to the effective date of the OBRA '93 changes, the annual compensation limit was increased annually based on the section 415 cost of living adjustment. After the effective date of OBRA '93, the annual compensation limit, as adjusted for changes in the cost of living, is rounded down to the next lowest multiple of $10,000. Thus, the annual compensation limit increases only when the cost of living adjustment would increase the limit by an increment of at least $10,000. As under the September 1991 regulations, any increase in the limit is effective for the plan year, or other 12-month period used to determine compensation, commencing in the calendar year for which the limit is adjusted. In addition, any increase in the annual compensation limit applies only to compensation for the year of the increase and subsequent years that is used in determining an employee's benefit. Thus, the increase does not apply to prior years' compensation.

3. Effective Date and Transition Rules

Section 401(a)(17) is generally effective for plan years beginning on or after January 1, 1989. The changes made by OBRA '93 are generally effective for plan years beginning on or after January 1, 1994. Special statutory effective dates are provided for collectively bargained plans. In addition, OBRA '93 provides a special grandfather rule for certain eligible participants in governmental plans.

These proposed regulations under section 401(a)(17) are generally effective at the same time that the reduced limit under OBRA '93 applies to the plan. However, in the case of plans maintained by tax-exempt organizations, the proposed regulations are effective for plan years beginning on or after January 1, 1996.

a. Fresh-Start Rules

The proposed regulations retain the rule from the September 1991 regulations that benefits accrued or allocations made under a plan for plan years prior to the effective date of section 401(a)(17) are not subject to the annual compensation limit. The proposed regulations similarly provide that the benefits accrued or allocations made under a plan for plan years prior to the effective date of the OBRA '93 changes are not subject to the reduced annual compensation limit. Thus, for example, an employee's benefits accrued prior to the 1994 plan year, that are based on compensation in excess of the $150,000 annual compensation limit under OBRA '93, are not required to be reduced, and these accruals based on excess compensation are not required to be offset against the employee's benefit accruals in subsequent years.

In order to satisfy the requirements of section 401(a)(17), a defined benefit plan must "fresh start" the benefits of all employees with accrued benefits that are based on compensation that exceeded the annual compensation limit. In order to implement the reduced limit under OBRA '93, a defined benefit plan must again "fresh start" the benefits of all employees with accrued benefits that are based on compensation that exceeded the OBRA '93 $150,000 compensation limit. These proposed regulations provide guidance on the implementation of these and other multiple fresh starts.

In addition, these proposed regulations coordinate the regulations with the fresh-start rules of the section 401(a)(4) regulations and provide examples of the application of those rules. For example, the proposed regulations cross-reference the section 401(a)(4) regulations for the definition of an employee's frozen accrued benefit. Thus, an employee's frozen accrued benefit as of the OBRA '93 effective date includes benefits accrued as a result of an amendment made within the TRA '86 remedial amendment period that is recognized under section 401(b) as effective before the OBRA '93 effective date.

b. Application of $150,000 Limit to Accruals or Allocations in Plan Years for Which OBRA '93 is Effective

The proposed regulations provide generally that benefits accruing or allocations made for plan years beginning on or after the OBRA '93 effective date may not take into account compensation for any plan year in excess of the OBRA '93 annual compensation limit applicable to that

plan year. Thus, compensation for any plan year before OBRA '93 applies to the plan that is used to determine benefits accruing in plan years beginning on or after the OBRA '93 effective date is generally limited to $150,000.

c. Governmental Plans

A special effective date is provided in the regulations for governmental plans (within the meaning of section 414(d)) to provide governmental employers with adequate time to amend their plans to comply with section 401(a)(17). Thus, the regulations provide that these governmental plans will automatically satisfy the requirements of section 401(a)(17) for plan years beginning before the later of January 1, 1996, or 90 days after the opening of the first legislative session beginning on or after January 1, 1996, of the governing body with authority to amend the plan, if that body does not meet continuously.

The regulations implement the grandfather rule in OBRA '93 for individuals who first became participants in governmental plans before the first plan year beginning after December 31, 1995 or, if earlier, the first plan year for which the plan is amended to comply with OBRA '93. Under the grandfather rule, the annual compensation limit will not apply for those individuals to the extent that the limit would reduce the amount of compensation taken into account under the plan below the amount that was allowed to be taken into account under the plan as in effect on July 1, 1993. However, in order for this grandfather rule to apply to a plan, the plan must be amended, effective for plan years beginning after December 31, 1995, to incorporate by reference the annual compensation limits of section 401(a)(17) for those participants who are not grandfathered under OBRA '93.

d. Good Faith Compliance Prior to the Regulatory Effective Date

For plan years beginning on or after the date that section 401(a)(17) first applies to a plan, but before these proposed regulations apply to the plan, the plan must be operated in accordance with a reasonable, good faith interpretation of the requirements of section 401(a)(17). Whether compliance is reasonable and in good faith will be determined on the basis of all of the relevant facts and circumstances, including the extent to which the employer has resolved unclear issues in its favor. Reasonable, good faith interpretation will be deemed to exist, however, if a plan is operated in accordance with the 1990 proposed regulations, the September 1991 regulations, or these proposed regulations. However, for plans maintained by tax-exempt organizations, a reasonable, good faith interpretation must reflect the OBRA '93 amendments to section 401(a)(17).

Reliance on These Proposed Regulations

Taxpayers may rely on these proposed regulations for guidance pending issuance of final regulations. If future regulations are more restrictive, such guidance will be applied without retroactive effect.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted timely (preferably a signed original and eight copies) to the Internal Revenue Service. All comments will be available for public inspection and copying in their entirety. Comments must be received by February 28, 1994.

Because the Treasury Department and the IRS expect to issue final regulations on this matter as soon as possible, a public hearing has been scheduled at 10 a.m. on Thursday, March 17, 1994, in the I.R.S. Auditorium, Seventh Floor, 7400 Corridor, Internal Revenue Service, 1111 Constitution Ave., NW., Washington, DC. Because of controlled access restrictions, attendees cannot be admitted beyond the lobby of the Internal Revenue Building before 9:45 a.m.

The rules of § 601.601(a)(3) apply to the public hearing. Persons who desire to present oral comments at the hearing on the proposed regulations, should also submit, not later than March 3, 1994, a request to speak and an outline of the oral comments to be presented at the hearing stating the time they wish to devote to each subject. A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be made after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these proposed regulations are David Munroe and Marjorie Hoffman of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *.

Par. 2. Section 1.401(a)(17)–1 is revised to read as follows:

§ 1.401(a)(17)–1 Limitation on annual compensation.

(a) *Compensation limit requirement*—(1) *In general.* In order to be a qualified plan, a plan must satisfy section 401(a)(17). Section 401(a)(17) provides an annual compensation limit for each employee under a qualified plan. This limit applies to a qualified plan in two ways. First, a plan may not base allocations, in the case of a defined contribution plan, or benefit accruals, in the case of a defined benefit plan, on compensation in excess of the annual compensation limit. Second, the amount of an employee's annual compensation that may be taken into account in applying certain specified nondiscrimination rules under the Internal Revenue Code is subject to the annual compensation limit. These two limitations are set forth in paragraphs (b) and (c) of this section, respectively. Paragraph (d) of this section provides the effective dates of section 401(a)(17), the amendments made by section 13212 of the Omnibus Budget Reconciliation Act of 1993 (OBRA '93), and this section. Paragraph (e) of this section provides rules for determining post-effective-date accrued benefits under the fresh-start rules.

(2) *Annual compensation limit for plan years beginning before January 1, 1994.* For purposes of this section, for plan years beginning prior to the OBRA '93 effective date, annual compensation limit means $200,000, adjusted as provided by the Commissioner. The amount of the annual compensation limit is adjusted at the same time and in the same manner as under section 415(d). The base period for the annual adjustment is the calendar quarter ending December 31, 1988, and the first adjustment is effective on January 1, 1990. Any increase in the annual compensation limit is effective as of January 1 of a calendar year and applies to any plan year beginning in that calendar year. In any plan year beginning prior to the OBRA '93 effective date, if compensation for any plan year beginning prior to the statutory effective date is used for determining allocations or benefit accruals, or when applying any nondiscrimination rule, then the annual compensation limit for the first plan year beginning on or after the statutory effective date (generally $200,000) must be applied to compensation for that prior plan year.

(3) *Annual compensation limit for plan years beginning on or after January 1, 1994*—(i) *In general.* For purposes of this section, for plan years beginning on or after the OBRA '93 effective date, annual compensation limit means $150,000, adjusted as provided by the Commissioner. The adjusted dollar amount of the annual compensation limit is determined by adjusting the $150,000 amount for changes in the cost of living as provided in paragraph (a)(3)(ii) of this section and rounding this adjusted dollar amount as provided in paragraph (a)(3)(iii) of this section. Any increase in the annual compensation limit is effective as of January 1 of a calendar year and applies to any plan year beginning in that calendar year. For example, if a plan has a plan year beginning July 1, 1994, and ending June 30, 1995, the annual compensation limit in effect on January 1, 1994 ($150,000), applies to the plan for the entire plan year.

(ii) *Cost of living adjustment.* The $150,000 amount is adjusted for changes in the cost of living by the Commissioner at the same time and in the same manner as under section 415(d). The base period for the annual adjustment is the calendar quarter ending December 31, 1993.

(iii) *Rounding of adjusted compensation limit.* After the $150,000, adjusted in accordance with paragraph (a)(3)(ii) of this section, exceeds the annual compensation limit for the prior calendar year by $10,000 or more, the annual compensation limit will be increased by the amount of such excess, rounded down to the next lowest multiple of $10,000.

(b) *Plan limit on compensation*—(1) *General rule.* A plan does not satisfy section 401(a)(17) unless it provides that the compensation taken into account for any employee in determining plan allocations or benefit accruals for any plan year is limited to the annual compensation limit. For purposes of this rule, allocations and benefit accruals under a plan include all benefits provided under the plan, including ancillary benefits.

(2) *Plan-year-by-plan-year requirement.* For purposes of this paragraph (b), the limit in effect for the current plan year applies only to the compensation for that year that is taken into account in determining plan allocations or benefit accruals for the year. The compensation for any prior plan year taken into account in determining an employee's allocations or benefit accruals for the current plan year is subject to the applicable annual compensation limit in effect for that prior year. Thus, increases in the annual compensation limit apply only to compensation taken into account for the plan year in which the increase is effective. In addition, if compensation for any plan year beginning prior to the OBRA '93 effective date is used for determining allocations or benefit accruals in a plan year beginning on or after the OBRA '93 effective date, then the annual compensation limit for that prior year is the annual compensation limit in effect for the first plan year beginning on or after the OBRA '93 effective date (generally $150,000).

(3) *Application of limit to a plan year*—(i) *In general.* For purposes of applying this paragraph (b), the annual compensation limit is applied to the compensation for the plan year on which allocations or benefit accruals are based.

(ii) *Compensation for the plan year.* If a plan determines compensation used in determining allocations or benefit accruals for a plan year based on compensation for the plan year, then the annual compensation limit that applies to the compensation for the plan year is the limit in effect for the calendar year in which the plan year begins. Alternatively, if a plan determines compensation used in determining allocations or benefit accruals for the plan year on the basis of compensation for a 12-consecutive-month period, or periods, ending no later than the last day of the plan year, then the annual compensation limit applies to compensation for each of those periods based on the annual compensation limit in effect for the respective calendar year in which each 12-month period begins.

(iii) *Compensation for a period of less than 12-months*—(A) *Proration required.* If compensation for a period of less than 12 months is used for a plan year, then the otherwise applicable annual compensation limit is reduced in the same proportion as the reduction in the 12-month period. For example, if a defined benefit plan provides that the accrual for each month in a plan year is separately determined based on the compensation for that month and the plan year accrual is the sum of the accruals for all months, then the annual compensation limit for each month is 1/12th of the annual compensation limit for the plan year. In addition, if the period for determining compensation used in calculating an employee's allocation or accrual for a plan year is a short plan year (i.e., shorter than 12 months), the annual compensation limit is an amount equal to the otherwise applicable annual compensation limit multiplied by a fraction, the numerator of which is the number of months in the short plan year, and the denominator of which is 12.

(B) *No proration required for participation for less than a full plan year.* Notwithstanding paragraph (b)(3)(iii)(A) of this section, a plan is not treated as using compensation for less than 12 months for a plan year merely because the plan formula provides that the allocation or accrual for each employee is based on compensation for the portion of the plan year during which the employee is a participant in the plan. In addition, no proration is required merely because an employee is covered under a plan for less than a full plan year, provided that allocations or benefit accruals are otherwise determined using compensation for a period of at least 12 months.

(4) *Limits on multiple employer and multiemployer plans.* For purposes of this paragraph (b), in the case of a plan described in section 413(c) or 414(f) (a plan maintained by more than one employer), the annual compensation limit applies separately with respect to the compensation of an employee from each employer maintaining the plan instead of applying to the employee's the total compensation from all employers maintaining the plan.

(5) *Family aggregation.* [Reserved]

(6) *Examples.* The following examples illustrate the rules in this paragraph (b).

Example 1. Plan X is a defined benefit plan and bases benefits on the average of an employee's high 3 consecutive years' compensation. Section 401(a)(17) applies to

Plan X in 1989. Employee A's high 3 consecutive years' compensation prior to the application of the annual compensation limits is $215,000 (1989), $200,000 (1988), and $185,000 (1987). To satisfy this paragraph (b), Plan X cannot base plan benefits for Employee A in 1989 on compensation in excess of $195,000 (the average of $200,000 (A's 1989 compensation capped by the annual compensation limit), $200,000 (A's 1988 compensation capped by the $200,000 annual compensation limit applicable to all years before 1989), and $185,000 (A's 1987 compensation capped by the $200,000 annual compensation limit applicable to all years before 1989)). For purposes of determining the 1989 accrual, each year (1989, 1988, and 1987), not the average of the 3 years, is subject to the 1989 annual compensation limit of $200,000.

Example 2. Assume the same facts as *Example 1*, except that Employee A's high 3 consecutive years' compensation prior to the application of the limits is $230,000 (1990), $220,000 (1989), and $210,000 (1988). The 1990 annual compensation limit is $209,200. Plan X cannot base plan benefits for Employee A in 1990 on compensation in excess of $203,067 (the average of $209,200 (A's 1990 compensation capped by the 1990 limit), $200,000 (A's 1989 compensation capped by the 1989 limit), and $200,000 (A's 1988 compensation capped by the $200,000 annual compensation limit applicable to all years before 1989)).

Example 3. (a) Plan Y is a defined benefit plan and bases benefits on the average of an employee's high 3 consecutive years' compensation. Section 401(a)(17) applies to Plan Y in 1989. Assume that, for each of the years 1991–94, Employee B's annual compensation under the plan's underlying definition of compensation prior to the application of the annual compensation limits is $300,000. The annual compensation limit is adjusted to $222,220, $228,860, and $235,840 for plan years beginning January 1, 1991, 1992, and 1993, respectively. To satisfy this paragraph (b), Plan Y cannot base Employee B's plan benefits for 1993 on compensation that exceeds $228,973 (the average of $222,220, $228,860, and $235,840).

(b) As of January 1, 1994, Plan Y is amended to provide that benefits will be determined based on compensation of $150,000 (the limit in effect under section 401(a)(17) for plan years beginning on or after the OBRA '93 effective date). To satisfy this paragraph (b) as of the OBRA '93 effective date, Plan Y cannot base plan benefits accrued for Employee B in plan years beginning on or after the OBRA '93 effective date on compensation that exceeds $150,000, including compensation for years prior to the OBRA '93 effective date. Thus, in determining Employee B's benefits for 1994, the compensation for each of the years 1992, 1993, and 1994 that is taken into account under the plan is capped at the annual compensation limit of $150,000 that applies to each of those years.

Example 4. Plan Z is a defined benefit plan that bases benefits on an employee's high consecutive 36 months of compensation ending within the plan year. Employee C's high 36 months are the period September 1989 to August 1992, in which Employee C earned $50,000 in each month. The annual compensation limit is $200,000, $209,200, and $222,220 in 1989, 1990, and 1991, respectively. To satisfy this paragraph (b), Plan Z cannot base Employe C's plan benefits for the 1992 plan year on compensation in excess of $210,473. This amount is determined by applying the applicable annual compensation limit to compensation for each of the three 12-consecutive-month periods. The September 1989 to August 1990 period is capped by the annual compensation limit of $200,000 for 1989; the September 1990 to August 1991 period is capped by the annual compensation limit of $209,200 for 1990; and the September 1991 to August 1992 period is capped by the annual compensation limit of $222,220 for 1991. The average of these capped amounts is the annual compensation limit applicable in determining benefits for the 1992 year.

Example 5. (a) Employer P is a partnership. Employer P maintains Plan M, a profit-sharing plan that provides for an annual allocation of employer contributions of 15 percent of plan year compensation for employees other than self-employed individuals, and 13.0435 percent of plan year compensation for self-employed individuals. In order to satisfy section 401(a)(17), the plan provides that the plan year compensation used in determining the allocation of employer contributions for each employee may not exceed the annual limit in effect for the plan year. The plan year of Plan M is the calendar year. Plan M defines compensation for self-employed individuals (employees within the meaning of section 401(c)(1)) as the self-employed individual's net profit from self-employment attributable to Employer P minus the amount of the self-employed individual's deduction under section 164(f) for one-half of self-employment taxes. Plan M defines compensation for all other employees as wages within the meaning of section 3401(a). Employee D and Employee E are partners of Employer P and thus are self-employed individuals. Neither Employee D nor Employee E owns an interest in any other business. For the 1991 calendar year, Employee D has net profit from self-employment of $150,000, and Employee E has net profit from self-employment of $230,000. The deduction for each employee under section 164(f) for one-half of self-employment taxes is $5,123.

(b) The plan year compensation under the plan formula for Employee D is $144,877 ($150,000 minus $5,123). The allocation of employer contributions under the plan allocation formula for 1991 for Employee D is $18,897 ($144,877 (Employee D's plan year compensation for 1991) multiplied by 13.0435%). The plan year compensation under the plan formula before application of the annual limit under section 401(a)(17) for Employee E is $224,877 ($230,000 minus $5,123). After application of the annual limit, the plan year compensation for the 1991 plan year for Employee E is $222,220 (the annual limit for 1991). Therefore, the allocation of employer contributions under the plan allocation formula for 1991 for Employee E is $28,985 ($222,220 (Employee E's plan year compensation after application of the annual limit for 1991) multiplied by 13.0435%).

Example 6. The facts are the same as in *Example 5*, except that Plan M provides that plan year compensation for self-employed individuals is defined as earned income within the meaning of section 401(c)(2) attributable to Employer P. In addition, Plan M provides for an annual allocation of employer contributions of 15 percent of plan year compensation for all employees in the plan, including self-employed individuals, such as Employees D and E. The net profit from self-employment for Employee D and the net profit from self-employment for Employee E are the same as provided in *Example 5*. However, the earned income of Employee D determined in accordance with section 401(c)(2) is $125,980 ($150,000 minus $5,123 minus $18,897). The earned income of Employee E determined in accordance with section 401(c)(2) is $195,545 ($230,000 minus $5,123 minus $29,332). Therefore, the allocation of employer contributions under the plan allocation formula for 1991 for Employee D is $18,897 ($125,980 (Employee D's plan year compensation for 1991) multiplied by 15%). Employee E's earned income for 1991 does not exceed the 1991 annual limit of $222,220. Therefore, the allocation of employer contributions under the plan allocation formula for 1991 for Employee E is $29,332 ($195,545 (Employee E's plan year compensation for 1991) multiplied by 15%).

(c) *Limit on compensation for nondiscrimination rules*—(1) *General rule.* The annual compensation limit applies for purposes of applying the nondiscrimination rules under sections 401(a)(4), 401(a)(5), 401(l), 401(k)(3), 401(m)(2), 403(b)(12), 404(a)(2) and 410(b)(2). The annual compensation limit also applies in determining whether an alternative method of determining compensation impermissibly discriminates under section 414(s)(3). Thus, for example, the annual compensation limit applies when determining a self-employed individual's total earned income that is used to determine the equivalent alternative compensation amount under § 1.414(s)-1(g)(1). This paragraph (c) provides rules for applying the annual compensation limit for these purposes. For purposes of this paragraph (c), compensation means the compensation used in applying the applicable nondiscrimination rule.

(2) *Plan-year-by-plan-year requirement.* For purposes of this paragraph (c), when applying an applicable nondiscrimination rule for a plan year, the compensation for each plan year taken into account is limited to the applicable annual compensation limit in effect for that year, and an employee's compensation for that plan year in excess of the limit is disregarded. Thus, if the nondiscrimination provision is applied

on the basis of compensation determined over a period of more than one year (for example, average annual compensation), the annual compensation limit in effect for each of the plan years that is taken into account in determining the average applies to the respective plan year's compensation. In addition, if compensation for any plan year beginning prior to the OBRA '93 effective date is used when applying any nondiscrimination rule in a plan year beginning on or after the OBRA '93 effective date, then the annual compensation limit for that prior year is the annual compensation limit for the first plan year beginning on or after the OBRA '93 effective date (generally $150,000).

(3) *Plan-by-plan limit.* For purposes of this paragraph (c), the annual compensation limit applies separately to each plan (or group of plans treated as a single plan) of an employer for purposes of the applicable nondiscrimination requirement. For this purpose, the plans included in the testing group taken into account in determining whether the average benefit percentage test of § 1.410(b)–5 is satisfied are generally treated as a single plan.

(4) *Application of limit to a plan year.* The rules provided in paragraph (b)(3) of this section regarding the application of the limit to a plan year apply for purposes of this paragraph (c).

(5) *Limits on multiple employer and multiemployer plans.* The rule provided in paragraph (b)(4) of this section regarding the application of the limit to multiple employer and multiemployer plans applies for purposes of this paragraph (c).

(d) *Effective date*—(1) *Statutory effective date*—(i) *General rule.* Except as otherwise provided in this paragraph (d), section 401(a)(17) applies to a plan as of the first plan year beginning on or after January 1, 1989. For purposes of this section, statutory effective date generally means the first day of the first plan year that section 401(a)(17) is applicable to a plan. In the case of governmental plans, statutory effective date means the first day of the first plan year for which the plan is not deemed to satisfy section 401(a)(17) by reason of paragraph (d)(4) of this section.

(ii) *Exception for collectively bargained plans.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986, section 401(a)(17) applies to allocations and benefit accruals for plan years beginning on or after the earlier of—

(A) January 1, 1991; or

(B) The later of January 1, 1989, or the date on which the last of the collective bargaining agreements terminates (determined without regard to any extension or renegotiation of any agreement occurring after February 28, 1986). For purposes of this paragraph (d)(1)(ii), any extension or renegotiation of a collective bargaining agreement, which extension or renegotiation is ratified after February 28, 1986, is to be disregarded in determining the date on which the agreement terminates.

(2) *OBRA '93 effective date*—(i) *In general.* For purposes of this section, OBRA '93 effective date means the first day of the first plan year beginning on or after January 1, 1994, except as provided in this paragraph (d)(2).

(ii) *Exception for collectively bargained plans.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and 1 or more employers ratified before August 10, 1993, OBRA '93 effective date means the first day of the first plan year beginning on or after the earlier of—

(A) The latest of—

(*1*) January 1, 1994;

(*2*) The date on which the last of such collective bargaining agreements terminates (without regard to any extension, amendment, or, modification of such agreements on or after August 10, 1993); or

(*3*) In the case of a plan maintained pursuant to collective bargaining under the Railway Labor Act, the date of execution of an extension or replacement of the last of such collective bargaining agreements in effect on August 10, 1993; or

(B) January 1, 1997.

(3) *Regulatory effective date.* This § 1.401(a)(17)–1 applies to plan years beginning on or after the OBRA '93 effective date. However, in the case of a plan maintained by an organization that is exempt from income taxation under section 501(a), including plans subject to section 403(b)(12)(A)(i) (nonelective plans), this § 1.401(a)(17)–1 applies to plan years beginning on or after January 1, 1996. For plan years beginning before the effective date of these regulations and on or after the statutory effective date, a plan must be operated in accordance with a reasonable, good faith interpretation of section 401(a)(17), taking into account, if applicable, the OBRA '93 reduction to the annual compensation limit under section 401(a)(17).

(4) *Special rules for governmental plans*—(i) *Deemed satisfaction by governmental plans.* In the case of governmental plans described in section 414(d), including plans subject to section 403(b)(12)(A)(i) (nonelective plans), section 401(a)(17) is considered satisfied for plan years beginning before the later of January 1, 1996, or 90 days after the opening of the first legislative session beginning on or after January 1, 1996, of the governing body with authority to amend the plan, if that body does not meet continuously. For purposes of this paragraph (d)(4), the term governing body with authority to amend the plan means the legislature, board, commission, council, or other governing body with authority to amend the plan.

(ii) *Transition rule for governmental plans*—(A) *In general.* In the case of an eligible participant in a governmental plan (within the meaning of section 414(d)), the annual compensation limit under this section shall not apply to the extent that the application of the limitation would reduce the amount of compensation that is allowed to be taken into account under the plan below the amount that was allowed to be taken into account under the plan as in effect on July 1, 1993. Thus, for example, if a plan as in effect on July 1, 1993, determined benefits without any reference to a limit on compensation, then the annual compensation limit in effect under this section will not apply to any eligible participant in any future year.

(B) *Eligible participant.* For purposes of this paragraph (d)(4)(ii), an eligible participant is an individual who first became a participant in the plan prior to the first day of the first plan year beginning after the earlier of—

(*1*) The last day of the plan year by which a plan amendment to reflect the amendments made by section 13212 of OBRA '93 is both adopted and effective; or

(*2*) December 31, 1995.

(C) *Plan must be amended to incorporate limits.* This paragraph (d)(4)(ii) shall not apply to any eligible participant in a plan unless the plan is amended so that the plan incorporates by reference the annual compensation limit under section 401(a)(17), effective with respect to noneligible participants for plan years beginning after December 31, 1995 (or earlier, if the plan amendment so provides).

(5) *Benefits earned prior to effective date*—(i) *In general.* Allocations under a defined contribution plan or benefits accrued under a defined benefit plan for plan years beginning before the statutory effective date are not subject to the annual compensation limit. Allocations under a defined contribution plan or benefits accrued

under a defined benefit plan for plan years beginning on or after the statutory effective date, but before the OBRA '93 effective date are subject to the annual compensation limit under paragraph (a)(2) of this section. However these allocations or accruals are not subject to the OBRA '93 reduction to the annual compensation limit described in paragraph (a)(3) of this section.

(ii) *Allocation for a plan year.* The allocations for a plan year include amounts described in § 1.401(a)(4)–2(c)(ii) or § 1.401(m)–1(f)(6) plus the earnings, expenses, gains, and losses attributable to those amounts.

(iii) *Benefits accrued for years before the effective date.* The benefits accrued for plan years prior to a specified date by any employee are the employee's benefits accrued under the plan, determined as if those benefits had been frozen (as defined in § 1.401(a)(4)–13(c)(3)(i)) as of the day immediately preceding such specified date. Thus, for example, benefits accrued for those plan years generally do not include any benefits accrued under an amendment increasing prior benefits that is adopted after the date on which the employee's benefits under the plan must be treated as frozen.

(e) *Determination of post-effective-date accrued benefits*—(1) *In general.* The plan formula that is used to determine the amount of allocations or benefit accruals for plan years beginning on or after the dates described in paragraph (d)(1) or (2) must comply with section 401(a)(17) as in effect on such date. This paragraph (e) provides rules for applying section 401(a)(17) in the case of section 401(a)(17) employees who accrue additional benefits under a defined benefit plan in a plan year beginning on or after the relevant effective date. Paragraph (e)(2) of this section contains definitions used in applying these rules. Paragraphs (e)(3) and (e)(4) of this section explain the application of the fresh-start rules in § 1.401(a)(4)–13 to the determination of the accrued benefits of section 401(a)(17) employees.

(2) *Definitions.* For purposes of this paragraph (e), the following definitions apply:

(i) *Section 401(a)(17) employee.* An employee is a section 401(a)(17) employee as of a date, on or after the statutory effective date, if the employee's current accrued benefit as of that date is based on compensation for a year prior to the statutory effective date that exceeded the annual compensation limit for the first plan year beginning on or after the statutory effective date. In addition, an employee is a section 401(a)(17) employee as of a date, on or after the OBRA '93 effective date, if the employee's current accrued benefit as of that date is based on compensation for a year prior to the OBRA '93 effective date that exceeded the annual compensation limit for the first plan year beginning on or after the OBRA '93 effective date. For this purpose, a current accrued benefit is not treated as based on compensation that exceeded the relevant annual compensation limit, if a plan makes a fresh start using the formula with wear-away described in § 1.401(a)(4)–13(c)(4)(ii), and the benefit determined for the employee by applying the current formula applied to the employee's total years of service, taking into account the annual compensation limit, exceeds the employee's frozen accrued benefit (or, if applicable, the employee's adjusted accrued benefit) as of the fresh-start date.

(ii) *Section 401(a)(17) fresh-start date.* Section 401(a)(17) fresh-start date means a fresh-start date as defined in § 1.401(a)(4)–12 not earlier than the last day of the last plan year beginning before the statutory effective date, and not later than the last day of the last plan year beginning before the effective date of these regulations.

(iii) *OBRA '93 fresh-start date.* OBRA '93 fresh-start date means the later of the last day of the last plan year beginning before the OBRA '93 effective date and the last day of the last plan year beginning before the effective date of these regulations.

(iv) *Section 401(a)(17) frozen accrued benefit.* Section 401(a)(17) frozen accrued benefit means the accrued benefit for any section 401(a)(17) employee frozen (as defined in § 1.401(a)(4)–13(c)(3)(i)) as of the last day of the last plan year beginning before the statutory effective date.

(v) *OBRA '93 frozen accrued benefit.* OBRA '93 frozen accrued benefit means the accrued benefit for any section 401(a)(17) employee frozen (as defined in § 1.401(a)(4)–13(c)(3)(i)) as of the OBRA '93 fresh-start date.

(3) *Application of fresh-start rules*—(i) *General rule.* In order to satisfy section 401(a)(17), a defined benefit plan must determine the accrued benefit of each section 401(a)(17) employee by applying the fresh-start rules in § 1.401(a)(4)–13(c). The fresh-start rules must be applied using a section 401(a)(17) fresh-start date and using the plan benefit formula, after amendment to comply with section 401(a)(17) and this section, as the formula applicable to benefit accruals in the current plan year. In addition, the fresh-start rules must be applied to determine the accrued benefit of each section 401(a)(17) employee using an OBRA '93 fresh-start date and using the plan benefit formula, after amendment to comply with the reduction in the section 401(a)(17) annual compensation limit described in paragraph (a)(3) of this section, as the formula applicable to benefit accruals in the current plan year.

(ii) *Consistency rules in § 1.401(a)(4)–13(c) and (d)*—(A) *General rule.* In applying the fresh-start rules of § 1.401(a)-13(c) and (d), the group of section 401(a)(17) employees is a fresh-start group. See § 1.401(a)(4)–13(c)(5)(ii)(A). Thus, the consistency rules of those sections govern, unless otherwise provided. For example, if the plan is using a fresh-start date applicable to all employees and is not adjusting frozen accrued benefits under § 1.401(a)(4)–13(d) for employees who are not section 401(a)(17) employees, then the frozen accrued benefits for section 401(a)(17) employees may not be adjusted under § 1.401(a)(4)–13(d) or this paragraph (e).

(B) *Determination of adjusted accrued benefit.* If the fresh-start rules of § 1.401(a)(4)–13(c) and (d) are applied to determine the benefits of all employees after a fresh-start date, the plan will not fail to satisfy the consistency requirement of § 1.401(a)(4)–13(c)(5)(i) merely because the plan makes the adjustment described in § 1.401(a)(4)–13(d) to the frozen accrued benefits of employees who are not section 401(a)(17) employees, but does not make the adjustment to the frozen accrued benefits of section 401(a)(17) employees. In addition, the plan does not fail to satisfy the consistency requirement of § 1.401(a)(4)–13(c)(5)(i) merely because the plan makes the adjustment described in § 1.401(a)(4)–13(d) for section 401(a)(17) employees on the basis of the compensation formula that was used to determine the frozen accrued benefit (as required under paragraph (e)(4)(iii) of this section) but makes the adjustment for employees who are not section 401(a)(17) employees on the basis of any other method provided in § 1.401(a)(4)–13(d)(8).

(4) *Permitted adjustments to frozen accrued benefit of section 401(a)(17) employees*—(i) *General rule.* Except as otherwise provided in paragraphs (e)(4)(ii) and (iii) of this section, the rules in § 1.401(a)(4)–13(c)(3) (permitting certain adjustments to frozen accrued benefits) apply to section 401(a)(17) frozen accrued benefits or OBRA '93 frozen accrued benefits.

(ii) *Optional forms of benefit.* After either the section 401(a)(17) fresh-start date or the OBRA '93 fresh-start date, a plan may be amended either to provide

a new optional form of benefit or to make an optional form of benefit available with respect to the section 401(a)(17) frozen accrued benefit or the OBRA '93 frozen accrued benefit, provided that the optional form of benefit is not subsidized. Whether an optional form is subsidized may be determined using any reasonable actuarial assumptions.

(iii) *Adjusting section 401(a)(17) accrued benefits*—(A) *In general.* If the plan adjusts accrued benefits for employees under the rules of § 1.401(a)(4)–13(d) as of a fresh-start date, the adjusted accrued benefit (within the meaning of section § 1.401(a)(4)–13(d)) for each section 401(a)(17) employee must be determined after the fresh-start date by reference to the plan's compensation formula that was actually used to determine the frozen accrued benefit as of the fresh-start date. For this purpose, the plan's compensation formula incorporates the plan's underlying compensation definition and compensation averaging period. In making the adjustment, the denominator of the adjustment fraction described in § 1.401(a)(4)–13(d)(8)(i) is the employee's compensation as of the fresh-start date using the plan's compensation formula as of that date and, in the case of an OBRA '93 fresh-start date, reflecting the annual compensation limits that applied as of the fresh-start date. The numerator of the adjustment fraction is the employee's updated compensation (i.e., compensation for the current plan year within the meaning of § 1.401(a)(4)–13(d)(8)), determined after applying the annual compensation limits to each year's compensation that is used in the plan's compensation formula as of the fresh-start date. Similarly, in applying the alternative rule in § 1.401(a)(4)–13(d)(8)(v), the updated compensation that is substituted must be determined after applying the annual compensation limits to each year's compensation that is used in the plan's compensation formula. Thus, no adjustment will be permitted unless the updated compensation (determined after applying the annual compensation limit) exceeds the compensation that was used to determine the employee's frozen accrued benefit.

(B) *Multiple fresh starts.* If a plan makes more than one fresh start with respect to a section 401(a)(17) employee, the employee's frozen accrued benefit as of the latest fresh-start date will either be determined by applying the current benefit formula to the employee's total years of service as of that fresh-start date or will consist of the sum of the employee's frozen accrued benefit (or adjusted accrued benefit (as defined in § 1.401(a)(4)–13(d)(8)(i))) as of the previous fresh-start date plus additional frozen accruals since the previous fresh start. If the frozen accrued benefit consists of such a sum, in making the adjustments described in paragraph (e)(4)(iii)(A) of this section, separate adjustments must be made to that previously frozen accrued benefit (or adjusted accrued benefit) and the additional frozen accruals to the extent that the frozen accrued benefit and the additional accruals have been determined using different compensation formulas or different compensation limits (i.e., the section 401(a)(17) limit before and after the reduction in limit described in paragraph (a)(3) of this section). In this case, if the plan is applying the adjustment fraction of § 1.401(a)(4)–13(d)(8)(i), the denominator of the separate adjustment fraction for adjusting each portion of the frozen accrued benefit must reflect the actual compensation formula, and, if applicable, compensation limit, originally used for determining that portion. For example, the frozen accrued benefit of a section 401(a)(17) employee as of the OBRA '93 fresh-start date may be based on the sum of the section 401(a)(17) frozen accrued benefit (determined without any annual compensation limit) plus benefit accruals in the years between the statutory effective date and the OBRA '93 effective date (based on compensation that was subject to the annual compensation limits for those years). In this example, in adjusting the section 401(a)(17) frozen accrued benefit, the denominator of the adjustment fraction does not reflect any annual compensation limit. Similarly, in adjusting the frozen accruals for years between the statutory effective date and the OBRA '93 effective date, the denominator of the adjustment fraction reflects the level of the annual compensation limit in effect for those years.

(5) *Examples.* The following examples illustrate the rules in this paragraph (e).

Example 1. (a) Plan Y is a calendar year defined benefit plan providing an annual benefit for each year of service equal to 2 percent of compensation averaged over an employee's high 3 consecutive calendar years' compensation. Section 401(a)(17) applies to Plan Y in 1989. As of the close of the last plan year beginning before January 1, 1989 (i.e., the 1988 plan year), Employee A, with 5 years of service, had accrued a benefit of $25,000 which equals 10 percent (2 percent multiplied by 5 years of service) of average compensation of $250,000. Effective for plan years after December 31, 1988, Plan Y is amended to provide that in determining an employee's benefit, compensation taken into account is subject to the annual compensation limit under section 401(a)(17), and that, for section 401(a)(17) employees, the employee's accrued benefit is the greater of (i) the employee's benefit under the plan's benefit formula (after the plan formula is amended to comply with section 401(a)(17)) as applied to the employee's total years of service, and (ii) the employee's accrued benefit as of December 31, 1988, determined as though the employee terminated employment on that date without regard to any plan amendments after that date. Employer X decides not to amend Plan Y to provide for the adjustments permitted under § 1.401(a)(4)–13(d) to the accrued benefit of section 401(a)(17) employees as of December 31, 1988.

(b) Under Plan Y, Employee A's accrued benefit at the end of 1989 is $25,000, which is the greater of Employee A's accrued benefit as of the last day of the 1988 plan year ($25,000), and $24,000, which is Employee A's benefit based on the plan's benefit formula applied to Employee A's total years of service ($200,000 multiplied by (2 percent multiplied by 6 years of service)). The formula of Plan Y applicable to section 401(a)(17) employees for calculating their accrued benefits for years after the section 401(a)(17) fresh-start date is the formula in § 1.401(a)–13(c)(4)(ii) (formula with wear-away). The fresh-start formula is applied using a benefit formula that satisfies section 401(a)(17) and this section and is applied using December 31, 1988, as the section 401(a)(17) fresh-start date. Thus, Plan Y, as amended, satisfies paragraph (e)(3)(i) of this section for plan years commencing prior to the OBRA '93 effective date.

Example 2. Assume the same facts as in *Example 1*, except that the plan formula provides that effective January 1, 1989, for section 401(a)(17) employees, an employee's benefit will equal the sum of the employee's accrued benefit as of December 31, 1988 (determined as though the employee terminated employment on that date and without regard to any amendments after that date), and 2 percent of compensation averaged over an employee's high 3 consecutive years' compensation times years of service taking into account only years of service after December 31, 1988. Thus, under Plan Y's formula, Employee A's accrued benefit as of December 31, 1989 is $29,000, which is equal to the sum of $25,000 (Employee A's accrued benefit as of December 31, 1988) plus $4,000 ($200,000 multiplied by (2 percent multiplied by 1 year of service)). The formula of Plan Y applicable to section 401(a)(17) employees for calculating their accrued benefits for years after the section 401(a)(17) fresh-start date is the formula in § 1.401(a)–13(c)(4)(i) (formula without wear-away). The fresh-start formula is applied using a benefit formula for the 1989 plan year that satisfies section 401(a)(17) and this section and is applied using December 31, 1988, as the section 401(a)(17) fresh-start date. Thus, Plan Y, as amended, satisfies paragraph (e)(1) of this section for plan years commencing prior to the OBRA '93 effective date.

Example 3. (a) Assume the same facts as in *Example 1*, except that the plan formula provides that effective January 1, 1989, an employee's benefit equals the greater of the plan formulas in *Example 1* and *Example 2*. The formula of Plan Y applicable to section 401(a)(17) employees for calculating their accrued benefits for years after the section 401(a)(17) fresh-start date is the formula in § 1.401(a)–13(c)(4)(iii) (formula with extended wear-away). The fresh-start formula is applied using a benefit formula for the 1989 plan year that satisfies section 401(a)(17) and this section and is applied using December 31, 1988, as the section 401(a)(17) fresh-start date. Thus, Plan Y, as amended, satisfies paragraph (e)(1) of this section for plan years commencing prior to the OBRA '93 effective date.

(b) Assume that for each of the years 1991–93 Employee A's annual compensation under the plan compensation formula, disregarding the amendment to comply with section 401(a)(17) is $300,000. The annual compensation limit is adjusted to $222,220, $228,860, and $235,840 for plan years beginning January 1, 1991, 1992, and 1993, respectively. The compensation that may be taken into account for plan benefits in 1993 cannot exceed $228,973 (the average of $222,220, $228,860, and $235,840). Therefore, as of December 31, 1993, the benefit determined under the fresh-start formula with wear-away would be $45,795 ($228,973 multiplied by (2 percent multiplied by 10 years of service)). The benefit determined under the fresh-start formula without wear-away would be $47,897, which is equal to $25,000 (Employee A's section 401(a)(17) frozen accrued benefit) plus $22,897 ($228,973 multiplied by (2 percent multiplied by 5 years of service)). Because Employee A's accrued benefit is being determined using the fresh-start formula with extended wear-away, Employee A's accrued benefit as of December 31, 1993, is equal to $47,897, the greater of the two amounts.

Example 4. (a) Assume the same facts as in *Example 3*, except that Plan Y satisfies § 1.401(a)(4)–13 (d)(3) through (d)(7) and that the amendment to Plan Y effective for plan years beginning after December 31, 1988, also provided for adjustments to the section 401(a)(17) frozen accrued benefit in accordance with § 1.401(a)(4)–13(d).

(b) As of December 31, 1993, the numerator of Employee A's compensation fraction is $228,973 (the average of Employee A's annual compensation for 1991, 1992, and 1993, as limited by the respective annual limit for each of those years). The denominator of Employee A's compensation fraction determined in accordance with paragraph (e)(4)(iii) of this section is $250,000 (the average of Employee A's high 3 consecutive calendar year compensation as of December 31, 1988, determined without regard to section 401(a)(17)). Therefore, Employee A's compensation fraction is $228,973/$250,000. Because the compensation adjustment fraction is less than 1, Employee A's section 401(a)(17) frozen accrued benefit is not adjusted. Therefore, Employee A's accrued benefit as of December 31, 1993, would still be $47,897, which is equal to $25,000 (Employee A's section 401(a)(17) frozen accrued benefit) plus $22,897 ($228,973 multiplied by (2 percent multiplied by 5 years of service)).

Example 5. (a) Assume the same facts as in *Example 3*, except that as of January 1, 1994, Plan Y is amended to provide that benefits will be determined based on compensation of $150,000 (the limit in effect under section 401(a)(17) for plan years beginning on or after the OBRA '93 effective date) and that for section 401(a)(17) employees, the employees' accrued benefit will be determined under § 1.401(a)(4)–13(c)(4)(i) (formula without wear-away) using December 31, 1993 as the OBRA '93 fresh-start date.

(b) Assume that for each of the years 1996–98 Employee A's annual compensation under the plan compensation definition, disregarding the amendment to comply with section 401(a)(17), is $400,000. Assume that the annual compensation limit is first adjusted to $160,000 for plan years beginning on or after January 1, 1997, and is not adjusted for the plan year beginning on or after January 1, 1998. The compensation that may be taken into account for the 1998 plan year cannot exceed $156,667 (the average of $150,000 for 1996, $160,000 for 1997, and $160,000 for 1998).

(c) Therefore, at the end of December 31, 1998, Employee A's accrued benefit is $63,564, which is equal to $47,897 (Employee A's OBRA '93 frozen accrued benefit) plus $15,667 ($156,667 multiplied by (2 percent multiplied by 5 years of service)).

Example 6. (a) Assume the same facts as in *Example 5*, except that, for the fresh-start group (in this case the section 401(a)(17) employees), the amendments to Plan Y provide for adjustments to the section 401(a)(17) frozen accrued benefit and the OBRA '93 frozen accrued benefit in accordance with § 1.401(a)(4)–13(d).

(b) Employee A's frozen accrued benefit as of December 31, 1993, is adjusted as of December 31, 1998, as follows:

(1) Employee A's frozen accrued benefit as of December 31, 1993, is the sum of Employee A's section 401(a)(17) frozen accrued benefit ($25,000) and Employee A's frozen accruals for the years 1989–93 ($22,897).

(2) The numerator of Employee A's adjustment fraction is $156,667 (the average of $150,000, $160,000, and $160,000). The denominator of Employee A's adjustment fraction with respect to Employee A's section 401(a)(17) frozen accrued benefit is $250,000, and the denominator of Employee A's adjustment fraction with respect to the rest of Employee A's frozen accrued benefit is $228,973 (the average of Employee A's annual compensation for 1991, 1992, and 1993, as limited by the respective annual limit for each of those years).

(3) Employee A's section 401(a)(17) frozen accrued benefit as adjusted through December 31, 1998, remains $25,000. The compensation adjustment fraction determined in accordance with paragraph (e)(4)(iii) of this section is less than one ($156,667 divided by $250,000).

(4) Employee A's frozen accruals for the years 1989–93, as adjusted through December 31, 1998, remain $22,897 because the adjustment fraction is less than one ($156,667 divided by $228,973).

(5) Employee A's adjusted accrued benefit as of December 31, 1998, equals $47,897 (the sum of the $25,000 and $22,897 amounts from paragraphs (b)(3) and (b)(4), respectively, of this *Example*).

(c) Employee A's section 401(a)(17) frozen accrued benefit will not be adjusted for compensation increases until the numerator of the fraction used to adjust that frozen accrued benefit exceeds the denominator of $250,000 used in determining those accruals. Similarly, the portion of Employee A's OBRA '93 frozen accrued benefit attributable to the frozen accruals for the years 1989–1993 will not be adjusted for compensation increases until the numerator of the fraction used to adjust those frozen accruals exceeds the denominator of $228,973 used in determining those accruals.

(f) *Additional guidance.* The Commissioner may, in revenue rulings, notices, and other guidance, published in the Internal Revenue Bulletin, provide any additional guidance that may be necessary or appropriate concerning the annual limits on compensation under section 401(a)(17). See § 601.601(d)(2)(ii)(*b*) of this chapter.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

[FR Doc. 93–31013 Filed 12–29–93; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 552

RIN 1215–AA82

Application of the Fair Labor Standards Act to Domestic Service

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Department of Labor proposes to revise the regulations governing the application of the Fair Labor Standards Act of 1938 (FLSA) to domestic service employees to clarify that the exemption from minimum wage and overtime compensation for certain employees who provide companionship services, and the exemption from overtime compensation for live-in domestic service employees, apply to employees who are employed by a third-party employer or agency only when the individuals are also employed by the family or household utilizing their services, i.e., a *joint* employment relationship must exist. Other minor updating and technical corrections and revisions are proposed.

DATES: Comments must be received on or before February 28, 1994.

ADDRESSES: Submit written comments to Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed, stamped post card. As a convenience to commenters, comments may be transmitted by facsimile ("FAX") machine to (202) 219–5122. This is not a toll-free number.

FOR FURTHER INFORMATION CONTACT: J. Dean Speer, Director, Division of Policy and Analysis, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, room S–3506, 200 Constitution Avenue, NW, Washington, DC 20210, (202) 219–8412. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

This regulation contains no reporting or recordkeeping requirements.

II. Background

The Fair Labor Standards Act of 1938 (52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.*), as amended by the Fair Labor Standards Amendments of 1974 (Pub. L. 93–259, 88 Stat. 55) extended with certain exceptions the FLSA's minimum wage, overtime pay, and recordkeeping provisions to domestic service employees. Section 13(a)(15) of the FLSA, among other things, provides an exemption from the minimum wage and overtime pay requirements of the Act for employees engaged in domestic service employment to provide companionship services. Section 13(b)(21) provides an overtime exemption for employees employed in domestic service in a household and who reside in such household. On February 20, 1975, regulations and interpretations implementing the domestic service employment provisions of the FLSA were published in the **Federal Register** (40 FR 7405) at 29 CFR part 552. Subpart A of part 552 defines and delimits the terms "domestic service employment" and "companionship services," among others. Subpart B sets out statements of general policy and interpretation concerning the application of the FLSA to domestic service employees.

Section 552.109 provides interpretations of "third party employment" as it relates to employees providing companionship services, babysitting services, and live-in domestic service employees. It has come to the Department's attention that this section may be susceptible of misinterpretation and should be revised to make it clear that the exemptions are available only to those employees who meet the definition of "domestic service employment" as set forth in § 552.3, which states that "domestic service employment" means "* * * services of a household nature performed by an employee *in or about a private home (permanent or temporary) of the person by whom he or she is employed.*" (Emphasis added.) This definition is based on the legislative history to section 6(f) of the FLSA, which added FLSA minimum wage coverage of domestic service employment as part of the 1974 FLSA Amendments. Report from the Committee on Labor and Public Welfare on S. 2747, Senate Report 93–690, 93rd Cong., 2d Sess. p. 20 (1974). In accordance with the regulatory language and legislative history, the Department has interpreted § 552.109 to permit companions and live-in domestics employed by third-party employers to fall within the section 13(a)(15) and section 13(b)(21) exemptions only where the individuals are also employed by the family or household using their services. In other words, a joint employment relationship must exist. It is proposed to clarify the language in § 552.109 to explicitly reference this requirement.

III. Summary of Rule

The rule proposes to revise § 552.109 to clarify that, in order for the exemptions in FLSA sections 23(a)(15) and 13(b)(21) to apply, employees engaged in providing companionship services and live-in domestic service employees who are employed by a third-party employer or agency must also be employed by the family or household using their services, i.e., a joint employment relationship must exist.

Section 552.100(a)(1) is being revised to delete references to former minimum wage levels that have been overtaken by subsequent statutory increases in the minimum wage since part 552 was last revised. This section will provide that domestic service employees must receive not less than the minimum wage required by section 6 of the FLSA (presently $4.25 an hour) but without referencing a specific rate so that the regulations will not have to be revised in response to statutory amendments to the minimum wage.

Section 552.100(c), which contains an enforcement policy of the Wage-Hour Administrator regarding credits taken by an employer for meals and lodging furnished to a domestic service employee, is being revised to reflect the increase in the statutory minimum wage since 29 CFR part 552 was published in February 1975, and to set forth acceptable credits in a percentage format so as to obviate the need to revise this section of the regulations each time the statutory minimum wage is revised. the statutory minimum wage in February 1975 for domestic service employment was $2.00 per hour and is currently $4.25. It is proposed to increase the acceptable amounts for meals and lodging accordingly.

The following technical corrections are also proposed:

In § 552.101(a)(1), the reference "20 CFR 404.1027(j)" should read "20 CFR 404.1057." This section, as well as a number of others, was redesignated in regulations issued under the Social Security Act. In § 552.105(a), the reference "section 3(s)(4)" of the FLSA should read "section 3(s)(1)(B)." (See the Fair Labor Standards Amendments of 1989, 103 Stat. 938.) The reference in the third sentence of § 552.2(b) should read "Section 7(l) instead of "Section 7(l)" (substituting a lower case letter "l" for the number "1" in the parentheses). In the last sentence of section 552.104(b), two spelling errors are corrected.

Executive Order 12866

The Department believes that this proposed rule is not a "significant regulatory action" within the meaning of Executive Order 12866, in that it is not likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no regulatory impact analysis has been prepared.

Regulatory Flexibility Analysis

The Department has determined that this rulemaking will not have a significant economic impact on a substantial number of small entities. This conclusion is based on the fact that

the proposal makes only one revision that is other than a minor or technical correction, and that is a clarification to assure conformity of an interpretative section to the legislative history and the regulatory provisions. The Department has certified to this effect to the Chief Counsel for Advocacy of the Small Business Administration. Therefore, no regulatory flexibility analysis is required.

Document Preparation

This document was prepared under the direction and control of Maria Echaveste, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 552

Domestic service workers, Employment, Labor, Minimum wages, Overtime pay, Wages.

Accordingly, part 552 of title 29 of the Code of Federal Regulations is proposed to be amended as set forth below.

Signed at Washington, DC on this 21st day of December, 1993.

Maria Echaveste,

Administrator, Wage and Hour Division.

PART 552—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO DOMESTIC SERVICE

1. The authority citation for part 552 is proposed to be revised to read as follows:

Authority: Secs. 13(a)(15) and (13)(b)(21) of the Fair Labor Standards Act, as amended (29 U.S.C. 213(a)(15), (b)(21), 88 Stat. 62; sec. 29(b) of the Fair Labor Standards Amendments of 1974 (Pub. L. 93–259, 88 Stat. 76), unless otherwise noted.

§ 552.2 [Amended]

2. In § 552.2, the reference beginning in the undesignated paragraph after paragraph (b)(2) is revised to read "Section 7(l)" instead of "Section 7(1)" (substituting a lower case letter "l" for the number "1" in the parentheses).

3. In § 552.100, paragraphs (a)(1), (c) and (d) are proposed to be revised to read as follows:

§ 552.100 Application of minimum wage and overtime provisions.

(a)(1) Domestic service employees must receive for employment in any household a minimum wage of not less than that required by section 6(a) of the Fair Labor Standards Act.

* * * * *

(c) For enforcement purposes, the Administrator will accept a credit taken by the employer of up to 37.5 percent of the statutory minimum hourly wage for a breakfast (if furnished), up to 50 percent of the statutory minimum hourly wage for a lunch (if furnished), and up to 62.5 percent of the statutory minimum hourly wage for dinner (if furnished), which meal credits when combined do not in total exceed 150 percent of the statutory minimum hourly wage for any day. Nothing herein shall prevent employers from crediting themselves with the actual cost of fair value of furnishing meals, as determined in accordance with part 531 of this chapter, if such cost of fair value is different from the meal credits specified above: *Provided, however,* That employers keep, maintain and preserve (for a period of 3 years) the records on which they rely to justify such different costs figures.

(d) In the case of lodging furnished to live-in domestic service employees, the Administrator will accept a credit taken by the employer of up to seven and one-half times the statutory minimum hourly wage for each week lodging is furnished. Nothing herein shall prevent employers from crediting themselves with the actual cost or fair value of furnishing lodging, as determined in accordance with part 531 of this chapter, if such cost or fair value is different from the amount specified above, *Provided however,* That employers keep, maintain, and preserve (for a period of 3 years) the records on which they rely to justify such different cost figures. In determining reasonable cost or fair value, the regulations and rulings in 29 CFR part 531 are applicable.

§ 552.101 [Amended]

4. In § 552.101, the parenthetical reference in the first sentence of paragraph (a) is revised to read "(20 CFR 404.1057)".

5. In § 552.104, paragraph (b) is proposed to be revised to read as follows:

§ 552.104 Babysitting services performed on a casual basis.

* * * * *

(b) Employment in babysitting services would usually be a "casual basis", whether performed for one or more employees, if such employment by all such employers does not exceed 20 hours per week in the aggregate. Employment in excess of these hours may still be on a "casual basis" if the excessive hours of employment are without regularity or are for irregular or intermittent periods. Employment in babysitting services shall also be deemed to be on a "casual basis" (regardless of the number of weekly hours worked by the babysitter) in the case of individuals whose vocations are not domestic service who accompany families for a vacation period to take care of the children if the duration of such employment does not exceed 6 weeks.

* * * * *

§ 552.105 [Amended]

6. In § 552.105, the reference in the fourth sentence of paragraph (a) is revised to read "section 3(s)(1)(B) of the Act * * *"

7. In § 552.109 paragraphs (a) and (c) are proposed to be revised to read as follows:

§ 552.109 Third party employment.

(a) Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15), provided that they are also employed by the person in whose home the services are provided, *i.e.*, a joint employment relationship must exist (*see* 29 CFR part 791). The assignment of such an employee to more than one household or family in the same workweek would not defeat the exemption for that workweek, provided that the services rendered during each assignment come within the definition of companionship services.

(b) * * *

(c) Live-in domestic service employees who are employed by an employer or agency other than the family or household using their services are exempt from the Act's overtime requirements by virtue of section 13(b)(21), provided that they are also employed by the person in whose home the services are provided, *i.e.*, a joint employment relationship must exist. This exemption, however, will not apply where the employee works only temporarily for any one family or household, since that employee would not be "residing" on the premises of such family or household.

[FR Doc. 93–31664 Filed 12–29–93; 8:45 am]

BILLING CODE 4510–27–M

Mine Safety and Health Administration

30 CFR Part 75

RIN 1219–AA11

Safety Standards for Underground Coal Mine Ventilation

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Proposed extension of administrative stay with request for comments.

SUMMARY: MSHA is proposing to extend the stay of the effective date of 30 CFR 75.313 and 75.344(a)(1) of the final rule revising safety standards for ventilation of underground coal mines until completion of a rulemaking involving these and other ventilation standards contained in the final rule published in the **Federal Register** on May 15, 1992 (57 FR 20868). The Agency is requesting comments on the proposed stay extension.

DATES: Comments on the proposed stay extension must be submitted on or before February 28, 1994.

It is proposed to extend the stay of §§ 75.313 and 75.344(a)(1) in 30 CFR part 75 until completion of a rulemaking involving these and other ventilation standards. Sections 75.314, 75.315 and 75.345 in 30 CFR part 75 will continue in effect until completion of the rulemaking.

ADDRESSES: Send written comments to the Mine Safety and Health Administration, Office of Standards, Regulations and Variances, Room 631, Ballston Tower No. 3, 4015 Wilson Boulevard, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations and Variances, MSHA, phone (703) 235–1910.

SUPPLEMENTARY INFORMATION: On May 15, 1992, MSHA published a final rule revising its safety standards for ventilation of underground coal mines (57 FR 20868). These standards were to take effect on August 16, 1992. On August 6, 1992, MSHA delayed the effective date of the rule until November 16, 1992, to allow mine operators time to effectively plan and implement necessary changes (57 FR 34683). On November 13, 1992, as a result of discussions with the mining community, MSHA administratively stayed the effective date of §§ 75.313 and 75.344(a)(1) until July 1, 1993 (57 FR 53856). Section 75.313 was stayed to allow MSHA to further evaluate the effect of fan stoppages in certain mines. Section 75.344(a)(1) was stayed to evaluate whether requiring portable compressors to be located in a noncombustible structure or area could create a fire hazard due to overheating. MSHA also recodified the provisions these standards were to replace as §§ 75.314, 75.315 and 75.345. On June 7, 1993, MSHA extended the stay until July 1, 1994 (58 FR 31908). Consistent with the stay extension, the recodified provisions continue in effect until July 1, 1994 (58 FR 33996).

As a result of meetings with the mining public and further review of the ventilation rule, the Agency is initiating a rulemaking to address the issues which prompted the stay. The Agency, therefore, is proposing to extend the stay of §§ 75.313 and 75.344(a)(1) until completion of that rulemaking. Extending the stay until the completion of the rulemaking will avoid further administrative actions and focus the resources of both the public and Government on the substantive issues. Because it is likely that the stay would remain in effect for an extended period of time, the Agency is providing the mining community with an opportunity to comment on the stay extension. Comments in response to this proposal should be limited to the extension of the stay on §§ 75.313 and 75.344(a)(1). This notice does not affect the indefinite suspension of § 75.321(a) (57 FR 55457). That action was in response to an order of the United States Court of Appeals which stayed § 75.321(a) indefinitely, pending court review. *American Mining Congress* v. *Secretary of Labor*, No. 92–1288, and consolidated cases (D.C. Cir., filed July 8, 1992) (Order of November 16, 1992).

This document is issued under 30 U.S.C. 811.

Dated: December 22, 1993.

Richard L. Brechbiel,

Acting Assistant Secretary, Mine Safety and Health.

[FR Doc. 93–31826 Filed 12–29–93; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 156

[CGD 93–081]

Lightering Zones

AGENCY: Coast Guard, DOT.

ACTION: Petitions for rulemaking and request for comment; extension of comment period.

SUMMARY: In response to a request and in order to permit interested persons an adequate opportunity to prepare comments, the Coast Guard is extending the comment period on whether to designate lightering zones in the Gulf of Mexico.

DATES: Comments must be received on or before February 2, 1994.

ADDRESSES Comments may be mailed to the Executive Secretary, Marine Safety Council (G–LRA/3406) (CGD 93–081), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593–0001 or may be delivered to room 3406 at the above address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 267–1477.

The Executive Secretary maintains the public docket for this rulemaking. Comments will become part of the docket and will be available for inspection or copying at room 3406, U.S. Coast Guard Headquarters.

FOR FURTHER INFORMATION CONTACT Lieutenant Commander Walter (Bud) Hunt, Project Manager, Oil Pollution Act (OPA 90) Staff, (G–MS–1), (202) 267–6740. This number is equipped to record messages on a 24-hour basis.

SUPPLEMENTARY INFORMATION:

Drafting Information

The principal persons involved in drafting this Notice are Lieutenant Commander Walter (Bud) Hunt, Project Manager, and Ms. Pamela Pelcovits, Project Counsel, OPA 90 Staff, (G–MS–1).

Background and Discussion

On December 2, 1993, the Coast Guard published in the **Federal Register** a notice of petitions for rulemaking and request for comment regarding whether it should designate lightering zones in the Gulf of Mexico (58 FR 63544). The comment period closes on January 3, 1994. On December 16, 1993, the Coast Guard published a notice of public meeting and scoping meeting to explore further the issues relevant to designating lightering zones (58 FR 65683).

In response to a request and in order to permit interested persons an adequate opportunity to prepare comments, especially in light of the upcoming January 18, 1994 meeting, the Coast Guard is extending the comment period through February 2, 1994.

Dated: December 23, 1993.

A.E. Henn,

Rear Admiral, U.S. Coast Guard, Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 93–31988 Filed 12–29–93; 8:45 am]

BILLING CODE 4910–14–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 72 and 73

[FRL-4820-1]

Acid Rain Program; Permits and Allowance System Proposed Regulations; Change in Public Comment Period for the Proposed Revisions to the Rules

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rules; change in public comment period.

SUMMARY: On November 18, 1993 (58 FR 60649–60968), EPA published proposed regulations revising 40 CFR parts 72 and 73, the Permits and Allowance System rules of the Acid Rain Program. The original comment period was to have ended on January 3, 1994. In response to requests from interested parties, EPA is extending the public comment period until January 19, 1994.

DATES: Comments must be submitted in writing and in duplicate to EPA on or before January 19, 1994.

ADDRESSES: Send comments to EPA Air Docket Section (LE–131), Attention, Docket No. A–93–40, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Comments received on this proposal will be available for reviewing and copying from 8 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays, in room M–1500, Waterside Mall, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: The Acid Rain Hotline at (202) 233–9620 or Karen Kent at (202) 233–9119, Acid Rain Division (6204J), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Dated: December 22, 1993.

Brian McLean,

Director, Acid Rain Division.

[FR Doc. 93–31923 Filed 12–29–93; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 58, No. 249
Thursday, December 30, 1993

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[TMD-93-00-2]

Hearings for Organic Livestock and Livestock Products

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of public hearings

SUMMARY: In accordance with the Organic Foods Production Act of 1990 AMS announces four public hearings on the production and processing of livestock and livestock products to be sold or labeled as organically produced under the Act. The hearings will provide an opportunity for public dialogue on issues relating to the organic production and processing of livestock and livestock products to be labeled as organic.

DATES:

January 27–28, 1994
February 10, 1994
February 24, 1994
March 22, 1994

ADDRESSES: The first hearings will be held in the Jefferson Auditorium of the South Building, USDA, located at 12th and Independence Avenues, SW, Washington, DC, from 8:30 a.m. to 5 p.m. on Thursday, January 27, and Friday, January 28, 1994. Subsequent hearings will be held at the following locations:

February 10, 1994, Hyatt Regency O'Hare, 9300 West Bryn Mawr Avenue, Rosemont, Illinois 60018, 708–696–1234

February 24, 1994, Hampton Inn, 4685 Quebec Street, Denver, Colorado 80216, 303–388–8100

March 22, 1994, Holiday Inn, 5321 Date Avenue, Sacramento, California 95841, 916–338–5800

All subsequent hearings will be conducted during the hours of 8:30 a.m. to 5 p.m. in the respective locations.

FOR FURTHER INFORMATION CONTACT: Dr. Harold S. Ricker, Staff Director, National Organic Program, room 4006 South Building, USDA, AMS, Transportation and Marketing Division (TMD), P.O. Box 96456, Washington, DC, 20090–6456. Telephone (202) 720–2704.

SUPPLEMENTARY INFORMATION: The purpose of these hearings is to provide additional information to USDA as it develops regulations to guide the implementation of standards for the production and processing of livestock and livestock products that will be sold or labeled as organically produced under the Act.

Background

The Organic Foods Production Act of 1990 as amended (7 U.S.C. 6501–6522) requires the Secretary of Agriculture to develop regulations to guide the implementation of standards for the production and processing of livestock products to be sold or labeled as organically produced. The Secretary also is authorized to hold public hearings on developing additional livestock standards. The Secretary will now hold public hearings to assist in developing the regulations to guide the implementation of standards for livestock and livestock products.

For livestock products to be considered for sale or labeling as organically produced, the animals from which they are derived must be produced according to organic production standards for livestock. Section 6510 provides additional guidance for handlers and processors.

Under the Act, the National Organic Standards Board (NOSB) has been established to advise the Secretary on any aspect of implementing the Act's program. The NOSB has been working to develop recommendations and has identified certain issues needing additional input for the development of recommendations for implementation of livestock standards within the Act's program.

Some of the issues for which USDA seeks public comment are:

1. Section 6506 (b) of the Act (7 U.S.C. 6506(b)) indicates that an organic certification program established under this Act may provide for the certification of an entire farm or handling operation or specific fields of a farm or parts of a handling operation if, among other things, appropriate physical facilities, machinery, and management practices are established to prevent the possibility of a mixing of organic and nonorganic products or a penetration of prohibited chemicals or other substances on the certified area. Public comment is requested on how this should this be applied to organic livestock production, and the processing and handling of livestock products that are to be sold or labeled as organically produced under the Act.

2. Section 6509(d)(1) of the Act (7 U.S.C. 6509(d)(1)) requires that for a farm to be certified under the Act as an organic farm with respect to livestock production on the farm, producers on an organic farm shall not:

(A) Use subtherapeutic doses of antibiotics;

(B) Use synthetic internal parasiticides on a routine basis; or

(C) Administer medication, other than vaccinations, in the absence of illness. The Act also says that the NOSB shall recommend to the Secretary standards in addition to those in paragraph (d)(1) for the care of livestock to ensure that such livestock is organically produced (7 U.S.C. 6509(d)(2)). USDA seeks public comment on what criteria need to be established to ensure that subtherapeutic doses of antibiotics and routine applications of synthetic internal parasiticides are not applied to livestock that are to be labeled as organically produced under the Act. Public comment is also sought on what constitutes routine use.

3. The Act addresses the acquisition of breeder stock in section 6509(b) (7 U.S.C. 6509(b)), but is silent on the purchase of slaughter stock which could be intended for sale as organic livestock meat products. How should the USDA address this issue?

4. Section 6509(c) (7 U.S.C. 6509(c)) indicates that the livestock organic feeding management system is to utilize certified organically grown feed. USDA seeks public comment on what reasonable exceptions for feed may be made under the Act and its provisions, including the provision that allows reasonable exemptions from the Act's requirements, except those in section 6511 (7 U.S.C. 6511) for Federal and State emergency pest or disease treatment programs that may effect livestock.

5. What management and audit trail records should necessarily be available

to ensure that the integrity of the retail organic livestock product package is properly established at the farm and maintained through the slaughter/processing process?

6. Other issues relating to the implementation of the standards under the Act for the production and processing of organic livestock and livestock products that require specific attention during the development of the standards for the production and processing of livestock and livestock products that will be sold or labeled as organically produced under the Act.

Purpose and Conduct of the Hearings

USDA is requesting that representatives of the public offer comments and suggestions to guide the implementation of standards for the production and processing of organic livestock and livestock products. Interested individuals are encouraged to address areas of concern, including issues that may not be covered in the above background section.

Persons who plan to offer oral testimony at any hearing should notify USDA of their preferred hearing date and the subject(s) to be addressed as soon as possible, but no later than seven (7) days preceding the specific hearing date to be scheduled. Oral testimony should not exceed five (5) minutes. Persons who are not able to notify USDA in advance of their intent to testify at a hearing may register at the hearing location and will be accommodated as time permits.

The hearings will be conducted by an administrative law judge, and testimony will be taken by a stenographic reporter. An examiner panel consisting of one representative each from AMS, the Food Safety Inspection Service, the Animal Plant Health Inspection Service, and the NOSB may be present to ask clarification questions of those providing testimony. Approximately ten (10) additional minutes may be allocated for clarification questions and responses, if needed.

Persons providing evidence at the hearing should make the written testimony available at the hearing. Those persons who are unable to attend the hearing, and those persons who are unable to provide written testimony at the hearing, may submit testimony any time up to fifteen (15) days following the hearings.

Notification and comments should be submitted to Dr. Harold S. Ricker, Staff Director, National Organic Program, room 4006 South Building, USDA, AMS, TMD, P.O. Box 96456, Washington, DC, 20090–6456. Telephone (202) 720–2704.

Authority: 7 U.S.C. 6501–6522.

Dated: December 27, 1993.

Lon Hatamiya,

Administrator.

[FR Doc. 93–31911 Filed 12–29–93; 8:45 am]

BILLING CODE 3410–02–P

Federal Grain Inspection Service

Designation of the Kankakee (IL) Agency, and the States of California and Washington

AGENCY: Federal Grain Inspection Service (FGIS), USDA.

ACTION: Notice.

SUMMARY: FGIS announces the designation of Kankakee Grain Inspection, Inc. (Kankakee), California Department of Food and Agriculture (California), and Washington Department of Agriculture (Washington) to provide official inspection services under the United States Grain Standards Act, as amended (Act).

EFFECTIVE DATE: February 1, 1994.

ADDRESSES: Neil E. Porter, Director, Compliance Division, FGIS, USDA, room 1647 South Building, P.O. Box 96454, Washington, DC 20090–6454.

FOR FURTHER INFORMATION CONTACT: Neil E. Porter, telephone 202–720–8262.

SUPPLEMENTARY INFORMATION: This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12866 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

In the July 30, 1993, **Federal Register** (58 FR 40787), FGIS announced that the designations of Kankakee, California, and Washington end on January 31, 1994, and asked persons interested in providing official services within the specified geographic areas to submit an application for designation. Applications were due by September 1, 1993. Kankakee, California, and Washington, the only applicants, each applied for designation in the entire area currently assigned to them.

FGIS requested comments on the applicants in the September 30, 1993, **Federal Register** (58 FR 51046). Comments were due by October 29, 1993. FGIS received no comments by the deadline. FGIS evaluated all available information regarding the designation criteria in section 7(f)(1)(A) of the Act; and according to section 7(f)(1)(B), determined that Kankakee, California, and Washington are able to provide official services in the geographic areas for which they applied.

Effective February 1, 1994, and ending January 31, 1997, Kankakee, California, and Washington are designated to provide official inspection services in the geographic areas specified in the July 30, 1993, **Federal Register**.

Interested persons may obtain official services by contacting Kankakee at 815–932–2851, California at 916–654–0743, and Washington at 206–753–5066.

Authority: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: December 16, 1993.

Neil E. Porter,

Director, Compliance Division.

[FR Doc. 93–31357 Filed 12–29–93; 8:45 am]

BILLING CODE 3410–EN–F

Request for Applications from Persons Interested in Designation to Provide Official Services in the Geographic Areas Presently Assigned to the Sioux City (IA) and Tischer (IA) Agencies

AGENCY: Federal Grain Inspection Service (FGIS), USDA.

ACTION: Notice.

SUMMARY: The United States Grain Standards Act, as amended (Act), provides that official agency designations shall end not later than triennially and may be renewed. The designations of Sioux City Inspection & Weighing Service Company (Sioux City), and A. V. Tischer and Son, Inc. (Tischer), will end June 30, 1994, according to the Act, and FGIS is asking persons interested in providing official services in the specified geographic areas to submit an application for designation.

DATES: Applications must be postmarked or sent by telecopier (FAX) on or before January 31, 1994.

ADDRESSES: Applications must be submitted to Neil E. Porter, Director, Compliance Division, FGIS, USDA, room 1647 South Building, P.O. Box 96454, Washington, DC 20090–6454. Telecopier (FAX) users may send applications to the automatic telecopier machine at 202–720–1015, attention: Neil E. Porter. If an application is submitted by telecopier, FGIS reserves the right to request an original application. All applications will be made available for public inspection at this address located at 1400 Independence Avenue, SW., during regular business hours.

FOR FURTHER INFORMATION CONTACT: Neil E. Porter, telephone 202–720–8262.

SUPPLEMENTARY INFORMATION: This action has been reviewed and determined not to be a rule or regulation

as defined in Executive Order 12866 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

Section 7(f)(1) of the Act authorizes FGIS' Administrator to designate a qualified applicant to provide official services in a specified area after determining that the applicant is better able than any other applicant to provide such official services.

FGIS designated Sioux City, main office located in Sioux City, Iowa, to provide official inspection services, and Tischer, main office located in Fort Dodge, Iowa, to provide official inspection and Class X or Y weighing services under the Act on July 1, 1991.

Section 7(g)(1) of the Act provides that designations of official agencies shall end not later than triennially and may be renewed according to the criteria and procedures prescribed in section 7(f) of the Act. The designations of Sioux City and Tischer end on June 30, 1994. The geographic area presently assigned to Sioux City, in the States of Iowa, Nebraska, and South Dakota, pursuant to section 7(f)(2) of the Act, which will be assigned to the applicant selected for designation is as follows:

In Iowa:

Bounded on the North by the northern Iowa State line from the Big Sioux River east to U.S. Route 59;

Bounded on the East by U.S. Route 59 south to B24; B24 east to the eastern O'Brien County line; the O'Brien County line south; the northern Buena Vista County line east to U.S. Route 71; U.S. Route 71 south to the southern Sac County line;

Bounded on the South by the Sac and Ida County lines; the eastern Monona County line south to State Route 37; State Route 37 west to State Route 175; State Route 175 west to the Missouri River; and

Bounded on the West by the Missouri River north to the Big Sioux River; the Big Sioux River north to the northern Iowa State line.

Cedar, Dakota, Dixon, Pierce (north of U.S. Route 20 and west of U.S. Route 81), and Thurston Counties, Nebraska.

In South Dakota:

Bounded on the North by State Route 44 (U.S. 18) east to State Route 11; State Route 11 south to A54B; A54B east to the Big Sioux River;

Bounded on the East by the Big Sioux River; and

Bounded on the South and West by the Missouri River.

The geographic area presently assigned to Tischer, in the State of Iowa, pursuant to section 7(f)(2) of the Act, which will be assigned to the applicant selected for designation is as follows:

Bounded on the North by Iowa-Minnesota State line from U.S. Route 71 east to U.S. Route 169;

Bounded on the East by U.S. Route 169 south to State Route 9; State Route 9 west to U.S. Route 169; U.S. Route 169 south to the northern Humboldt County line; the Humboldt County line east to State Route 17; State Route 17 south to C54; C54 east to U.S. Route 69; U.S. Route 69 south to the northern Hamilton County line; the Hamilton County line west to R38; R38 south to U.S. Route 20; U.S. Route 20 west to the eastern and southern Webster County lines to U.S. Route 169; U.S. Route 169 south to E18; E18 west to the eastern Greene County line; the Greene County line south to U.S. Route 30;

Bounded on the South by U.S. Route 30 west to E53; E53 west to N44; N44 north to U.S. Route 30; U.S. Route 30 west to U.S. Route 71; and

Bounded on the West by U.S. Route 71 north to the Iowa-Minnesota State line.

The following locations, outside of the above contiguous geographic area, are part of this geographic area assignment: Farmers Co-op Elevator, Boxholm, Boone County (located inside Central Iowa Grain Inspection Service, Inc.'s, area); and Cargill, Inc., Algona, Kossuth County; Big Six Elevator, Burt, Kossuth County; Gold-Eagle, Goldfield, Wright County; and Farmers Co-op Elevator, Holmes, Wright County (located inside D. R. Schaal Agency's area).

Interested persons, including Sioux City and Tischer are hereby given the opportunity to apply for designation to provide official services in the geographic areas specified above under the provisions of section 7(f) of the Act and § 800.196(d) of the regulations issued thereunder. Designation in the specified geographic areas is for the period beginning July 1, 1994, and ending June 30, 1997. Persons wishing to apply for designation should contact the Compliance Division at the address listed above for forms and information.

Applications and other available information will be considered in determining which applicant will be designated.

Authority: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: December 16, 1993.

Neil E. Porter,

Director, Compliance Division.

[FR Doc. 93–31365 Filed 12–29–93; 8:45 am]

BILLING CODE 3410–EN–F

Request for Comments on the Applicants for Designation in the Geographic Areas Currently Assigned to the Lincoln (NB) and Omaha (NB) Agencies

AGENCY: Federal Grain Inspection Service (FGIS).

ACTION: Notice.

SUMMARY: FGIS requests interested persons to submit comments on the applicants for designation to provide official services in the geographic areas currently assigned to Lincoln Inspection Service, Inc. (Lincoln), and Omaha Grain Inspection Service, Inc. (Omaha).

DATES: Comments must be postmarked, or sent by telecopier (FAX) or electronic mail by January 31, 1994.

ADDRESSES: Comments must be submitted in writing to Neil E. Porter, Director, Compliance Division, FGIS, USDA, Room 1647 South Building, P.O. Box 96454, Washington, DC 20090–6454. SprintMail users may respond to [A:ATTMAIL,O:USDA,ID:A36CPDIR]. ATTMAIL and FTS2000MAIL users may respond to !A36CPDIR. Telecopier (FAX) users may send comments to the automatic telecopier machine at 202–720–1015, attention: Neil E. Porter. All comments received will be made available for public inspection at the above address located at 1400 Independence Avenue, S.W., during regular business hours.

FOR FURTHER INFORMATION CONTACT: Neil E. Porter, telephone 202–720–8262.

SUPPLEMENTARY INFORMATION:

This action has been reviewed and determined not to be a rule or regulation as defined in Executive Order 12866 and Departmental Regulation 1512–1; therefore, the Executive Order and Departmental Regulation do not apply to this action.

In the October 29, 1993, **Federal Register** (58 FR 58149), FGIS asked persons interested in providing official services in the geographic areas assigned to Lincoln and Omaha to submit an application for designation. Applications were due by December 1, 1993. Lincoln and Omaha, the only applicants, each applied for designation in the entire area currently assigned to them. FGIS is publishing this notice to provide interested persons the opportunity to present comments concerning the applicants for designation in the Lincoln and Omaha areas. Commenters are encouraged to submit reasons and pertinent data for support or objection to the designation of these applicants. All comments must be submitted to the Compliance Division at the above address.

Comments and other available information will be considered in making a final decision. FGIS will publish notice of the final decision in the Federal Register, and FGIS will send the applicants written notification of the decision.

Authority: Pub. L. 94–582, 90 Stat. 2867, as amended (7 U.S.C. 71 *et seq.*)

Dated: December 16, 1993.

Neil E. Porter,

Director, Compliance Division.

[FR Doc. 93–31364 Filed 12–29–93; 8:45 am]

BILLING CODE 3410–EN–F

Forest Service

Proposed Cottonwood Springs Timber Sale Within the Sheep Gulch Roadless Area, Payette National Forest, Washington County, ID

AGENCY: Forest Service, USDA.

ACTION: Notice of Intent to prepare an environmental impact statement.

SUMMARY: The Forest Service will prepare an environmental impact statement for the proposed Cottonwood Springs Timber Sale, Weiser Ranger District, Payette National Forest, Idaho. The proposed sale would construct roads and harvest timber within a portion of the Sheep Gulch Roadless Area that the Payette National Forest Land and Resource Management Plan (1988) allocated to multiple use management.

The agency gives notice of the environmental analysis and decision-making process that is beginning on the proposal so that interested and affected people know how they may participate and contribute to the final decision. The agency invites comments and suggestions on the scope of the analysis, including issues to be addressed during the analysis.

A scoping document explaining the proposed action and analysis process is available from the contacts identified below.

DATES: Comments on the scope of the analysis would be most useful if received by February 14, 1994.

ADDRESSES: Send written comments to John W. Baglien, District Ranger, Weiser Ranger District, Payette National Forest, 275 E. 7th Street, Weiser, ID 83672.

FOR FURTHER INFORMATION CONTACT: John Baglien, District Ranger, or Mike Stayton, EIS Team Leader, phone 208–253–4215.

SUPPLEMENTARY INFORMATION: The USDA Forest Service is proposing to construct 1.8 miles of roads and harvest about 3.0 million board feet of timber from 305 acres of suitable timber lands within the Cottonwood Springs timber sale area. A mix of silvicultural treatments is proposed, including 78 acres of commercial thinning, 23 acres of overstory removal, 19 acres of reserve tree (about 5 trees per acre), 62 acres of shelterwood (about 35 percent crown canopy closure), 96 acres of irregular shelterwood (50–60 percent crown canopy closure). This mix of silvicultural prescriptions seeks to retain suitable habitat for sensitive species within all treatment units where it currently exists, improve forest health (resilience and resistance to insect and disease), and increase dominance of seral ponderosa pine and Douglas-fir.

Helicopter logging is proposed for 162 acres (54 percent of the treatment acreage and 42 percent of the volume). Skyline logging is proposed for 73 acres (24 percent of the acreage and 40 percent of the volume). Tractor logging is proposed on 70 acres (21 percent of the acreage and 18 percent of the volume). The proposed mix of logging systems seeks to maintain the recreation setting and protect leave stands in a cost efficient and cost effective manner.

This sale lies within the Sheep Gulch Roadless Area, Washington County, ID. Several small tributaries of the West Fork of Brownlee Creek (Sheep Gulch, Neil Gulch, Sheep Camp Gulch, Box Gulch and Stickney Gulch), and a portion of Cottonwood Creek are within the proposed sale area. Brownlee Creek and Cottonwood Creek flow into Brownlee Reservoir.

The proposal follows direction in the Payette National Forest Land and Resource Management Plan (Forest Plan). This proposal has evolved from one of the unidentified "small sales" of the Forest Plan. The decision to be made is whether the sale area should be entered at this time for timber harvest and associated activities, and if so, the specific conditions of entry.

The proposal is detailed as Alternative 5 in an environmental assessment (EA) available from the contacts listed above. The results of the EA indicated that an environmental impact statement was needed to address the roadless area issue. Issues identified and addressed within the EA include: (1) The effects of proposed road construction and timber harvest in wildlife (particularly deer and bear, management indicator species—elk, vesper sparrow, Williamson's sapsucker and pileated woodpecker, and sensitive species—flammulated owl, northern goshawk, great gray owl and white-headed woodpecker; and (2) the effects of the proposed road construction and timber harvest on recreation opportunities (particularly the potential loss of the remote "semi-primitive" experience the area currently offers). An additional issue, which precipitated the need for an environmental impact statement, is the effect of the proposal on the Sheep Gulch Roadless Area.

Alternatives considered to date include no action, the proposed action described above, an alternative that emphasizes Forest Plan timber objectives, and alternatives that would build 10.6 miles of roads to allow implementation of the silvicultural prescriptions using only conventional logging systems.

A draft environmental impact statement that will consider the proposed action and a reasonable range of alternatives will be prepared. The draft environmental impact statement is expected to be filed with the Environmental Protection Agency and to be available for public review by April 1994. The comment period on the draft environmental impact statement will be 45 days from the date the Environmental Protection Agency's notice of availability appears in the Federal Register.

The Forest Service believes, at this early stage, it is important to give reviewers early notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of that proposal so that it is meaningful and alerts an agency to the reviewers position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC, 435 U.S. 519, 553 (1978).*

Also, environmental objections that could have been raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon* v. *Hodel*, 803 F.2d 1016, 1022 (9th Circut, 1986) and *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980).

Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when the agency can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific

as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

The final environmental impact statement is scheduled to be completed by July 1994.

The Responsible Official is David F. Alexander, Forest Supervisor, Payette National Forest, McCall, ID 83638.

Dated: December 20, 1993.

David F. Alexander,

Forest Supervisor.

[FR Doc. 93-31962 Filed 12-29-93; 8:45 am]

BILLING CODE 3410-01-M

Title to Forest Lieu Selection Lands

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: This notice sets forth an initial list of base lands, located within national forests, for which the Forest Service has determined that the "forest lieu selection" provisions of the Act of June 4, 1897 (Organic Administration Act), have not been realized. This action is the first step in a five-step procedure set forth by the Act of July 2, 1993, to resolve these situations.

DATES: Requests to have parcels of land added to the initial list pursuant to this notice must be received in writing by July 2, 1994.

ADDRESSES: Submit requests to add omitted base lands in writing to the Director, Lands Staff, USDA Forest Service, P.O. 96090, Washington, DC 20090-6090.

The public and affected parties may inspect requests for additions to the initial list in the Office of the Director, Lands, 4th Floor South, Auditor's Building, 205 14th Street SW., Washington, DC. Those wishing to inspect requests should call ahead [(202) 205-1275] to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Questions about this notice should be addressed to Paul Haarala, Lands Staff, (202) 205-1255.

SUPPLEMENTARY INFORMATION:

Background

Certain provisions of the Act of June 4, 1897 (16 U.S.C. 473-475; the Organic Administration Act), which provided for the management of the forest reserves of the United States, also included a provision known as "forest lieu selection." Under that provision, persons who had patented public land, or a claimant to such land, which fell within a proclaimed forest reserve boundary in the western United States were authorized to convey or relinquish their land or claim to such land ("base land") to the United States and to select an equal acreage of vacant public land open to settlement ("in-lieu land"). The forest reserves were renamed as national forests in 1905.

In 1905, Congress repealed the forest lieu selection authorization, but protected previously made contracts and claims. This protection preserved the rights of those persons who had relinquished their inholdings by providing a deed to the United States, but who had not yet realized or exercised their selection rights under the forest lieu selection provision of the Organic Administration Act. In legislation enacted in 1922 and 1930, Congress provided further opportunity to resolve remaining claims by authorizing reconveyance of the base lands back to the former owners or their heirs or assigns. Consequently, most of the claims for in-lieu land were resolved.

However, Congress because concerned about allegations of abuse of the provisions of the 1930 Act, which by the 1950's was leading to reconveyance of valuable national forest and national park lands. In 1960, legislation was enacted that repealed the 1930 Act and sought to close all unresolved claims under the 1897 Act. The legislation provided for compensating persons who had not received appropriate relief under the prior acts. Section 4 of the 1960 Act provided that any base lands for which payment was made, or any base lands for which payment might have been made, but for which no demand was made, would become a part of appropriate national forest, national park, or other Federal area. However, no payments were made under the 1960 Act, continuing the unresolved title status of some of the base lands.

Thus, most of these base lands with questionable title have continued to be considered part of the national forests, although some have been continuously occupied by private parties since before 1960. Others have been the subject of court decisions, raising further questions about the United States' claim of title.

In the mid-1980's, the Forest Service, pursuant to a request from Congress, compiled a list of grantors and base lands relinquished to the United States under the 1897 Act provision for which selection or other rights were not realized or exercised. This list was submitted to the 98th Congress and was used by it and subsequent Congresses in deliberations on legislation eventually enacted as the Act of July 2, 1993.

The 1993 Act was enacted to provide the final resolution of the status of title question of the remaining base lands. The Act sets forth a 5-step procedure by which the United States will finally resolve the title question by either retaining or by quitclaiming all right, title, and interest in and to the base lands.

Step 1 requires the Secretaries of Agriculture and of the Interior, acting through the Forest Service and the Bureau of Land Management, to compile and publish an initial list of base lands in the **Federal Register**. This initial list will be prepared by the agencies from information in their actual possession. The agencies are not required to make a search of local records when preparing initial lists.

Step 2 will allow persons who assert a particular parcel should be included in the initial list to request the addition. The agencies will revise the initial list by acting on the suggestions received from interested parties. Parcels will be added to the initial list if the agencies determine that selection or other rights under the 1897 Act or supplemental legislation were not realized or exercised.

Step 3 requires the compilation and publication in the **Federal Register** of a list of nationally significant lands. This list will include base lands on the initial list that are determined by the agencies to be of "national significance." Identification of nationally significant lands on this list will cause their removal from the completed initial list. Nationally significant lands are defined by the Act of July 2, 1993, as base lands within conservation units established by law, including units of the National Park System, National Wildlife Refuge System, National Wilderness Preservation, National Wild and Scenic Rivers System, or National Trails Systems; lands within any national recreation area, national forest monument, or national conservation area; lands within any area being studied for possible designation as any such unit or area; or lands within any area designated by Congress for specific management. Lands of national significance also include lands which the Secretaries of Agriculture and of the Interior determine, under their own discretion, should be retained in public

ownership to meet public, resource protection, or administrative needs.

Step 4 requires the preparation and publication in the **Federal Register** of a final list showing those base lands which would be quitclaimed to the listed grantors.

Step 5 requires the agencies to issue documents of disclaimer of interest, confirming the quitclaiming of the U.S. interests. These instruments would be recorded in appropriate county records in the name of the grantors, their heirs, devisees, successors, or assigns, and noted in the agencies own land title records.

Procedure

The procedure the Forest Service will observe in carrying out the provisions of the Act of July 2, 1993, follows:

1. Compile, Publish, and Distribute an Initial List of All Affected Base Lands

This list will be compiled from the agency's own records. Persons claiming an interest in the base lands will have 180 days from the date of publication to suggest base lands to add to the initial list. In addition to publication in the **Federal Register**, Forest Service field offices will send the initial list to all persons or entities, such as the Forest Lieu Selection Committee and title companies, that have indicated a title interest in the base lands, to appropriate Bureau of Land Management State offices, and to appropriate State and county offices.

2. Consider Suggested Additions and Revise the Initial List

The agency will add parcels suggested by interested parties which it determines meet the conditions set forth in the Act—those for which selection or other rights under the 1897 Act, as amended and supplemented, were not realized or exercised. Parcels that do not meet those conditions, or which for other reasons are no longer affected by those conditions, will not be included or will be removed from the initial list.

3. Identify, Compile, Publish, and Distribute a List of Nationally Significant Lands and Other Lands To Be Deleted From the Initial List

Following preparation of the initial list, the agency will identify nationally significant lands which the agency determines should be retained as a part of the National Forest System. This list will be published in the **Federal Register** before or concurrently with the final list of lands described under step 4 below. The list will be distributed to those parties submitting information on the initial list and to those who receive the initial list. Upon publication, all right, title, and interest in these nationally significant lands, subject to valid existing rights, will be vested and confirmed in the United States. The list will be recorded in appropriate county, Forest Service, and BLM records.

Anyone claiming that the identification of nationally significant lands under the Act was a "taking" of property will be allowed a one-year opportunity to file a petition in the United States Claims Court for monetary compensation. Identification of national significant lands does not of itself entitle any party to compensation. The burden is on the claimant to prove a compensable claim.

4. Compile, Publish, and Distribute a Final List of Lands To Be Relinquished by the United States

This list will be published within 24 months after publication of the initial list and will be the result of revisions made to the initial list by additions under step 2 and by deletions of nationally significant lands under step 3.

5. Issue Instruments of Disclaimer of Interest Confirming the Statutory Quitclaim of Lands Included in the Final List

Within 6 months of publication of the final list in the **Federal Register**, the agency will issue documents of disclaimer confirming the quitclaiming of all right, title, and interest in and to these base lands, subject to valid existing rights, to the listed grantors, their heirs, devises, successors, and assigns. The document of disclaimer of interest, confirming the statutory quitclaim of the lands included on the final list, will be recorded in appropriate county, Forest Service, and BLM records.

The acceptance of benefits under Act of July 2, 1993, or the failure to seek the benefits provided under this Act within the time allotted with respect to any base or other lands will be considered a waiver of any claims against the United States with respect to those lands or to any revenues therefrom.

Initial List

Table 1, shown at the end of this notice, presents the initial list of base lands. It has been prepared based on information in the actual possession of the Forest Service as of July 2, 1993, including information submitted to Congress pursuant to the directive contained in Senate Report No 98–578, issued for the Fiscal Year 1985 Interior and Related Agencies Appropriation Act.

The table presents the information grouped by State, by meridian, and by county. The first column identifies the parcel of base land by an agency identifier. The second column lists the names of the individual or entity that relinquished base lands to the United States under the 1897 Act. Columns 4 and 5 list the volume and page of the deed recordation book of the county within which the parcel is located. Columns 6 through 9 show the legal description of the base lands by Township (T), Range (R), section (sec.), and the legal subdivisions of the section. The standard procedure for identifying legal subdivisions has been modified for brevity. For example, the south one-half of the north one-half of a section is SN, the south one-half of the northeast one-quarter of the southwest one-quarter of a section is SNESW, the east one-half of the southeast one-quarter is ESE, and so forth. Column 10 shows the acres associated with the legal description of the base land parcel.

Persons asserting an interest in any base lands that may have been omitted from the initial list are invited to suggest the addition of omitted parcels to the list in order to be considered for relief pursuant to Act of July 2, 1993. Suggestions for additions to the initial list must be received in writing by the agency at the address shown above by July 2, 1994. The request must include the name of the person or entity granting the lands to the United States, the State and county in which the deed is recorded, the volume and page of the deed recordation book, and the legal description of the lands.

The agency will add to the following initial list any such parcels that the agency determines meets the necessary conditions of the Act and remove any parcels that do not meet those conditions or which, for other reasons, are no longer affected by those conditions:

Dated: December 22, 1993.

David G. Unger,

Associate Chief.

BILLING CODE 3410-11-M

TABLE 1
INITIAL LIST - FOREST LIEU SELECTION RESOLUTION

PARCEL ID NO.	GRANTOR NAME	DEED BOOK VOL.	DEED BOOK PAGE	LEGAL DESCRIPTION	ACRES
STATE: Arizona	MERIDIAN: Gila and Salt River				
			Apache County		
12	Hartley, Roland	11	252	T.6 N., R.29 E., sec. 1, Lots 1, 2	39
				29, SWSW	40
13	Clark, W.H.	12	76	T.7 N., R.30 E., sec. 29, SWSW	40
				32, NWNW	40
14	Hale, Howard	12	88	T.7 N., R.27 E., sec. 2, ESE	80
			Coconino County		
16	Santa Fe RR	24	000	T.20 N., R.1 E., sec. 13, NWNE	40
17	Santa Fe RR	35	170	T.20 N., R.4 E., sec. 21, Lot 9 (NESE)	40
19	Boyce, C.E.	00	000	T.20 N., R.4 E., sec. 4, SWNE	40
20	Santa Fe RR	40	455	T.20 N., R.5 E., sec. 25, SESW	40
21	Santa Fe RR	40	496	T.20 N., R.5 E., sec. 31, Lot 2 (SWSW) Lot 4 (SWNW)	74
22	Santa Fe RR	35	8	T.20 N., R.6 E., sec. 21, SSE	80
23	Santa Fe RR	40	1	T.20 N., R.7 E., sec. 1, SESE	40
24	Toombs, Oscar	9	445	T.20 N., R.7 E., sec. 26, NENE	40
25	Toombs, Oscar	10	77	T.20 N., R.7 E., sec. 26, NWNE	40
26	Toombs, Oscar	9	466	T.20 N., R.7 E., sec. 34, SENE	40
28	Keys, C.D.	7	611	T.21 N., R.3 E., sec. 6, Lot 5	39
33	Santa Fe RR	34	599	T.21 N., R.6 E., sec. 7, NENE	40
35	Perrin, E.B.	21	339	T.23 N., R.4 E., sec. 7, NWNE	40
36	Santa Fe RR	29	280	T.23 N., R.8 E., sec. 25, NENE	40
37	Santa Fe RR	29	356	T.25 N., R.4 E., sec. 27, NWNW	40
38	Baker, Wm. F.	13	231	T.27 N., R.4 E., sec. 3, SWSE	40
40	Santa Fe RR	39	97	T.29 N., R.2 E., sec. 29, NWNE	40
41	Santa Fe RR	34	366	T.16 N., R.8 E., sec. 11, SE	160
42	Santa Fe RR	34	195	T.18 N., R.6 E., sec 31, Lot 6	36
43	Santa Fe RR	40	56	T.19 N., R.6 E., sec. 7, SWSE	40
44	Santa Fe RR	35	82	T.19 N., R.7 E., sec. 25, SSE	80
48	Pratt, James S.	40	455	T.16 N., R.8 E., sec. 12, NSW	80
50	Santa Fe RR	35	450	T.20 N., R.5 E., sec. 3, SESW	40
51	Santa Fe RR	40	285	T.20 N., R.5 E., sec. 7, NE	160
52	Santa Fe RR	34	384	T.20 N., R.5 E., sec. 13, NENW	40
			Navajo County		
15	Ling, Reams	2	630	T.10 N., R.21 E., sec. 6, Lot 2	40
49	Aztec Land & Cattle	1	132	T.11 N., R.18 E., sec. 35, SWSW	40
			Yavapai County		
45	Sullivan, J.W.	50	206	T.14 N., R.3 W., sec. 15, SESE (Tr. 38)	40
46	Santa Fe RR	68	149	T.15 N., R.6 E., sec. 3, Lot 2	32
47	Santa Fe RR	15	567	T.18 N., R.4 E., sec. 27, SE	160
STATE: California	MERIDIAN: Mt. Diablo				
			El Dorado County		
1	Hyde, F.A.	56	25	T.13 N., R.16 E., sec. 36, SWNW (Tr.37)	38
2	Hyde, F.A.	56	49	T.13 N., R.16 E., sec. 36, NENE (Tr.38) NWNE	59
			Fresno County		
8	Collins, Jeremiah	229	237	T.8 S., R.25 E., sec. 14, SENW NENE	80
9	Ockenden, Wm.	258	126	T.10 S., R.25 E., sec. 10, NSE SESE	120
10	Ockenden, Wm.	258	126	T.10 S., R.25 E., sec. 11, SWSW	40
11	Clarke, C.W.	232	165	T.10 S., R.27 E., sec. 36, SWNW	40
12	Collins, Jeremiah	229	237	T.8 S., R.25 E., sec. 15, SENWSW ENENWSW	15
13	Collins, Jeremiah	229	237	T.8 S., R.25 E., sec. 15, SSSENE	10
14	Clarke, C.W.	232	165	T.10 S., R.27 E., sec. 36, NWNW	40
15	Cowden, Thomas J.	228	448	T.9 S., R.29 E., sec. 16, SENW	40
			Kern County		
23	Hyde, F.A.	86	43	T.25 S., R.35 E., sec. 16, NENW	40
24	Dimond, E.	78	59	T.28 S., R.34 E., sec. 16, NENE (Tr. 37)	40
25	Dimond, E.	78	59	T.28 S., R.34 E., sec. 16, ENW (Tr. 38)	80
26	Dimond, E.	78	59	T.28 S., R.34 E., sec. 16, SE (Tr. 39)	160
28	Hyde, F.A.	62	473	T.9 N., R.23 W., sec. 16, NE (Tr.50)	160
29	Hyde, F.A.	62	479	T.9 N., R.23 W., sec. 16, NENW (Tr. 51)	40

TABLE 1 (Continued)
INITIAL LIST - FOREST LIEU SELECTION RESOLUTION

PARCEL ID NO.	GRANTOR NAME	DEED BOOK VOL.	PAGE	LEGAL DESCRIPTION	ACRES
STATE: California	MERIDIAN: Mt. Diablo				
	Los Angeles County				
62	Eddy, John A.	1295	291	T.1 N., R.8 W., sec. 18, SENW	40
63	Cook, E.J.	1458	220	T.1 N., R.9 W., sec. 15, NWSE SSE	120
64	Campbell, John	1519	174	T.3 N., R.8 W., sec. 1, SESW SWSE	80
65	Campbell, John	1507	188	T.3 N., R.8 W., sec. 12, NWNE	40
66	Christey, William	1352	250	T.5 N., R.15 W., sec. 30, Lot 2, NENW	80
67	Eddy, John A.	1304	299	T.5 N., R.16 W., sec. 16, NSE	80
93	Elliott, Thomas	00	000	T.5 N., R.15 W., sec. 30, Lot 3, SWNW	80
	Madera County				
4	Hyde, F.A.	23	63	T.5 S., R.24 E., sec. 16, SESW	40
5	Willingham, C.B.	18	136	T.6 S., R.24 E., sec. 5, NWSE	40
6	Hamilton, H.M.	23	207	T.7 S., R.22 E., sec. 36, SWSE	40
7	Collins, Peter M.	40	268	T.8 S., R.23 E., sec. 18, E/Lot 4	6
	Mono County				
17	Clarke, C.W.	N	156	T.3 N., R.24 E., sec. 16, SE	160
18	Hyde, F.A.	N	348	T.5 N., R.23 E., sec. 36, NS	160
	Tuolumne County				
3	Keil, Hugo D.	42	521	T.6 N., R.18 E., sec. 16, SENW	40
	Tulare County				
16	Collins, Peter M.	94	403	T.17 S., R.34 E., sec. 36, NSE	80
18	Clarke, C.W.	92	423	T.20 S., R.33 E., sec. 16, SWNW	40
19	Hilton, Frank P.	94	472	T.20 S., R.33 E., sec. 8, WSW EESW	120
20	Hyde, F.A.	102	335	T.22 S., R.33 E., sec. 36, NENE	40
21	Hyde, F.A.	85	216	T.23 S., R.33 E., sec. 36, SWSE	40
STATE: California	MERIDIAN: San Bernardino				
	Riverside County				
87	Swezy, Chas E.	135	126	T.4 S., R.2 E., sec. 13, WNE	80
88	Hood, William	184	14	T.4 S., R.2 E., sec. 7, SESW	40
89	Collins, Peter M.	135	282	T.5 S., R.2 E., sec. 5, NSW	80
90	Bemis, John M.	142	70	T.6 S., R.2 E., sec. 19, ENW	80
	Santa Barbara County				
44	Lyman, Richard	67	501	T.7 N., R.29 W., sec. 7, NWNE	40
45	Hyde, F.A.	72	25	T.9 N., R.24 W., sec. 16, SESW	40
46	Forrester, Edward E	80	379	T.9 N., R.29 W., sec. 25, NWSW	40
				26, SESE	40
47	Clarke, C.W.	69	77	T.8 N., R.29 W., sec. 36, N SW	480
48	Clarke, C.W.	69	621	T.8 N., R.28 W., sec. 16, Lot 1	22
49	Hyde, F.A. & Co.	82	618	T.8 N., R.25 W., sec. 16, WNW	80
50	Clarke, C.W.	68	263	T.7 N., R.29 W., sec. 22, NWSE	40
51	Clarke, C.W.	68	264	T.7 N., R.29 W., sec. 22, NENE	40
52	Hyde, F.A.	70	134	T.7 N., R.27 W., sec. 36, ESW SNW	160
53	SB/LA Water Co.	102	1	T.5 N., R.25 W., sec. 19, Lot 2	38
54	SB/LA Water Co.	102	1	T.5 N., R.25 W., sec. 29, NWSW	40
55	Washburn, Jed	101	55	T.5 N., R.27 W., sec. 1, Lot 1	25
56	Pettinger, Hannah	105	160	T.5 N., R.28 W., sec. 7, Lots 5, 6	67
57	Paul, George W.	103	325	T.5 N., R.29 W., sec. 13, WNE	80
59	Holbrook, C.H.	83	451	T.5 N., R.31 W., sec. 14, Lots 15, 16	80
60	Kester, G.W.	119	423	T.5 N., R.31 W., sec. 21, NWSW	40
61	Washburn, Jed L.	101	55	T.6 N., R.28 W., sec. 24, Lots 1, 2	61
61	Washburn, Jed L.	101	55	T.6 N., R.27 W., sec. 13, Lots 7, 8	60
	San Bernardino County				
68	Schneider, Fred	290	380	T.1 N., R.1 W., sec. 8, S/Lot 5 Lot 8	80
69	Cooper, A.W.	284	382	T.1 N., R.6 W., sec. 6, NESE	40
70	Burson, John	293	109	T.1 N., R.7 W., sec. 6, Lot 5	40
71	Hamilton, Hiram M.	305	490	T.2 N., R.2 W., sec. 27, SSE	80
72	Vine, Emory	339	127	T.2 N., R.6 W., sec. 24, SENE	40
73	Goslin, Wm. G.	283	2	T.2 N., R.4 W., sec. 21, NW	160
76	Selway, Robert	283	204	T.2 N., R.7 W., sec. 36, W	320
77	Campbell, John F.	291	252	T.1 S., R.1 W., sec. 18, Lot 1	40
78	Clarke, C.W.	000	000	T.3 N., R.6 W., sec. 36, SWNW	28

TABLE 1 (Continued)
INITIAL LIST - FOREST LIEU SELECTION RESOLUTION

PARCEL ID NO.	GRANTOR NAME	DEED BOOK VOL.	PAGE	LEGAL DESCRIPTION	ACRES
STATE: California	MERIDIAN: San Bernardino				
	San Bernardino County (continued)				
79	Richards, Jarrett	354	55	T.3 N., R.6 W., sec. 4, NNE	80
80	Richards, Jarrett	349	57	T.3 N., R.6 W., sec. 7, SSE	80
81	Richards, Jarrett	349	57	T.3 N., R.6 W., sec. 20, SENE SE	200
82	Richards, Jarrett	349	57	T.3 N., R.6 W., sec. 21, SWSW NSW WNW	200
83	Richards, Jarrett	349	57	T.3 N., R.6 W., sec. 8, SSE	80
84	Richards, Jarrett	349	57	T.3 N., R.6 W., sec. 26, ESW SWSW	99
84	Richards, Jarrett	349	57	T.3 N., R.6 W., sec. 26, ES W SWSW	21
85	Richards, Jarrett	349	96	T.3 N., R.6 W., sec. 26, NWSW	40
95	Hyde, F.A.	72	130	T.11 N., R.30 W., sec. 36, NWNW	40
96	Hyde, F.A.	72	133	T.11 N., R.30 W., sec. 36, NWNW	40
97	Doyle & McGonagle	286	320	T.1 N., R.7 W., sec. 2, ENW	80
	Ventura County				
30	Hyde, F.A.	72	18	T.9 N., R.24 W., sec. 16, EE	160
31	Black, Lewis	86	131	T.8 N., R.21 W., sec. 33, NNW	80
32	Hinckley, Artie M.	90	1	T.8 N., R.21 W., sec. 33, NNE	80
33	Miller, Wm. T.	84	449	T.8 N., R.23 W., sec. 20, NWNE NENW	80
34	Holbrook, C.H.	86	56	T.8 N., R.24 W., sec. 16, NN	160
35	Hyde, F.A.	62	635	T.8 N., R.24 W., sec. 36, WNE NENW	120
37	Goslin, Wm. G.	62	377	T.6 N., R.19 W., sec. 16, NNW	80
38	Hyde, F.A.	62	617	T.5 N., R.19 W., sec. 36, SENW SENE	80
39	Clarke, C.W.	58	535	T.5 N., R.22 W., sec. 16, ENE	80
40	McLeod, Gary	78	143	T.5 N., R.24 W., sec. 15, NSENE	20
41	Rice, Sarah	77	280	T.5 N., R.23 W., sec. 19, SWSE	40
42	Rapp, J.J.	77	344	T.5 N., R.24 W., sec. 23, SNSE	40
				24, SNSW	40
43	Morris, Daisy	90	201	T.4 N., R.24 W., sec. 14, NWSW	40
92	Clarke, C.W.	56	153	T.8 N., R.23 W., sec. 36, NWNW	40
STATE: Colorado	MERIDIAN: 6th Principal				
	Custer County				
17	Locke, James T.	60	95	T.21 S., R.70 W., sec. 5, NESW	40
	Fremont County				
16	Locke, James T.	118	435	T.20 S., R.70 W., sec. 29, SESW	40
	Jefferson County				
2	Holcomb, Eugene	130	10	T.8 S., R.71 W., sec. 32, NSENE NENE NNWNE	80
4	Moses, W.E.	63	70	T.8 S., R.72 W., sec. 1, NENE	40
	Park County				
1	Wilson, Alfred	65	10	T.7 S., R.74 W., sec. 8, NENENE	10
3	Sloan, Robert E.	63	342	T.8 S., R.72 W., sec. 31, SESW	40
5	Sloan, Robert E.	63	549	T.8 S., R.73 W., sec. 26, NSE	80
6	Sloan, Robert E.	63	342	T.9 S., R.72 W., sec. 6, Lots 3,4,5	74
7	Holcomb, Oscar E.	65	374	T.9 S., R.74 W., sec. 8, SESE	40
8	Holcomb, Oscar E.	65	378	T.9 S., R.74 W., sec. 31, WNW SWNE SENW	131
9a	Wilson, Alfred C.	65	28	T.10 S., R.73 W., sec. 9, WNENW NSENW NENWNE SWNWNE SWNWNWNE	73
9b	Wilson, Alfred C.	65	28	T.10 S., R.73 W., sec. 9, NNENENW	5
9c	Wilson, Alfred C.	65	29	T.10 S., R.73 W., sec. 9, SENWNE	10
10	Bullock, Jared	65	137	T.11 S., R.73 W., sec. 10, SNW (Tr 39)	80
11	Moses, W.E.	70	51	T.12 S., R.71 W., sec. 32, NENESE	10
12	Moses, W.E.	65	11	T.12 S., R.72 W., sec. 27, SWNE	40
13	Armour, Edwin	335	420	T.13 S., R.68 W., sec. 17, NWNE SENE	80
15	Moses, W.E. LS&R	70	48	T.13 S., R.71 W., sec. 20, SNE SENW NWSE	160
	Teller County				
14	Hedges, Zachary T.	43	175	T.12 S., R.68 W., sec. 7, S/Lot 3	40

TABLE 1 (Continued)
INITIAL LIST - FOREST LIEU SELECTION RESOLUTION

PARCEL ID NO.	GRANTOR NAME	DEED BOOK VOL.	PAGE	LEGAL DESCRIPTION	ACRES
STATE: Idaho	**MERIDIAN: Boise**				
			Bonner County		
2	No. Pacific RR	5	20	T.57 N., R.5 W., sec. 31, SE	160
3	Richardson, Geo. B.	8	51	T.57 N., R.5 W., sec. 35, NSW	80
4	Kohrs, Conrad	5	471	T.58 N., R.3 W., sec. 21, SWSW	40
6	No. Pacific RR	4	126	T.58 N., R.5 W., sec. 35, SE	160
7	No. Pacific RR	4	146	T.58 N., R.5 W., sec. 35, W	320
8	No. Pacific RR	4	144	T.58 N., R.5 W., sec. 29, NSE SESE	120
9	No. Pacific RR	4	118	T.59 N., R.5 W., sec. 35, NESW NWSE SESE	128
10	No. Pacific RR	5	368	T.60 N., R.4 W., sec. 17, Lot 3	24
11	No. Pacific RR	5	368	T.61 N., R.4 W., sec. 21, Lot 2	5
			Boundary County		
12	No. Pacific RR	5	371	T.62 N., R.4 W., sec. 9, Lots 7, 8	53
STATE: New Mexico	**MERIDIAN: New Mexico Principal**				
			Catron County		
4	Black, Lewis C.	47	516	T.5 S., R.19 W., sec. 5, SENE SWNW	80
5	Black, Lewis C.	47	512	T.5 S., R.19 W., sec. 32, SWNW	40
6	Porter, Henry M.	44	390	T.8 S., R.15 W., sec. 4, SSE SESW	120
				9, NENW	40
7	Sherman, Jesse H.	48	178	T.11 S., R.12 W., sec. 29, NWNW	40
13	Moses, W.E.	54	422	T.8 S., R.19 W., sec. 15, NSW	80
14	Coffin, Mary	54	334	T.6 S., R.21 W., sec. 2, SNESE	20
14	Adair, Charles	45	316	T.6 S., R.21 W., sec. 2, SNESE	20
15	Jones, Flemming WA	54	465	T.7 S., R.19 W., sec. 26, ENE	80
			Grant County		
9	G.O.S. Cattle Co.	41	243	T.14 S., R.13 W., sec. 32, SWNW	40
16	Watson, William W.	41	574	T.14 S., R.17 W., sec. 25, SWNE SESE	80
17	Miller, Ellis	47	67	T.10 S., R.15 W., sec. 34, NENE WNE NWSE	160
			Lincoln County		
10	Moses, W.E. LS&R	W	214	T.8 S., R.16 E., sec. 30, SESW	40
11	Jaffa, Joseph	W	147	T.8 S., R.17 E., sec. 13, SSE	80
				24, NNE	80
18	Moses, W.E.	W	177	T.8 S., R.14 E., sec. 1, SENW	40
19	Ridgeway, Arnold	W	226	T.7 S., R.12 E., sec. 12, NENE SESE	80
20	Seaberg, Hugo	W	114	T.8 S., R.17 E., sec. 7, SENE	40
			Sierra County		
21	Plemmons, John C.	C	397	T.12 S., R.11 W., sec. 29, SWSW	40
22	Ingles, Thomas & Jane	C	404	T.12 S., R.11 W., sec. 29, SESW	40
			San Miguel County		
1	Moses, W.E.	50	48	T.19 N., R.14 E., sec. 26, NWNW WNENW	60
2	Moses, W.E.	49	522	T.18 N., R.14 E., sec. 21, SENW	40
3	Barker, Squire L.	50	412	T.18 N., R.14 E., sec. 3, NEly 1/2 of the SESE	16
12	Ehrlich, L. & Annie	52	6	T.18 N., R.14 E., sec. 11, SNW ESW	160
STATE: Oregon	**MERIDIAN: Willamette**				
			Clackamas County		
1	Murphy, John T.	75	168	T.1 S., R.5 E., sec. 36, SW SSE	240
2	Strickland, M.C.	89	218	T.2 S., R.7 E., sec. 10, NW	160
3	Henderson, M.F.	86	18	T.2 S., R.7 E., sec. 8, SENW	40
26	Hyde, F.A.	68	440	T.3 S., R.7 E., sec. 36, Part NNE	63
			Deschutes County		
9	Clarke, C.W.	1	235	T.19 S., R.9 E., sec. 36, SESE	40
10	Clarke, C.W.	11	271	T.22 S., R.9 E., sec. 36, ESE SWSE SENE	160
11	Hyde, F.A.	11	235	T.23 S., R.7 E., sec. 36, SESW	40
12	Hyde, F.A.	12	95	T.23 S., R.9 E., sec. 36, ESE	80
13	Hyde, F.A.	12	95	T.23 S., R.9 E., sec. 36, SENW SW WSE NE	440
24	Clark, C.W.	1	271	T.17 S., R.9 E., sec. 16, SWNE NWSE SESE	120

TABLE 1 (Continued)
INITIAL LIST - FOREST LIEU SELECTION RESOLUTION

PARCEL ID NO.	GRANTOR NAME	DEED BOOK VOL.	PAGE	LEGAL DESCRIPTION	ACRES
STATE: Oregon	MERIDIAN: Willamette				
			Hood River County		
23	Hyde, F.A.	B	407	T.1 S., R.8 E., sec. 36, SESE	40
			Jackson County		
14	Hyde, F.A.	37	206	T.32 S., R.4 E., sec. 36, SNE	80
15	Kohrs, Conrad	37	368	T.35 S., R.4 E., sec. 27, NSE	80
16	Kohrs, Conrad	37	368	T.37 S., R.4 E., sec. 31, SWNW	40
17	English, John T.	37	626	T.39 S., R.1 E., sec. 29, SENE	40
18	English, John T.	37	626	T.39 S., R.1 E., sec. 31, ESW	80
			Klamath County		
19	Hyde, F.A.	12	167	T.35 S., R.6 E., sec. 16, SWNW	40
20	Clarke, C.W.	11	296	T.37 S., R.5 E., sec. 36, SWSW	40
21	Hyde, F.A.	11	206	T.37 S., R.6 E., sec. 16, SSE NW NSW SWSW	360
25	Hyde, F.A.	11	235	T.23 S., R.8 E., sec. 16, SWSE	40
25	Hyde, F.A.	11	235	T.27 S., R.6.5 E., sec. 36, S	320
			Lane County		
6	Cal-Ore-Land Co.	56	567	T.20 S., R.1 E., sec. 11, NESE	40
7	Cal-Ore-Land Co.	63	383	T.20 S., R.2 E., sec. 29, ENE	80
8	Goslin, Wm. G.	47	567	T.20 S., R.2 E., sec. 20, NENE	40
22	Cal-Ore-Land Co.	63	40	T.23 S., R.3 E., sec. 21, Lot 3	25
			Lincoln County		
5	Peterson, Christine	67	133	T.10 S., R.5 E., sec. 13, ENE SWNESENW	160
			Wasco County		
4	Drake, Alexander M.	35	139	T.2 S., R.11 E., sec. 12, WSW	80
STATE: South Dakota	MERIDIAN: Black Hills				
			Custer County		
57	Hazeltine, Stillman	2	500	T.2 S., R.6 E., sec. 24, SWSE SESW	80
				26, WNE	80
58	Wright, Wilbur F	6	306	T.3 S., R.4 E., sec. 33, NNE SENE NENSE	160
			Lawrence County		
22	Blaine, James E	175	630	T.6 N., R.2 E., sec. 31, Lot 2	40
23	Weare, Henry G.	141	250	T.6 N., R.2 E., sec. 31, Lots 3,4 ESW	160
24	Smith, Frank D	157	427	T.5 N., R.4 E., sec. 10, ENW SNE NESE	200
33	Price-Baker Co	17	524	T.2 N., R.6 E., sec. 7, SNE NSE	160
			Meade County		
25	Christy, William	17	499	T.4 N., R.6 E., sec. 19, Lot 4	35
26	Chaplin, Carle H.	25	162	T.3 N., R.6 E., sec. 6, Lots 5, 6 & 7 7 Lot 1	145
			Pennington County		
27	Rumsey, James D.C.	23	183	T.2 N., R.6 E., sec. 32, SESE	40
28	Rumsey, James D.C.	23	184	T.2 N., R.6 E., sec. 32, NSE NESW	120
29	Rumsey, James D.C.	23	173	T.2 N., R.6 E., sec. 29, ENE	80
30	Rumsey, James D.C.	23	176	T.2 N., R.6 E., sec. 29, SSE	80
31	Rumsey, James D.C.	23	156	T.2 N., R.6 E., sec. 21, SSE	80
32	Rumsey, James D.C.	23	157	T.2 N., R.6 E., sec. 21, NE	160
34	Conley, Hiram F.	16	439	T.1 N., R.6 E., sec. 17, NWSW	40
				18, SWNE NSE	120
35	Mathias, J. Howell	16	410	T.1 N., R.6 E., sec. 31, NWSW(Lot 3)	40
36	Rapid Cty Lbr. Co.	16	517	T.1 N., R.6 E., sec. 11, WNW SENW NWSW	160
37	Morse, Corbin	16	238	T.1 N., R.6 E., sec. 35, SWSE SESW	80
38	Christy, William	16	242	T.1 N., R.6 E., sec. 13, SESE	40
				24, ENE NESE	120
39	McCaffrey, Frank	16	316	T.1 N., R.4 E., sec. 29, SWSE	40
				32, WNE NWSE	120
40	Ransom, Albert F	16	330	T.1 N., R.4 E., sec. 34, NESW SENW SWNE NWSE	160

TABLE 1 (Continued)
INITIAL LIST - FOREST LIEU SELECTION RESOLUTION

PARCEL ID NO.	GRANTOR NAME	DEED BOOK VOL.	PAGE	LEGAL DESCRIPTION			ACRES
STATE: South Dakota	**MERIDIAN:** Black Hills						
		Pennington County (Continued)					
41	Turner, George	16	303	T.1 N.,	R.4 E.,	sec. 33, ESW SWSW	120
42	Turner, George	16	303	T.1 S.,	R.4 E.,	sec. 4, Lot 3	40
43	Castle, Willard R.	16	576	T.1 N.,	R.4 E.,	sec. 17, SWSW	40
44	Todd, Wm.	16	552	T.1 N.,	R.4 E.,	sec. 29, SESE	40
45	Pruett, James P.	J	392	T.1 N.,	R.1 E.,	sec. 13, SWSW	40
						14, SESE	40
						24, NWNW	40
46	Simpson, Frank O.	16	364	T.1 S.,	R.3 E.,	sec. 25, SWSW	40
						26, SSE SESW	120
47	Hurlburt, Frank	16	432	T.1 S.,	R.4 E.,	sec. 9, Lots 3,4 & 5 SESE	120
47	Hurlburt, Frank	16	432	T.1 S.,	R.4 E.,	sec. 9, Lot 8	40
48	White, Willison B.	16	342	T.1 S.,	R.4 E.,	sec. 14, NE less 15.43 ac.	135
49	Ostle, William	16	307	T.1 S.,	R.5 E.,	sec. 33, Lots 3,4, 7, 8 & 9	96
50	Bishop, Albert L.	16	326	T.1 S.,	R.5 E.,	sec. 31, Lots 3 & 13 SNE	144
51	Weaver, Lucretia	16	334	T.1 S.,	R.5 E.,	sec. 28, Lots 2,4, 8 SWNW SWSW	107
52	White, John	16	310	T.1 S.,	R.5 E.,	sec. 19, Lots 4,5 NESW NWSE	147
53	Blight, Ephraim	16	306	T.1 S.,	R.5 E.,	sec. 33, SENE	119
						34, Lot 1 NWNW	
54	Tutty, John	23	218	T.2 S.,	R.5 E.,	sec. 1, Lot 1	40
55	Boland, Abram C.	23	216	T.2 S.,	R.6 E.,	sec. 21, NWSE	40
56	Roy, William	16	453	T.2 S.,	R.6 E.,	sec. 8, SESW SWSW	80
59	Rumsey, James D.	23	169	T.2 N.,	R.6 E.,	sec. 28, NWSW	40
STATE: Utah	**MERIDIAN:** Salt Lake						
		Sanpete County					
8	Gray, L.H.	47	356	T.15 S.,	R.5 E.,	sec. 35, WNW	80
9	Badger, George T	47	387	T.15 S.,	R.5 E.,	sec. 26, WSW	80
10	Ziegler, Charles	47	183	T.15 S.,	R.5 E.,	sec. 2, Lots 1, 2,3 & 4 SNE NSE	320
16	Ziegler, Charles	47	175	T.14 S.,	R.5 E.,	sec. 36, SESE	40
		Summit County					
1	Tevis, William L	H	319	T.1 S.,	R.7 E.,	sec. 32, NW	205
						2, Lot 4	
2	Zeigler, Charles	H	109	T.1 S.,	R.7 E.,	sec. 36, NW	160
3	Zeigler, Charles	G	587	T.1 S.,	R.7 E.,	sec. 36, NENE	40
4	Richardson, Charles	5	295	T.3 S.,	R.7 E.,	sec. 17, NNW	80
		Sevier County					
11	Moses LS&R Co.	27	114	T.24 S.,	R.2 E.,	sec. 10, ENE	80
12	Moses LS&R Co.	27	118	T.24 S.,	R.2 E.,	sec. 15, NWSE	40
13	Hamilton, Hiram M.	27	90	T.25 S.,	R.3 E.,	sec. 32, SENE	40
14	Moses LS&R Co.	26	7	T.11 N.,	R.2 E.,	sec. 15, SW	160
15	Moses LS&R Co.	21	532	T.11 N.,	R.2 E.,	sec. 22, SW	160
17	Lyman, Richard M.	27	189	T.23 S.,	R.3 E.,	sec. 36, NENW	40
		Utah County					
5	Moses, W.E. LS&R Co.	73	3	T.10 S.,	R.2 E.,	sec. 16, NE ENW	240
6	Moses, W.E. LS&R Co.	74	6	T.10 S.,	R.2 E.,	sec. 2, NESE NSW SWSE	160
7	Moses, W.E. LS&R Co.	74	11	T.10 S.,	R.2 E.,	sec. 16, WSW	80
STATE: Washington	**MERIDIAN:** Willamette						
		Clallam County					
22	Olsen, Carl	58	346	T.29 N.,	R.3 W.,	sec. 21, SWSW	40
23	Peters, Wm. A	21	243	T.30 N.,	R.10 W.,	sec. 20, SWSE	40
24	Coffin, Mary	57	212	T.30 N.,	R.11 W.,	sec. 26, Lot 3 SWNW	79
		Snohomish County					
25	Peavey, Gary	71	278	T.30 N.,	R.9 E.,	sec. 22, SWSW	40

TABLE 1 (Continued)
INITIAL LIST - FOREST LIEU SELECTION RESOLUTION

PARCEL ID NO.	GRANTOR NAME	DEED BOOK VOL.	PAGE	LEGAL DESCRIPTION	ACRES
STATE: Wyoming		MERIDIAN: 6th Principal			
				Albany County	
18	Burrows, C.B.	100	48	T.15 N., R.72 W., sec. 1, S	320
19	Burrows, C.B.	101	43	T.15 N., R.71 W., sec. 31, ESW SE	240
20	Burrows, C.B.	100	268	T.15 N., R.71 W., sec. 7, Lot 2	34
21	Burrows, C.B.	101	31	T.15 N., R.71 W., sec. 19, NE ENW	240
				Big Horn County	
17	Collins, Jeremiah	9	639	T.56 N., R.88 W., sec. 30, NENE	40
22	Souter, Charles H.			T.31 N., R.100 W., sec. 34, SESE	40
				Carbon County	
16	Carbon Tbr. Co.	69	302	T.17 N., R.79 W., sec. 3, NWNE NENW	88
				Sublette County	
16	Holmes, Avery T.	7	105	T.38 N., R.110 W., sec. 30, SSE	80

[FR Doc. 93–31899 Filed 12–29–93; 8:45 am]
BILLING CODE 3410–11–C

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Alabama Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that the Alabama Advisory Committee to the Commission will meet on Thursday, January 20, 1994, from 6 p.m. until 8 p.m. at the Radisson Hotel, 808 South 20th Street, Birmingham, Alabama 32505. The purpose of the meeting is to discuss and plan for future SAC activities.

Persons desiring additional information, or planning a presentation to the Committee, should contact Melvin L. Jenkins, Director of the Central Regional Office, 816–426–5253 (TTY 816–426–5009). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, December 20, 1993.

Carol-Lee Hurley,

Chief, Regional Programs Coordination Unit.

[FR Doc. 93–31895 Filed 12–29–93; 8:45 am]

BILLING CODE 6335–01–P

Agenda and Notice of Public Meeting of the West Virginia Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the West Virginia Advisory Committee to the Commission will be convened at 1:30 p.m. and adjourn at 4 p.m. on Tuesday, January 18, 1994, at the Conference Room, Governor's Office, State Building, Charleston, West Virginia 25305. The purpose of the meeting is to plan activities for fiscal year 1994.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson Marcia Pops at 304–292–3017, or John I. Binkley, Director of the Eastern Regional Office, 202–376–7533 (TDD 202–376–8116). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, December 21, 1993.

Carol-Lee Hurley,

Chief, Regional Programs Coordination Unit.

[FR Doc. 93-31896 Filed 12–29–93; 8:45 am]

BILLING CODE 6335–01–P

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Recreation Access Advisory Committee; Meeting

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meeting.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) gives notice, as required by the Federal Advisory Committee Act (5 U.S.C. App. 2), of the times and location of the next meeting of the Recreation Access Advisory Committee.

DATES: The next meeting of the Recreation Access Advisory Committee is scheduled for Friday, January 29, 1994 (9 a.m.–5 p.m.) and Saturday, January 30, 1994 (9 a.m.–5 p.m.).

ADDRESSES: The meeting will be held at 800 North Capitol Street, NW., Washington, DC in the Maritime Commission Hearing Room on the first floor of the building. The accessible entrance is on the H Street side of the building. Building security requires a list of members of the public wishing to attend the meeting. Please call the Access Board in advance and leave your name on voice mail ext. 68.

FOR FURTHER INFORMATION CONTACT: Peggy H. Greenwell, Office of Technical and Information Services, Architectural and Transportation Barriers Compliance Board, 1331 F Street, NW., suite 1000, Washington, DC 20004–1111. Telephone number (202) 272–5434 ext. 34 (Voice); (202) 272–5449 (TTY). These are not toll free numbers. This document is available in accessible formats (cassette tape, braille, large print, or computer disc) upon request.

SUPPLEMENTARY INFORMATION: The Access Board established a Recreation Access Advisory Committee to provide advice on issues related to making recreational facilities and outdoor developed areas readily accessible to and usable by individuals with disabilities. This advice will be used by the Access Board to develop accessibility guidelines under the Americans with Disabilities Act of 1990 and the Architectural Barriers Act of 1968 for newly constructed and altered recreational facilities and outdoor developed areas. The advisory committee is composed of owners and operators of various recreational facilities; persons who design recreational facilities or manufacture related equipment; Federal, State and local government officials responsible for parks and other outdoor developed areas; and individuals with disabilities and organizations representing the interests of such persons.

The Recreation Access Advisory Committee has formed subcommittees to assist in its work. The subcommittees include: Amusement Parks; Golf; Play Area Settings; Recreational Boating and Fishing; Developed Outdoor Recreation Facilities and Areas; and Sports Facilities. Subcommittee meetings will be held during the January 29th and 30th committee meeting and at other scheduled dates. The public is encouraged to attend subcommittee meetings and to provide input in the form of written material. Information about these subcommittees can be obtained from Peggy Greenwell at the address indicated at the beginning of this notice.

This meeting is open to the public and meeting sites will be accessible to individuals with disabilities. Sign language interpreters and assistive listening systems will be available for individuals with hearing impairments.

Lawrence W. Roffee,

Executive Director.

[FR Doc. 93–31929 Filed 12–29–93; 8:45 am]

BILLING CODE 8150–01–M

Meeting

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meeting.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) has scheduled its regular business meetings to take place in Washington, DC on Tuesday and Wednesday, January 11–12, 1994 at the times and location noted below.

DATES: The schedule of events is as follows:

Tuesday, January 11, 1994

9–12:45 p.m. Ad Hoc Committee on Communications: Workshop on the Effects of the Built Environment on Communications for People Who

are Deaf, Hard of Hearing, and Deaf/Blind

2–5 p.m. Briefing on Major Issues for Children's Environments (closed meeting)

Wednesday, January 12, 1994

9–10:30 a.m. Technical Programs Committee

10:45–12:15 p.m. Planning and Budget Committee

1:30–3 p.m. Board Meeting

ADDRESSES: The meetings will be held at: Holiday In Crowne Plaza, Salon B, 775 12th Street, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT:

For further information regarding the meetings, please contact Lawrence W. Roffee, Executive Director, (202) 272–5434 ext. 14 (voice) and (202) 272–5449 (TTY).

SUPPLEMENTARY INFORMATION: At the Board meeting, the Access Board will consider the following agenda items:

- Approval of the Minutes of the November 10, 1993 Board Meeting.
- Executive Director's Report.
- Ad Hoc Committee on Communications Report on Workshop.
- Report on Briefing on Children's Environments (closed).
- Status Report on FY 1992 Research Projects.
- Status Report on FY 1993 Research Projects.
- Changes to Fiscal Year 1994 Projects.
- Proposed Projects for Fiscal Years 1995 and 1996.
- Operating Plan for FY 1994.
- Status Report on FY 1995 Budget.
- Report on Extraordinary Work.
- Complaint Status Report.
- Recreation Access Advisory Committee Status Report.
- Election of Officers.

Some meetings or items may be closed to the public as indicated above. All meetings are accessible to persons with disabilities. Sign language interpreters and an assistive listening system are available at all meetings.

Lawrence W. Roffee,

Executive Director.

[FR Doc. 93–31930 Filed 12–29–93; 8:45 am]

BILLING CODE 8150–01–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–421–805]

Postponement of Final Antidumping Duty Determination: Aramid Fiber Formed of Poly-Phenylene Terephthalamide From the Netherlands

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

ACTION: Notice.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Jennifer Katt or Jeffrey Denning, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0498 or (202) 482–4194.

POSTPONEMENT OF FINAL DETERMINATION: On December 9, 1993, (58 FR 65699, December 16, 1993), the Department of Commerce (the Department) issued an affirmative preliminary determination in the antidumping duty investigation of aramid fiber formed of poly-phenylene terephthalamide from the Netherlands.

In accordance with section 735(a)(2)(A) of the Tariff Act of 1930, as amended, (the Act), on December 17, 1993, the sole respondent in this investigation, Aramide Maatschappij V.O.F. and Akzo Fibers Inc. (collectively Akzo), requested that the Department postpone its final determination in this investigation until 135 days after the date of publication of the preliminary determination. Under section 735(a)(2) of the Act and section 353.20(b) of the Department's regulations (19 CFR 353.20(b)) if, subsequent to an affirmative preliminary determination, the Department receives a request for postponement of the final determination from producers or resellers who account for a significant proportion of exports of the merchandise under investigation, the Department will, absent compelling reasons for denial, grant the request. Accordingly, we are postponing our final determination in this investigation until May 2, 1994.

Public Comment

In accordance with 19 CFR 353.38, case briefs or other written comments in at least ten copies must now be submitted to the Assistant Secretary for Import Administration no later than March 25, 1994, and rebuttal briefs, no later than March 30, 1994. We have received a request for a hearing by the respondent in this investigation, and therefore under 19 CFR 353.38(f), we will hold a public hearing to allow parties to comment on arguments raised in the case or rebuttal briefs. Tentatively, the hearing will be held on April 1, 1994 at 10 a.m. at the U.S. Department of Commerce, Room 4830, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

This notice is published pursuant to section 735(d) of the Act and 19 CFR 353.20(b)(2).

Dated: December 22, 1993.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration.

[FR Doc. 93–31950 Filed 12–29–93; 8:45 am]

BILLING CODE 3510–DS–P

[A–614–502]

Brazing Copper Wire and Rod From New Zealand; Intent To Revoke Antidumping Duty Order

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of intent to revoke antidumping duty order.

SUMMARY: The Department of Commerce is notifying the public of its intent to revoke the antidumping duty order on brazing copper wire and rod from New Zealand.

Domestic interested parties who object to this revocation must submit their comments in writing no later than January 31, 1994.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Norbert Gannon or Barbara Tillman, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, telephone: (202) 482–2786.

SUPPLEMENTARY INFORMATION:

Background

On December 4, 1985, the Department of Commerce (the Department) published an antidumping duty order on brazing copper wire and rod from New Zealand (50 FR 49740). The Department has not received a request to conduct an administrative review of this order for the most recent four consecutive annual anniversary months.

The Department may revoke an antidumping duty order or finding if the Secretary of Commerce concludes that it is no longer of interest to interested

parties. Accordingly, as required by § 353.25(d)(4) of the Department's regulations, we are notifying the public of our intent to revoke this antidumping duty order.

Opportunity to Object

No later than January 31, 1994, domestic interested parties, as defined in section 353.2(k) (3), (4), (5), and (6) of the Department's regulations, may object to the Department's intent to revoke this antidumping duty order.

Seven copies of any such objections should be submitted to the Assistant Secretary for Import Administration, room B-099, U.S. Department of Commerce, Washington, DC 20230.

No interested parties requested an administrative review in accordance with the Department's notice of opportunity to request administrative review by the end of the anniversary month. If domestic interested parties do not object to the Department's intent to revoke by December 30, 1993, we shall conclude that the order is no longer of interest to interested parties and shall proceed with revocation.

This notice is in accordance with 19 CFR 353.25(d).

Dated: December 20, 1993.

Roland L. MacDonald,

Acting Deputy Assistant Secretary for Compliance.

[FR Doc. 93-31951 Filed 12-29-93; 8:45 am]

BILLING CODE 3510-DS-M

[A-570-001]

Potassium Permanganate From The People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration/ International Trade Administration, Department of Commerce

ACTION: Notice of preliminary results of antidumping duty administrative review.

SUMMARY: The Department of Commerce is conducting an administrative review of the antidumping duty order on potassium permanganate from the People's Republic of China. This review covers 15 Chinese producers/exporters and 32 third-country resellers for the period January 1, 1990, through December 31, 1990. The review indicates the existence of dumping margins for all firms.

We invite interested parties to comment on these preliminary results.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Paul Stolz or Thomas Futtner, Office of Antidumping Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-4474 and (202) 482-3814 respectively.

Background

On January 31, 1984, the Department of Commerce (the Department) published in the **Federal Register** (49 FR 3898) the antidumping duty order on potassium permanganate from the People's Republic of China (PRC). On January 31, 1991, Carus Chemical Company requested that the Department conduct an administrative review for the period January 1, 1990, through December 31, 1990, in accordance with 353.22(a) of the Department's regulations (19 CFR 353.22(a)). On February 19, 1991, we published an notice of initiation (56 FR 6621) of this antidumping duty administrative review. The Department is conducting this administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act).

Scope of the Review

Imports covered by this review are shipments of potassium permanganate, an inorganic chemical produced in free-flowing, technical, and pharmaceutical grades. During the review period, potassium permanganate was classifiable under item 2841.60.0010 of the Harmonized Tariff Schedule (HTS). The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive. The review covers 15 producers/exporters and 32 third-country resellers for the period January 1, 1990, through December 31, 1990.

Analysis

On August 13, 1991, we issued questionnaires to the following PRC exporters/manufacturers:

(1) The China National Chemicals Import and Export Corporation (SINOCHEM)
(2) China Export Bases Development Corp., Guangdong Branch and Qingdao Branch
(3) Guangdong Foreign Trading Development
(4) Guangdong Foreign Economics Development Co., Ltd.
(5) Guangdong Foreign Economic Relations & Trade Consultancy Corporation
(6) Guangxi Import & Export Trading Corporation
(7) Guilin Native Produce & Animal-China Native Produce and Animal By-Products I/E Corporation
(8) Shenzhan Metals Materials Co.
(9) Tongji Chemical Plant
(10) Jinan Huaiyin Chemical General Factory
(11) Tranjin Haiyang Chemical Plant
(12) Changsha Organic Chemical Plant
(13) Beijing Dayu Chemical Plant
(14) Zunyi Chemical Plant (Zunyi)
(15) Chongging Jialing Chemical Plant.

Questionnaires were also issued to the following third-country resellers:

(1) Tin Sing Chemical Engineers, Ltd.
(2) K L & Company
(3) Yue Pak Co., Ltd. (Yue Pak)
(4) Sam Wing International, Ltd.
(5) Far Ocean Trading Co.
(6) Landyet Company, Ltd.
(7) Go Up Company
(8) Hip Fung Trading Company
(9) AEL Asia Express (HK) Ltd.
(10) Anduk Industry Supply Co., Ltd.
(11) Asia Express Company
(12) Asia Express Packages
(13) Chemproha Chemical Distributors Ltd.
(14) Mayer Shipping Ltd.
(15) Newesdean Trading Co. Ltd.
(16) Pan Air & Sea Forwarders (HK) Ltd.
(17) Power Shipping Co.
(18) Progressive Resources Ltd.
(19) Reimer Martens
(20) Santex Import & Export Co.
(21) Seagull Container Line
(22) Continental Freight Forwarders
(23) Devoted Cargo Services (HK) Ltd.
(24) Dynamic Freight Services Ltd.
(25) Far Ocean Trading Co.
(26) He-Ro Chemicals Ltd. (He-Ro)
(27) ICD Group (HK) Ltd. (ICD)
(28) International Merona Ltd.
(29) J.A. Moeller (HK) Ltd.
(30) Kenwa Shipping Co. Ltd.
(31) Sidneyson Ltd.
(32) Vincent Shipping Co.

We also sent a series of questions to the Embassy of the PRC in Washington, DC, requesting information regarding government ownership, control and general involvement in the potassium permanganate industry.

Of the PRC respondents, three made submissions:

(1) SINOCHEM reported that its Shandong branch made two sales to a Hong Kong company without knowledge, at the time of the sale, that the ultimate destination was the United States. Since there was no knowledge that the United States was the ultimate destination, we have not considered these transactions to be U.S. sales by the Shandong branch. However, SINOCHEM's responses to our initial questionnaire and our supplemental questionnaire were deficient as the respondent failed to address entire sections of both.

(2) China Export Bases Development Corp., Qingdao Branch, reported no shipments.

(3) Zunyi Chemical Plant reported four U.S. sales.

Of the third-country reseller respondents, nine made submissions. The following three reported U.S. sales:

(1) Yue pak reported nine U.S. sales
(2) He-Ro reported 19 U.S. sales
(3) ICD reported seven U.S. sales

The following six reported that they made no shipments and/or that they acted as agents only:

(1) Hip Fung Trading Co.
(2) AEL Asia Express HK Ltd.
(3) Mayer Shipping
(4) Pan Air & Sea Forwarder
(5) Santex Import & Export
(6) Vincent Shipping

The Chinese Embassy did not respond to our questions.

The methodology that the Department has determined appropriate to apply to the conduct of this review is that which was in effect at the time of initiation of this review. This review, covering the period January 1, 1990, through December 31, 1990, was initiated on February 19, 1991. At that time, the Department's policy was to apply a single country-wide margin to respondents located in a non-market economy. We set forth this policy in the final results of the antidumping duty administrative review for Iron Construction Castings From the People's Republic of China, 56 FR 16 (January 24, 1991): "Our determination that the PRC is a state-controlled economy in which all entities are presumed to export under the control of the state leads us to question the application of multiple rates, absent a clear showing of legal, financial and economic independence. Thus, we conclude that a single country-wide rate is appropriate for this case."

We have considered the PRC to be a non-market economy for purposes of this review. Therefore, this review was undertaken under the assumption that PRC entities were under the control of the state and that, accordingly, we would establish a single PRC rate unless it was clearly shown that state control did not exist. To this end, the Department contacted the PRC government to obtain detailed information regarding the PRC potassium permanganate industry and the PRC producers of potassium permanganate. However, the PRC government did not respond to our inquiry. The only responsive producer with U.S. sales, Zunyi, states in its response that it is under the control of the Economic Commission of Zunyi City (the Commission) and that the Commission gave "* * * guiding instructions as to the planning of production in terms of value and quantity". Furthermore, Zunyi has acknowledged that it is state-owned. Therefore, Zunyi is presumed to be under the control of the central government and has not established that it is entitled to a rate separate from the PRC country-wide rate for this review. The remaining 14 PRC entities were either non-responsive or made no shipments during the period of review.

Furthermore, we will not base the country-wide rate on a rate calculated only on the basis of the response by Zunyi. Were we to establish a practice of using only one company's response to calculate the country-wide rate, firms under common control would be able to manipulate the review process by limiting responses to one or more better-situated firms. Therefore, due to the lack of a sufficient response from the PRC as a whole, including the government and the producers/exporters, we have preliminarily determined to apply best information available (BIA) to determine margins for all PRC producers and shippers.

Best Information Available for PRC Firms

The Department's policy for determining the appropriate BIA rate for an uncooperative entity is to use as BIA the higher of the highest rate assigned any company in any previous review or in the less-than-fair-value investigation or the highest rate for a responding firm in the current review. Since the PRC potassium permanganate industry as a whole was uncooperative in its response, the Department has selected 128.94 percent, the highest margin from the 1989 period of review, as the country-wide rate in this review. This single country-wide rate will apply to both the named parties in this review and to any unnamed PRC parties.

Third Country Resellers

Yue Pak, He-Ro, and ICD reported U.S. sales during the period of review, and asserted that their third-country sales should be used as foreign market value. However, for the reasons discussed below, these companies do not qualify as intermediate country resellers. Furthermore, no other trading company has attempted to establish on the record that it qualifies as an intermediate country reseller. According to 19 CFR 353.47, a reseller will be considered an intermediate country reseller and foreign market value will be calculated based on sales in that intermediate country if (1) the reseller in an intermediate country purchases the merchandise from the producer; (2) the producer does not know (at time of sale) the country to which the reseller intends to export the merchandise; (3) the merchandise enters commerce of the intermediate country but is not substantially transformed in that country; and (4) merchandise is subsequently exported to the United States.

Each of the three above-mentioned respondents failed to meet at least one of these conditions. First, during the review period, Yue Pak, He-Ro, and ICD purchased all of their merchandise from import/export/trading companies, not producers. Second, it is clear from the questionnaire responses of Yue Pak, He-Ro, and ICD that none of the potassium permanganate destined for the United States entered the commerce of Hong Kong. This merchandise was ordered from the United States specifically for the U.S. market. The responses of Yue Pak, He-Ro, and ICD clearly indicate the following pattern of trade: (1) Hong Kong resellers received orders from their U.S. customers and (2) the resellers then contacted their Chinese suppliers to supply the exact amount required to fill these orders. The Hong Kong resellers also contend that the merchandise entered the commerce of Hong Kong because they were required to pay certain import/export fees. However, it appears that these fees are assessed on any merchandise moving through Hong Kong, whether or not it is classified as an import, export, transhipment or re-export. As a result, the application of the above-mentioned fees cannot be relied upon to determine whether merchandise has entered the commerce of Hong Kong. Therefore, we do not consider any third-country shippers of potassium permanganate from the PRC in this review to be intermediate country resellers. Instead, all will receive the dumping margin associated with their producers, which is the country-wide PRC rate of 128.94 percent.

Preliminary Results of Review

We have preliminarily determined that the margin for all manufacturers/producers/exporters of potassium permanganate from the PRC for the period January 1, 1990, through December 31, 1990, is 128.94 percent.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Upon completion of this review, the Department will issue appraisement instructions concerning all respondents directly to the U.S. Customs Service.

Furthermore, the following deposit requirement will be effective for all

shipments of the subject merchandise, entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided for by section 751(a)(1) of the Tariff Act: (1) The cash deposit rate for the PRC country-wide firms will be that rate established in the final results of this administrative review, and (2) if a non-PRC exporter has not established on the record, for this administrative review, that it qualifies as an intermediate country reseller under the terms of the statute, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise. In this instance, that rate will be the PRC country-wide rate.

Because any PRC firm must affirmatively show that it is entitled to a separate rate before such a rate can be given and any intermediate country reseller must affirmatively show that it is entitled to such status under the intermediate country reseller provision of the regulations (19 CFR 353.47), any new shippers will also be subject to the PRC country-wide deposit rate until they request review and demonstrate an entitlement to an exception. Therefore, there is no need for an "all others" cash deposit rate for intermediate country resellers. Furthermore, no "all others" rate will be established for the PRC. Because a country-wide rate is applied to all imports of potassium permanganate from the PRC, there is no need for an "all others" cash deposit rate for PRC entities.

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Interested parties may request disclosure within five days of the date of publication of this notice, and a hearing within 10 days of the date of publication. Any hearing requested, will be held as early as convenient for parties but not later than 44 days after date of publication, or the first workday thereafter. Case briefs, or other written comments, from interested parties may be submitted not later than 30 days after the date of publication of this notice. Rebuttal briefs and rebuttal comments, limited to issues raised in the case briefs, may be filed not later than 37 days after the date of publication. The Department will publish the final results of review, including its results of its analysis of issues raised in any such written comments.

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: December 22, 1993.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration.

[FR Doc. 93-31952 Filed 12-29-93; 8:45 am]

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[A-401-603]

Stainless Steel Hollow Products From Sweden; Preliminary Results of Antidumping Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Preliminary results of antidumping duty administrative reviews: Stainless steel hollow products from Sweden.

SUMMARY: In response to requests by respondent Sandvik AB, AB Sandvik Steel, and Sandvik Steel Company, the Department of Commerce (Department) has conducted two administrative reviews of the antidumping duty order on stainless steel hollow products from Sweden. These reviews cover one manufacturer/exporter of this merchandise to the United States, and the periods May 22, 1987 through November 30, 1988, and December 1, 1988 through November 30, 1989. The reviews indicate the existence of dumping margins for the respondent during the administrative review periods.

As a result of these reviews, the Department has preliminarily determined to assess antidumping duties equal to the calculated differences between United States prices (USPs) and foreign market values (FMVs). Interested parties are invited to comment on the preliminary results of these reviews.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: David Mason Jr. or Richard Herring, Office of Countervailing Duty Compliance, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-3337.

SUPPLEMENTARY INFORMATION:

Background

On December 3, 1987, the Department published in the **Federal Register** an antidumping duty order on stainless steel hollow products (SSHP) from Sweden (52 FR 45985), amended on November 5, 1992 (57 FR 52761). On December 5, 1988, Sandvik AB, AB Sandvik Steel, and Sandvik Steel Company (referred to collectively as Sandvik) requested that the Department conduct an administrative review for the period May 22, 1987 through November 30, 1988, in accordance with 19 CFR 353.22(a). On December 19, 1989, Sandvik requested that the Department conduct an administrative review for the period December 1, 1988 through November 30, 1989.

Pursuant to allegations made by AL Tech Specialty Steel Corporation and the United Steelworkers of America, we initiated cost of production (COP) investigations on Sandvik's third country sales of pipes and tubes and redraw hollows on January 31, 1990, and on Sandvik's home market sales of hollow bars on October 9, 1990, for the review period May 22, 1987 through November 30, 1988. The Department is now conducting these reviews in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Review

The merchandise covered by these reviews is stainless steel hollow products, including pipes, tubes, hollow bars and blanks of circular cross section, containing over 11.5 percent chromium by weight. This merchandise is currently classified under subheadings 7304.41.00 and 7304.49.00 of the Harmonized Tariff System (HTS). Prior to January 1, 1989, this merchandise was classified under subheadings 610.5130, 610.5202, 610.5229 and 610.5230 of the Tariff Schedules of the United States Annotated (TSUSA). Although the HTS and TSUSA subheadings are provided for convenience and customs purposes, the written description of the scope of these reviews remains dispositive.

Review Periods

The administrative review periods are May 22, 1987 through November 30, 1988 (the first review period) and December 1, 1988 through November 30, 1989 (the second review period).

United States Price

We based USP on both purchase price in accordance with section 772(b) of the

Act, and exporter's sales price (ESP) in accordance with section 772(c) of the Act. ESP was used when sales were made to unrelated parties after importation into the United States. Purchase price was used when the subject merchandise was sold to unrelated purchasers in the United States and ESP methodology was not indicated by other circumstances. Purchase price was also used when the subject merchandise was sold to unrelated parties in third countries with the knowledge that the ultimate destination was to customers in the United States.

We calculated purchase price and ESP based on the packed, delivered prices to unrelated customers in the United States. We also calculated purchase price based on the packed, delivered prices to unrelated customers in a third country when the ultimate destination of the merchandise was to the United States. We made deductions from purchase price and ESP, where appropriate, for foreign inland freight, inland insurance, ocean or air freight, marine insurance, brokerage and handling, import duties, repacking, and all U.S. inland freight and insurance, in accordance with section 772(d)(2) of the Act. We also allowed deductions, where appropriate, for rebates and discounts. (The reported unit prices are net of all discounts.) We made further deductions from ESP, where appropriate, for credit expenses, royalties, warranties, advertising, product liability expenses, inventory carrying costs and all other indirect selling expenses incurred in Sweden and the United States, pursuant to section 772(e)(2) of the Act. In accordance with section 772(e)(1) of the Act, we also deducted commissions.

In addition, when FMV was based on home market price, we made adjustments for the value added tax. On October 7, 1993, the United States Court of International Trade (CIT), in *Federal-Mogul Corp. and The Torrington Co.* v. *United States*, Slip Op. 93–194 (CIT, October 7, 1993), rejected the Department's methodology for calculating an addition to USP under section 772(d)(1)(C) of the Tariff Act to account for taxes that the exporting country would have assessed on the merchandise had it been sold in the home market. The CIT held that the addition to USP under section 772(d)(1)(C) of the Act should be the result of applying the foreign market tax rate to the price of the United States merchandise at the same point in the chain of commerce that the foreign market tax was applied to foreign market sales. *Federal-Mogul*, Slip Op. 93–194 at 12.

The Department has changed its methodology in accordance with the *Federal-Mogul* decision. The Department will add to USP the result of multiplying the foreign market tax rate by the price of the United States merchandise at the same point in the chain of commerce that the foreign market tax was applied to foreign market sales. The Department will also adjust the USP tax adjustment and the amount of tax included in FMV. These adjustments will deduct the portions of the foreign market tax and the USP tax adjustment that are the result of expenses that are included in the foreign market price used to calculate foreign market tax and are included in the United States merchandise price used to calculate the USP tax adjustment and that are later deducted to calculate FMV and USP. These adjustments to the amount of the foreign market tax and the USP tax adjustment are necessary to prevent our new methodology for calculating the USP tax adjustment from creating antidumping duty margins where no margins would exist if no taxes were levied upon foreign market sales.

This margin creation effect is due to the fact that the bases for calculating both the amount of tax included in the price of the foreign market merchandise and the amount of the USP tax adjustment include many expenses that are later deducted when calculating USP and FMV. After these deductions are made, the amount of tax included in FMV and the USP tax adjustment still reflects the amounts of these expenses. Thus, a margin may be created that is not dependent upon a difference between USP and FMV, but is the result of the price of the United States merchandise containing more expenses than the price of the foreign market merchandise. The Department's policy to avoid the margin creation effect is in accordance with the United States Court of Appeals' holding that the application of the USP tax adjustment under section 772(d)(1)(C) of the Act should not create an antidumping duty margin if pre-tax FMV does not exceed USP. *Zenith Electronics Corp.* v. *United States*, 988 F.2d 1573, 1581 (Fed. Cir. 1993). In addition, the CIT has specifically held that an adjustment should be made to mitigate the impact of expenses that are deducted from FMV and USP upon the USP tax adjustment and the amount of tax included in FMV. *Daewoo Electronics Co., Ltd.* v. *United States*, 760 F. Supp. 200, 208 (CIT, 1991). However, the mechanics of the Department's adjustments to the USP tax adjustment and the foreign market tax amount as described above are not identical to those suggested in *Daewoo*.

We have not added to USP hypothetical taxes that were not collected by reason of exportation of the merchandise to the United States because such taxes are not included in the price of the such or similar merchandise sold to Germany, the third country market that is the basis of FMV for pipes and tubes and redraw hollows in both administrative reviews. Although consumption taxes were paid on sales to Germany, these were collected by the German government, and not the Swedish government, which is the "country of exportation" in this case. Accordingly, we interpret section 772(d)(1)(C) of the Act as prohibiting us from increasing USP by the amount of taxes added to the price of sales to third countries since these taxes were not collected in the country of exportation.

In addition to the aforementioned deductions, we deducted value added in the United States pursuant to section 772(e)(3) of the Act for ESP transactions involving further manufacture prior to sale in the United States. The value added consists of the production costs incurred in converting an imported redraw hollow into a finished pipe or tube, the expenses incurred in the sale of the finished pipe or tube, and a proportional amount of profit or loss related to the value added. We calculated profit or loss by deducting from the sales price of the finished pipe or tube: (1) The production cost of the redraw hollow, (2) finishing costs in the United States, and (3) all expenses incurred in transporting the redraw hollow into the United States. We then allocated proportionately the total profit or loss to the imported redraw hollow and the finished pipe or tube based on the proportion of the total COP accounted for by the production cost of the redraw hollow and the further U.S. manufacturing cost, respectively. Only the profit or loss attributable to the U.S. value added was deducted.

We have determined that further manufacturing costs included: (1) The costs of manufacture (labor and overhead cost; there is no material cost since the pipe or tube is made from the imported redraw hollow); (2) movement charges; and (3) general expenses, including selling, general and administrative expenses.

Sandvik did not report warranty expenses incurred on U.S. sales. Therefore, we calculated warranty expenses based on the total value of returned defective merchandise and the total cost of reworking defective merchandise incurred by Sandvik's U.S. subsidiary.

Sandvik did not report product liability expenses for U.S. sales for the first review. Therefore, we used the premium liability expenses reported for German sales. This expense in Germany was calculated as a ratio of total liability expense allocated over all of Sandvik's sales in all markets. Therefore, the calculation is also applicable to U.S. sales.

Sandvik reported advertising expenses incurred on end-user sales. Since these advertising expenses were directed at Sandvik's own customers, we have treated these expenses as an indirect selling expense. We treated advertising expenses incurred on distributor sales as a direct expense since the advertising was directed at the distributors' customers.

We have recalculated credit expenses for purchase price sales. Sandvik calculated credit expenses from the date of shipment from its U.S. subsidiary to the customer until the date the customer makes payment on the sale. We recalculated credit expenses to take into account the time from date of shipment from Sweden to the date of payment by the U.S. customer.

Foreign Market Value

In order to determine whether there were sufficient sales of SSHP in the home market to serve as a basis for calculating FMV, we compared the volume of home market sales for each category of such or similar merchandise to the aggregate volume of third country sales for the same such or similar category, in accordance with section 773(a)(1) of the Act. For purposes of these reviews, we have determined that there are three such or similar categories: (1) Pipes and tubes, (2) redraw hollows and (3) hollow bars. Pipes and tubes and redraw hollows were sold in the United States during both review periods, but there were U.S. sales of hollow bars only within the first review period. The volume of home market sales of hollow bars was greater than five percent of the aggregate volume of third country sales of hollow bars. Therefore, we determined that home market sales of hollow bars constituted a viable basis for calculating FMV, in accordance with 19 CFR 353.48. For the other two such or similar categories during each of the review periods, the volume of home market sales within each respective category was less than five percent of the aggregate volume of third country sales. Therefore, FMVs for sales of pipes and tubes and redraw hollows were based on third country sales.

In selecting the appropriate third country market to use for comparison purposes, we first determined which third country markets had "adequate" volumes of sales within the meaning of 19 CFR 353.49(b)(1). We determined that the volume of sales to a third country market was adequate if the sales of such or similar merchandise exceeded or were equal to five percent of the volume sold in the United States. We then examined the most similar merchandise and the volume of sales criteria, 19 CFR 353.49 (b)(1) and (b)(2), respectively. In this case, Germany was the most appropriate selection because it had both the largest volume of sales of pipes and tubes and redraw hollows of any third country market, and the merchandise exported to Germany was more similar to the merchandise exported to the U.S. market than that sold to any other third country market with adequate sales volume. Therefore, for sales of both pipes and tubes and redraw hollows, we based FMV on Sandvik's sales to Germany, to the extent that such sales were not known by Sandvik to be destined for the U.S. market.

In the first review, petitioners alleged that Sandvik sold pipes and tubes and redraw hollows in the German market at prices below their COP. Petitioners further alleged that Sandvik's sales of hollow bar in the home market were also made at prices below their COP. Based on the evidence presented in petitioners' allegations, the Department initiated COP investigations on this merchandise.

We based the COP on the cost data supplied by Sandvik. Sandvik adjusted its cost data to conform with U.S. generally accepted accounting principles (GAAP). While the company's financial statement conforms to U.S. GAAP, its cost records are based on Swedish GAAP. Under Swedish GAAP, production costs must include an imputed interest expense and depreciation must be based on replacement cost. Sandvik adjusted its cost data by replacing imputed interest expenses with actual interest expenses and by substituting depreciation based on replacement costs with historical depreciation costs.

It is the Department's practice to accept cost information provided in accordance with the GAAP of the country subject to review, except in instances where the Department believes that the country's GAAP does not provide for the use or reflection of actual production costs. We have accepted Sandvik's adjustment from Swedish GAAP to U.S. GAAP because we believe that use of imputed interest expenses and depreciation based on replacement costs distorts the actual production costs of the subject merchandise. We have, therefore, used the cost information supplied by Sandvik in its response for this determination since it appears the costs have been calculated in a manner consistent with our methodology.

Since we found that virtually all sales of hollow bar were made at prices above the COP, we based our comparisons for hollow bar on all sales of that product in Sweden. For sales of redraw hollows and pipes and tubes, we found that less than 90 but more than 10 percent of sales, by volume, were made at prices above COP. Therefore, we considered only the above-cost sales as a basis for determining FMV. Furthermore, there was a sufficient number of above-costs sales in Germany so that we could base FMV on German sales rather than constructed value.

In the event we could not find appropriate German sales of pipe and tube or redraw hollows, or Swedish sales of hollow bar for comparison with U.S. sales, we used constructed value as the basis for FMV. And, where constructed value was not available, we used, as best information otherwise available, the rate from the underlying investigation.

We calculated FMVs for pipes and tubes and redraw hollows based on the c.i.f. and delivered prices to unrelated customers in Germany. We made deductions, where appropriate, for inland freight from Sweden to Germany, inland insurance, brokerage and handling, German inland freight to the customer, repacking expenses in Germany, and rebates. We also allowed deductions for discounts. (The reported German prices were net of all discounts.) We also deducted German packing and added U.S. packing to the third country price, in accordance with section 773(a)(1) of the Act.

In addition, for comparisons involving purchase price sales, we adjusted third country prices, where appropriate, for differences in credit expenses, warranties, royalties, advertising, and after-sale warehousing, in accordance with 19 CFR 353.56(a).

For comparisons involving ESP transactions, we made further deductions for credit expenses, warranties, royalties, and advertising. We also deducted indirect selling expenses, including inventory carrying expenses, product liability, and other indirect selling expenses. The deduction for third country indirect selling expenses was capped by the amount of indirect selling expenses incurred in the U.S. market, in accordance with 19 CFR 353.56(b)(2).

For comparisons to both purchase price and ESP sales, we made further adjustments to third country prices to account for differences in the physical characteristics of the merchandise, in accordance with section 773(a)(4)(C) of the Act.

We did not include in third country price consumption taxes imposed by the Government of Germany. While the Court of Appeals in *Zenith Electronics Corp.* v. *United States*, 988 F.2d 1573 (CAFC 1993), rejected tax adjustments in home market FMV and required that such adjustments be made to USP—that holding is limited to situations in which the country of exportation (the home market) is the basis for FMV. Moreover, *Zenith* cannot be directing the Department to make an upward USP adjustment for third country consumption taxes because under section 772(d)(1)(C) of the Act, only taxes collected in the "country of exportation" can be adjusted for in the USP. The consumption taxes applied to the third country sales in this case cannot be considered to be taxes imposed in the "country of exportation." (*See* "United States Price" discussion, above). Finally, being statutorily barred from making the USP adjustment, the Department cannot include the taxes in FMV either, because to do so could create a dumping margin even when pre-tax dumping is zero. (See *Federal Mogul*, Slip. Op. 93–194.)

For the above stated reasons, the Department determines that it must exclude consumption taxes from third country FMV. (See Memo regarding Treatment of Third Country Consumption Taxes, dated December 2, 1993.)

We calculated FMV for hollow bar based on ex-mill and delivered prices to unrelated customers in the home market. We made deductions from home market price, where appropriate, for inland freight and inland insurance. We also allowed deductions for discounts. (The reported home market price was net of all discounts.) We also deducted home market packing and added U.S. packing costs, in accordance with section 773(a)(1) of the Act. Further, we adjusted home market prices, where appropriate, for differences in credit expenses, warranties, royalties, and advertising, in accordance with 19 CFR 353.56(a). In addition, we made adjustments, where appropriate, to home market prices to account for differences in the physical characteristics of the merchandise, in accordance with section 773(a)(4)(C) of the Act.

For comparisons involving ESP transactions, we made further deductions for credit expenses, warranties, royalties, and advertising. We also deducted indirect selling expenses, including inventory carrying expenses, product liability, and other indirect selling expenses. The deduction for home market indirect selling expenses was capped by the amount of indirect selling expenses incurred in the U.S. market, in accordance with 19 CFR 353.56(b)(2).

In addition, for comparisons involving both purchase price and ESP sales, we included in FMV, the amount of value added tax collected in the home market. We also calculated the amount of the tax that was due solely to the inclusion of price deductions in the original tax base (i.e., the tax rate multiplied by the sum of any adjustments, expenses, charges, and offsets that were deducted from the tax base). This amount was deducted from the amount of value added tax collected in the home market. By making this additional tax adjustment, we avoid distortion that would cause the creation of a dumping margin even when pre-tax dumping is zero.

For ESP sales, we also calculated a re-adjustment of the amount of tax on the U.S. direct selling expenses added to FMV by applying the tax rate to those expenses. This re-adjustment amount was also added to FMV.

Sandvik claimed advertising expenses incurred on end-user sales in both the home market and in Germany. We have treated advertising incurred on end-user sales as an indirect selling expense since these costs are not assumed by Sandvik on behalf of the purchaser. We treated advertising expenses incurred on distributor sales as a direct expense since the advertising was directed at the distributors' customers.

Sandvik claimed a service charge for cutting pipe to length in the home market. We did not make an adjustment for this service claim because the company did not provide us with the necessary information to make the adjustment.

Sandvik claimed that the Department should compare comparable quantities of U.S. and German sales, and if such comparisons are not possible, to make an adjustment for differences in quantity between U.S. and German sales in accordance with 19 CFR 353.55. The German price list divides the product sales into four quantity brackets. Based on this price list, if the quantity purchased increases, the unit price on a per kilogram basis would decrease. Information submitted by Sandvik shows that, in fact, the average price of merchandise decreases as sales fall into higher quantity brackets. Therefore, for the preliminary results of these administrative reviews, we matched sales of comparable quantities, whenever possible.

However, when sales of comparable quantities could not be matched, no adjustment for differences in quantity was made. As the Department indicated in the Final Determination of Sales at Less Than Fair Value: Brass Sheet and Strip From the Netherlands (53 FR 23431, June 22, 1988), to qualify for an adjustment for differences in quantity, the exporter must demonstrate, using evidence such as a price list or quantity discount schedule, that it gave discounts on a uniform basis and that the discounts were available to substantially all home market (or third country) customers. Although information on the record indicates a general relationship between the average price of a commodity and the quantity bracket of the sale of that commodity, Sandvik's actual prices demonstrate that quantity discounts were not given uniformly to customers within the same quantity bracket. Therefore, no adjustment under 19 CFR 353.55 was made when comparing sales of different quantities.

In both the German and the U.S. markets, Sandvik sells the subject merchandise out of inventory (ex-stock sales), or produces to order and ships directly from the production site to the customer (ex-mill sales). Sandvik argues that, if the Department compares ex-mill sales to ex-stock sales, a circumstance-of-sale adjustment under 19 CFR 353.56 must be made to account for the increased costs of selling products ex-stock. Sandvik claims that such costs include warehousing the merchandise, inventory carrying costs, and cutting pipe to length. To determine the appropriateness of this claim, the Department examined the evidence on the record, but could find no relationship between the prices of identical products of comparable quantity and the fact that they are sold either ex-stock or ex-mill. We have, therefore, denied Sandvik's claim for a circumstance-of-sale adjustment.

Sandvik states that during both review periods an alloy surcharge was imposed on most of its sales in Germany and the United States. This alloy surcharge, which was assessed in addition to the quoted price of the merchandise, was used to offset the fluctuating price of nickel and ferrochrome, two inputs into the production of the subject merchandise. The alloy surcharges were revised monthly, and the surcharge for a

particular sale was determined by the surcharge rate in effect at the time of shipment to the customer. Sandvik argues that the Department should take into account price changes caused by the alloy surcharge by making an adjustment for differences in merchandise under 19 CFR 353.57, even when comparing identical merchandise. In the alternative, Sandvik states that the Department should make a circumstance-of-sale adjustment under 19 CFR 353.56 using the production cost differences supplied with their differences in merchandise claim under 19 CFR 353.57.

Under 19 CFR 353.57, the Department is specifically precluded from making adjustments for differences in the costs of production when comparing merchandise with identical physical characteristics. Furthermore, as the Department stated in Brass Sheet and Strip from Germany; Final Results of Antidumping Duty Administrative Review, 56 FR 60087, 60089 (November 27, 1991), "[c]ircumstances of sale adjustments are normally only allowed for differences in selling expenses being compared, not differences in raw material costs, and would therefore be inappropriate in this case." For these reasons, we have disallowed Sandvik's claimed adjustment for the alloy surcharge. Finally, we attempted to have the company provide the amount of alloy surcharge levied on each sale so that, if we determined a price adjustment was warranted, we would have the information necessary to make such an adjustment. However, Sandvik stated that it was not possible to break out the alloy surcharge on each sale.

In disallowing this claim, we note that when comparing non-identical merchandise, the Department made an adjustment to home market price to account for differences in the physical characteristics of the merchandise in accordance with 19 CFR 353.57. Furthermore, the comparison of contemporaneous sales should mitigate any perceived distortions between USP and FMV which might be attributable to the alloy surcharge.

Sandvik also made a claim for a level of trade adjustment on sales in Germany under 19 CFR 353.58. We disallowed this claimed adjustment because Sandvik did not demonstrate that it incurred different indirect selling expenses on sales to different levels of trade in the German market. However, as is our established practice, we attempted to compare distributor sales in the United States to distributor sales in Germany and end-user sales in the United States to end-user sales in Germany.

Preliminary Results of Review

As a result of our reviews, we preliminarily determine that the margin for Sandvik for the period May 22, 1987 through November 30, 1988 was 21.28 percent; and that the margin for Sandvik for the period December 1, 1988 through November 30, 1989 was 15.89 percent.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between USP and FMV may vary from the percentage stated above. Upon completion of these administrative reviews, the Department will issue appraisement instructions directly to Customs.

Because the Department has already completed and published the final results of the third administrative review (57 FR 21389, May 20, 1992) covering the period December 1, 1989 through November 30, 1990, the dumping margins determined in these reviews will have no impact on cash deposit rates for Sandvik. As provided by section 751(a)(1) of the Act, the Customs Service shall continue to require a cash deposit based on each firm's rate calculated in the most recent administrative review period.

The cash deposit rate for all other manufacturers or exporters will be 20.47 percent. On May 25, 1993, the CIT in *Floral Trade Council* v. *United States*, Slip Op. 93–79, and *Federal-Mogul Corporation* v. *United States*, Slip Op. 93–83, decided that once an "all others" rate is established for a company, it can only be changed through an administrative review. The Department has determined that in order to implement these decisions, it is appropriate to reinstate the original "all others" rate from the less-than-fair-value (LTFV) investigation (or that rate as amended for correction of clerical errors or as a result of litigation) in proceedings governed by antidumping duty orders for the purposes of establishing cash deposits in all current and future administrative reviews. In proceedings governed by antidumping findings, unless we are able to ascertain the "all others" rate from the Treasury LTFV investigation, the Department has determined that it is appropriate to adopt the "new shipper" rate established in the first final results of administrative review published by the Department (or that rate as amended for correction of clerical error or as a result of litigation) as the "all others" rate for the purposes of establishing cash deposits in all current and future administrative reviews.

Because this proceeding is governed by an antidumping duty order, the "all others" rate for the purposes of this review will be 20.47 percent, the "all others" rate established in the final notice of LTFV investigation by the Department, as amended (52 FR 45985, December 3, 1987).

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Public Comment

Parties to the proceeding may request disclosure within five days of the date of publication of this notice in the **Federal Register**, and any interested party may request a hearing within 10 days of publication. Any hearing, if requested, will be held 44 days after the date of publication, or the first workday thereafter. Case briefs and/or written comments from interested parties may be submitted not later than 30 days after the date of publication. Rebuttal briefs and rebuttals to written comments, limited to issues raised in those comments, may be filed not later than 37 days after publication. The Department will publish a notice of final results of these administrative reviews, including an analysis of issues raised in any written comments.

These administrative reviews and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1)) and § 353.22(c)(5) of the Department's regulations.

Dated: December 23, 1993.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration.

[FR Doc. 93–31953 Filed 12–29–93; 8:45 am]

BILLING CODE 3510–DS–P

[A–588–054]

Preliminary Results and Partial Termination of Antidumping Duty Administrative Reviews; Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of preliminary results and partial termination of antidumping duty administrative reviews.

SUMMARY: In response to a request by seven respondents, one unrelated importer, and the petitioner, the Department of Commerce (the Department) has conducted administrative reviews of the antidumping finding on tapered roller bearings, four inches or less in outside diameter, and components thereof, from Japan. The reviews cover 14 manufacturers/exporters of the subject merchandise to the United States generally during the periods April 1, 1979, through July 31, 1980, August 1, 1980, through July 31, 1981, August 1, 1981, through July 31, 1982, August 1, 1982, through July 31, 1983, August 1, 1983, through July 31, 1984, August 1, 1984, through July 31, 1985, and August 1, 1985, through July 31, 1986. We preliminarily applied best information available (BIA) for five of the manufacturers/exporters. In addition, we are terminating the reviews of three firms. The reviews indicate the existence of dumping margins for all periods.

As a result of these reviews, the Department has preliminarily determined to assess antidumping duties equal to the differences between United States price (USP) and foreign market value (FMV).

We invite interested parties to comment on these preliminary results.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Maureen McPhillips (Koyo), Valerie Turoscy (Toyota, Nachi-Fujikoshi, Niigata Converter, Toyosha, Suzuki, Maekawa, Sumitomo, Mitsubishi), Gabriel Adler (NSK), Lisa Raisner (Yamaha, Nissan, Mazda, MC International), Chip Hayes, or John Kugelman, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, telephone: (202) 482–5253.

SUPPLEMENTARY INFORMATION:

Background

We initiated the administrative reviews for the periods 1979–1985 on July 9, 1986 (51 FR 24883), and October 3, 1986 (51 FR 35384), and for the period 1985–1986 on September 16, 1986 (51 FR 32817), based on requests from seven respondents, one unrelated importer, and the petitioner (the Timken Company). We are now conducting these reviews in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act).

Scope of the Reviews

Imports covered by these reviews are tapered roller bearings (TRBs), four inches or less in outside diameter when assembled, including inner race or cone assemblies and outer races or cups, sold either as a unit or separately. During the review period such merchandise was classifiable under items 680.3932, 680.3934, and 680.3938 of the Tariff Schedules of the United States Annotated (TSUSA). This merchandise is currently classified under the Harmonized Tariff Schedule (HTS) item numbers 8482.20.00 and 8482.99.30. These TSUSA and HTS item numbers are provided for convenience and Customs purposes only. The written description remains dispositive.

These reviews cover TRB sales by Koyo Seiko Company, Ltd. (Koyo), for the periods 1979 through 1986, NSK Ltd. (formerly Nippon Seiko, K.K.) (NSK), for the periods 1980 through 1986, Mitsubishi Corp. (Mitsubishi), for the periods 1980 through 1985, Sumitomo Corporation (Sumitomo) for the periods 1980 through 1986, and Nachi-Fujikoshi, Niigata Converter, Toyosha, Toyota, Yamaha, Suzuki, and Maekawa Bearing Manufacturer (Maekawa) for the period 1985 through 1986. Nachi-Fujikoshi and Niigata Converter claimed no shipments during the 1985–86 period of review (POR). Consequently, for both firms we have used each firm's rate from the last prior period in which they had shipments.

Two firms, Nissan and Mazda, withdrew their review requests. In addition, the petitioner also withdrew its request for these reviews and its request for the review of MC International. Therefore, we are terminating all three reviews. We also received a statement from the petitioner consenting to termination of the review as to resale transactions to Mazda or its subsidiaries through Sumitomo. Because we never received a response to our questionnaire from Sumitomo, we are unable to terminate the Mazda portion of Sumitomo's review. Therefore, these preliminary results include Sumitomo.

United States Price

The Department used exporter's sales price (ESP) for Koyo, NSK, Toyota, and Yamaha, as defined in section 772(c) of the Tariff Act, to calculate USP. ESP was based on the packed, delivered price to unrelated purchasers in the United States. We made adjustments, where applicable, for foreign pre-sale and post-sale inland freight, air freight, ocean freight, marine insurance, export inspection fees, brokerage and handling, U.S. inland freight, U.S. duty, commissions to unrelated parties, U.S. credit, discounts, price protection, technical service expenses, warranties, rebates, packing expenses (which include inventory carrying costs, warehouse transfer expenses, advertising, and other selling expenses). No other adjustments were claimed or allowed.

Foreign Market Value

The Department used the home market price or constructed value (CV), as defined in section 773(a)(2) of the Tariff Act, to calculate FMV.

In general, the Department relies on monthly weighted-average prices in the calculation of FMV. In consideration of the significant volume of home market sales involved in these reviews, we used an average of respondents' home market sales for each review period in accordance with section 777A of the Tariff Act. To determine whether an annual average is representative of the transactions under consideration, we compared in the annual weighted-average home market price for each product with each of the 12 monthly weighted-average prices for that product during each review period. Because the weighted-average prices for each model sold by Koyo, NSK, Toyota, and Yamaha (companies for which we performed dumping calculations) during each review period did not vary meaningfully from the monthly weighted-average prices of sales, we consider the annual weighted-average prices for each review period to be representative of the transactions under consideration. (For further details, see analysis memorandum for each firm). Therefore, we calculated a single FMV for each model sold by Koyo, NSK, Toyota, and Yamaha on an annual weighted-average basis, in accordance with section 777A of the Tariff Act.

When we used home market sales as the basis of comparison, we based FMV on packed, F.O.B., ex-factory, or delivered prices to related purchasers (where an arm's-length relationship was demonstrated) and unrelated purchasers in the home market. We made adjustments, where applicable, for home market pre-sale and post-sale inland freight, credit, discounts, rebates, commissions, warranties, and differences in physical characteristics. For comparison to ESP sales, we adjusted FMV for indirect selling expenses (which include advertising, inventory carrying costs, and other selling expenses) in the home market, limiting the home market indirect selling expense deductions by the amount of indirect selling expenses

incurred in the United States. We added to FMV packing expenses incurred in Japan for U.S. sales.

Based on petitioner's allegation and a finding by the Department that there was reason to believe or suspect that sales below the cost of production (COP) were occurring in the home market, pursuant to section 773(b) of the Tariff Act, we investigated whether Koyo and NSK sold such or similar merchandise in the home market at prices below COP. We calculated COP as the sum of reported materials, labor, factory overhead, and general expenses, and compared COP to home market prices, net of price adjustments and discounts. We found below-COP sales by Koyo and NSK in each period.

In accordance with section 773(b) of the Tariff Act, in determining whether to disregard home market sales made at prices below COP, we examined whether such sales were made in substantial quantities over an extended period of time, and whether such sales were made at prices which would permit recovery of all costs within a reasonable period of time in the normal course of trade.

When less than 10 percent of the home market sales of a model in a POR were at prices below COP, we did not disregard any sales of that model for that POR. When 10 percent or more, but not more than 90 percent, of the home market sales of a particular model in a POR were determined to be below cost, we excluded the below-cost home market sales from our calculation of FMV for that POR, provided that these below-cost market sales were made over an extended period of time. When more than 90 percent of the home market sales of a particular model were made below cost over an extended period of time during a POR, we disregarded all home market sales of that model in our calculation of FMV for that POR, in accordance with section 773(a)(2) of the Tariff Act.

To determine whether sales below cost had been made over an extended period of time, we compared the number of months in which below-cost sales occurred for a particular model to the number of months during a POR in which that model was sold. If the model was sold in fewer than three months during a POR, we did not disregard below-cost sales unless there were below-cost sales of that model in each month sold. If a model was sold in three or more months in a POR, we did not disregard below-cost sales unless there were sales below cost in at least three of the months in which the model was sold during each POR. We used CV as the basis for FMV when an insufficient number of home market sales were made at prices above COP.

We calculated CV in accordance with section 773(e) of the Tariff Act. We included the cost of materials, labor, and factory overhead in our calculations. Where the actual selling, general, and administrative expenses (SG&A) were less than the statutory minimum of 10 percent of the cost of manufacture (COM), we calculated SG&A as 10 percent of the COM. Where the actual profits were less than the statutory minimum of eight percent of the cost of manufacture plus SG&A, we calculated profit as eight percent of the sum of COM plus SG&A. We adjusted the CV for selling, credit, and U.S. packing expenses.

Best Information Available

In accordance with section 776(c) of the Tariff Act, we have used BIA in cases where a party refused or was unable to produce information requested in a timely manner and in the form required. The Department generally uses a two-tiered approach in its choice of BIA. For uncooperative respondents (first tier), the Department uses the higher of: (1) The highest rate for any company from the original investigation or prior administrative review or (2) the highest rate found in the current review for any company. For respondents which attempt to cooperate (second tier), the Department uses the higher of: (1) The highest rate ever applicable to the firm for the subject merchandise or (2) the highest calculated rate in the current review for any firm (see Antifriction Bearings (Other than Tapered Roller Bearings) and Parts from France, et al., 58 FR 39729, July 26, 1993). For parties refusing to respond, the first-tier BIA rate we applied in these preliminary results is 39.6 percent, which is the highest of the rates found for any firm in the final results of an administrative review of an earlier period. This rate is the result of a court-ordered redetermination of NSK for the April 1, 1978, through July 1, 1978 period (see *Koyo, et al.*, v. *United States*, Slip. Op. 93–28, March 4, 1993). The second-tier BIA rate for parties attempting to cooperate was applied on a company-specific basis. In addition, where there were limited or small amounts of information missing, we applied partial BIA. Specific instances of our application of partial BIA are as follows:

1. Toyota—a. Purchase price sales were missing date-of-sale information.

b. Certain U.S. models had no identical home market model match and no information by which to identify a most similar model was provided.

In both instances we applied the highest calculated rate in the applicable POR to the U.S. sales, which was Koyo's rate of 63.76 percent.

2. Yamaha failed to provide adequate information by which to identify a most similar home market sale for those U.S. sales that had no identical home market model match. Therefore, for U.S. sales that did not have an identical home market model match we used the highest calculated rate in the applicable POR, which was Koyo's rate of 63.76 percent.

3. Koyo reported it has sample U.S. sales for PORs, but failed to provide any date for those sales. As BIA we used the percentage of home market sample sales reported to impute the amount and value of sample sales in the U.S. market. Following the second-tier approach to BIA, we applied the highest margin rate Koyo has received in any previous review to the imputed value of these sales and incorporated the value and the resulting margin in our weighted-average margin for each POR.

4. NSK—a. Certain identical or most similar home market models had no reported COP information.

b. Certain U.S. models lacked variable COM information for use in calculating difference-in-mechandise adjustments.

c. Certain U.S. models lacked physical criteria by which to identify a model match in the home market.

In all three cases, following the second-tier BIA methodology, we applied the highest margin NSK has received in any previous review to the sales in question.

For more information on these and other BIA applications to the above companies, see the analysis memorandum for each firm.

Preliminary Results of the Reviews

As a result of our comparison of USP to FMV, we preliminarily determine that margins exist for the periods as follows:

Manufacturer/exporter	*Percent margin*
April 1, 1979 through July 31, 1980:	
Koyo Seiko	37.53
August 1, 1980 through July 31, 1981:	
Koyo Seiko	42.26
NSK Ltd.	28.87
Mitsubishi	39.60
Sumitomo	39.60
August 1, 1981 through July 31, 1982:	
Koyo Seiko	66.06
NSK Ltd.	15.97
Mitsubishi	39.60
Sumitomo	39.60

Manufacturer/exporter	Percent margin
August 1, 1982 through July 31, 1983:	
Koyo Seiko	17.44
NSK Ltd.	9.53
Mitsubishi	39.60
Sumitomo	39.60
August 1, 1983 through July 31, 1984:	
Koyo Seiko	12.17
NSK Ltd.	15.77
Mitsubishi	39.60
Sumitomo	39.60
August 1, 1984 through July 31, 1985:	
Koyo Seiko	23.64
NSK Ltd.	6.07
Mitsubishi	39.60
Sumitomo	39.60
August 1, 1985 through July 31, 1986:	
Koyo Seiko	63.76
NSK Ltd.	36.88
Nachi-Fujikoshi	*18.70
Niigata Converter	*00.00
Toyota	5.42
Toyosha	39.60
Yamaha	22.49
Suzuki	39.60
Maekawa	39.60
Sumitomo	39.60

*No shipments during the period; rate from the last period in which there were shipments.

Interested parties may request disclosure within 5 days of the date of publication of this notice and may request a hearing within 10 days of publication. Any hearing, if requested, will be held 44 days after the date of publication or the first business day thereafter. Case briefs and/or written comments from interested parties may be submitted no later than 30 days after the date of publication. Rebuttal briefs and rebuttals to written comments, limited to issues raised in those comments, may be filed not later than 37 days after the date of publication of this notice. The Department will publish the final results of these administrative reviews including the results of its analysis of issues raised in any such written comments or at a hearing.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between the USP and FMV may vary from the percentages stated above. The Department will issue appraisement instructions on each exporter directly to the Customs Service.

Furthermore, the following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of these administrative reviews, as provided for by section 751(a)(1) of the Tariff Act.

(1) All exports of subject merchandise by firms covered in these reviews will be subject to cash deposit rates as follows:

a. For Koyo, NSK, and Nachi-Fujikoshi, see the final results of the 1991–1992 review issued December 9, 1993,

b. For Toyota, see the final results for the 1986–1987 period (55 FR 38720, September 20, 1990), and

c. For those firms that have not been covered in subsequent reviews, the cash deposit rates will be those rates established in the final results of the 1985–1986 review.

(2) For previously reviewed or investigated companies not listed in this notice and not reviewed in subsequent periods, the cash deposit rate will continue to be the company-specific rate published for the most recent period;

(3) If the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and

(4) If neither the exporter nor the manufacturer is a firm covered in this or any previous review conducted by the Department, the cash deposit rate will be the "new shipper" rate established in the first review conducted by the Department in which a "new shipper" rate was established, as discussed below.

On May 25, 1993, the Court of International Trade (CIT) in *Floral Trade Council* v. *United States,* Slip Op. 93–79, and *Federal-Mogul Corporation and the Torrington Company* v. *United States,* Slip Op. 93–83, decided that once an "all others" rate is established for a company, it can only be changed through an administrative review. The Department has determi[illegible]hat in order to implement the [illegible]ions, it is appropriate to reinstate [illegible]l others" rate from the LTFV investigation (or that rate as amended for correction of clerical errors or as a result of litigation) in proceedings governed by antidumping duty orders.

In proceedings governed by antidumping findings, unless we are able to ascertain the "all others" rate from the Treasury LTFV investigation, the Department has determined that it is appropriate to adopt the "new shipper" rate established in the first final results of administrative review published by the Department (or that rate as amended for correction of clerical errors as a result of litigation) as the "all others" rate for the purposes of establishing cash deposits in all current and future administrative reviews.

Because this proceeding is governed by an antidumping finding, and we are unable to ascertain the "all others" rate from the Treasury LTFV investigation, the "all others" rate for the purpose of this review would normally be the "new shipper" rate established in the first notice of final results of administrative review published by the Department (47 FR 25757, June 15, 1982). However, a "new shipper" rate was not established in that notice. Therefore, we are using the "all others" rate of 18.07 percent from Tapered Roller Bearings and Certain Components Thereof from Japan, Final Results of Administrative Review of Antidumping Finding, 49 FR 8976 (March 9, 1984), the first review conducted by the Department in which a "new shipper" rate was established.

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during these review periods. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

These administrative reviews and this notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22(c).

Dated: December 23, 1993.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration.

[FR Doc. 93–31954 Filed 12–29–93; 8:45 am]

BILLING CODE 3510–DS–M

[A–588–802]

3.5 Inch Microdisks and Coated Media Thereof From Japan; Preliminary Results of Antidumping Duty Administrative Review

AGENCY: Import Administration/ International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of antidumping duty administrative review.

SUMMARY: In response to requests from one respondent, Hitachi Maxell, Ltd. (HML), the Department of Commerce (the Department) has conducted an administrative review of the antidumping duty order on 3.5 inch

microdisks and coated media thereof (microdisks) from Japan. The review covers one manufacturer/exporter of this merchandise to the United States, HML, and the period April 1, 1992, through March 31, 1993.

Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Arthur N. DuBois or Thomas F. Futtner, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, telephone: (202) 482–6312/3814.

SUPPLEMENTARY INFORMATION

Background

On April 30, 1993, the Department published a notice of "Opportunity to Request an Administrative Review" (57 FR 11934) of the antidumping duty order on microdisks from Japan (54 FR 13406, April 3, 1989). On April 30, 1993, one respondent, HML, requested an administrative review. We initiated the review, covering April 1, 1992, through March 31, 1993, on May 27, 1993 (58 FR 30767). The Department has now conducted this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act).

Scope of the Review

Imports covered by the review are shipments of 3.5 inch microdisks and coated media thereof from Japan, currently classifiable under Harmonized Tariff Schedule (HTS) item number 8523.20.0000. The HTS item number is provided for convenience and for Customs purposes. The written descriptions remain dispositive.

A 3.5 inch microdisk is a tested or untested magnetically coated polyester disk with a steel hub encased in a hard plastic jacket. These microdisks are used to record and store encoded digital computer information for access by a 3.5 inch floppy disk drive. The 3.5 inch microdisk includes single-sided, double-sided, or high-density formats.

Coated media is the flexible recording material used in the finished microdisk. Media consists of a polyester base film to which a coating of magnetically charged particles is bonded. The 3.5 inch microdisk is intended for use specifically in a 3.5 inch floppy disk drive.

The review covers one Japanese manufacturer/exporter of this merchandise to the United States, HML, and the period April 1, 1992, through March 31, 1993.

Such or Similar Comparisons

Pursuant to section 771(16) of the Tariff Act, we established two categories of "such or similar" merchandise: (1) 3.5 inch microdisks and (2) coated media.

In order to determine whether there were sufficient sales of microdisks and coated media in the home market to serve as the basis for calculating foreign market value (FMV), we compared the volume of home market sales within the such or similar category to the volume of third-country sales within each respective such or similar category, in accordance with section 773(a)(1)(B) of the Tariff Act.

HML had sufficient home market sales of 3.5 inch microdisks to serve as a basis for calculating FMV for microdisks.

There were no sales of coated media in the home market or in any third country during the period of review (POR). Therefore, the basis of FMV for coated media sales to the United States is constructed value (CV).

United States Price

We calculated the United States price (USP) based on exporter's sales price (ESP) in accordance with section 772(c) of the Tariff Act.

We calculated ESP based on packed, delivered prices to unrelated customers in the United States. We made deductions, where appropriate, for foreign brokerage and handling, foreign inland freight, ocean freight, marine insurance, U.S. duty, U.S. inland freight, U.S. inland insurance, discounts, rebates, credit expenses, advertising, and U.S. brokerage and handling. We also made deductions for commissions and indirect selling expenses, including inventory carrying costs, and indirect selling expenses associated with U.S. sales that were incurred in Japan.

For microdisks manufactured in the United St[illegible]om Japanese coated media, w[illegible]ted from the selling price of t[illegible]rodisks all value added in the United States, pursuant to section 772(e)(3) of the Tariff Act. The "residual value" constitutes USP for the imported coated media. The added value consists of the cost associated with the production and sale of the complete microdisk, other than the cost associated with the imported media, and a proportional amount of profit or loss related to the added value. Profit or loss was calculated by deducting from the sales price of the microdisk all production and selling cost incurred by the company for the microdisk. The total profit or loss was then allocated proportionately to all components of cost.

In determining the cost incurred to produce the microdisks in the United States, the Department included (1) the cost of manufacture (COM), (2) movement and packing expenses, and (3) administrative expenses, R&D expenses, and interest expenses.

Foreign Market Value

We calculated FMV based on home market sales prices or CV in accordance with section 773 of the Tariff Act.

Microdisks

For comparison to U.S. ESP sales of microdisks we based FMV on packed, delivered prices of identical merchandise in the home market. We made deductions, where appropriate, for brokerage and handling, foreign inland freight, selling expenses, indirect selling expenses, packing, discounts, inventory carrying costs, and imputed credit.

The deduction for indirect selling expenses was capped by the amount of indirect selling expenses incurred in the U.S. market, in accordance with section 353.56(b) of the Department's regulations. We added U.S. packing costs to the FMV in accordance with section 773 of the Tariff Act.

Coated Media

All coated media entered during the POR was further manufactured by Maxell Corporation of America into microdisks. There were no sales of coated media in the home market or in any third country during the POR. Therefore, for coated media sold in the United States for further manufacture, we calculated FMV based on CV, in accordance with sections 773(a)(2) and 773(e) of the Tariff Act. The CV includes the cost of materials and fabrication of the merchandise exported to the United States, plus general expenses, profit, and packing.

We used actual general expenses in accordance with section 773(e)(1)(B)(i) of the Tariff Act, because these expenses exceeded the statutory minimum of 10 percent. For profit, we applied eight percent of the combined cost of materials, fabrication, and general expenses, pursuant to section 773(e)(1)(B)(ii) of the Tariff Act, because the actual amount was less than the statutory minimum of eight percent. Then we added U.S. packing costs to FMV.

Preliminary Results of the Review

As a result of this review, we preliminarily determine that the

following margin exists for the period April 1, 1992 through March 31, 1993:

Manufacturer/Producer/Exporter	Margin (Percent)
Hitachi Maxell Ltd.	0.98

Case briefs and/or written comments from interested parties may be submitted no later than 30 days after the date of publication of this notice. Rebuttal briefs and rebuttals to written comments, limited to issues raised in the case briefs and comments, may be filed not later than 37 days after the date of publication of this notice.

Within 10 days of the date of publication of this notice, interested parties to this proceeding may request a disclosure and/or a hearing. The hearing, if requested, will take place not later than 44 days after publication of this notice. Persons interested in attending the hearing should contact the Department for the date and time of the hearing.

The Department will subsequently publish the final results of this administrative review, including the results of its analysis of issues raised in any such written comments or a hearing.

The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. Individual differences between USP and FMV may vary from the percentage stated above. The Department will issue appropriate appraisement instructions directly to the Customs Service upon completion of this review.

Furthermore, the following deposit requirements will be effective upon publication of our final results of review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after that publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Tariff Act: (1) The cash deposit rate for the reviewed company will be the rate established in the final results of this review; (2) for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters shall be 42.95 percent. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

On March 25, 1993, the Court of International Trade (CIT), in *Floral Trade Council* v. *United States*, Slip Op. 93–79, and *Federal-Mogul Corporation* v. *United States*, Slip Op. 93–83, decided that once an "all others" rate is established for a company, it can only be changed through an administrative review. The Department has determined that in order to implement these decisions, it is appropriate to reinstate the original "all others" rate from the LTFV investigation (or that rate as amended for correction of clerical errors or as a result of litigation) in a proceeding governed by an antidumping duty order.

Because this proceeding is governed by an antidumping duty order, the "all others" rate for the purposes of this review will be 42.95 percent, the "all others" rate established in the LTFV investigation (54 FR 13406, April 3, 1989).

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act and 19 CFR 353.22.

Dated: December 23, 1993.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration.

[FR Doc. 93–31949 Filed 12–29–93; 8:45 am]

BILLING CODE 3510–DS–M

Annual Listing of Foreign Government Subsidies on Articles of Quota Cheese

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Publication of annual listing of foreign government subsidies on articles of quota cheese.

SUMMARY: The Department of Commerce, in consultation with the Secretary of Agriculture, has prepared its annual list of foreign government subsidies on articles of quota cheese. We are publishing the current listing of those subsidies that we have determined exist.

EFFECTIVE DATE: January 1, 1994.

FOR FURTHER INFORMATION CONTACT: Karn Goff or Patricia W. Stroup, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230, telephone: (202) 482–0983 or 482–3691.

SUPPLEMENTARY INFORMATION: Section 702(a) of the Trade Agreements Act of 1979 ("the TAA") requires the Department of Commerce ("the Department") to determine, in consultation with the Secretary of Agriculture, whether any foreign government is providing a subsidy with respect to any article of quota cheese, as defined in section 701(c)(1) of the TAA, and to publish an annual list and quarterly updates of the type and amount of those subsidies.

The Department has developed, in consultation with the Secretary of Agriculture, information on subsidies (as defined in section 702(h)(2) of the TAA) being provided either directly or indirectly by foreign governments on articles of quota cheese. The appendix to this notice lists the country, the subsidy program or programs, and the gross and net amount of each subsidy on which information is currently available.

The Department will incorporate additional programs which are found to constitute subsidies, and additional information on the subsidy programs listed, as the information is developed.

The Department encourages any person having information on foreign government subsidy programs which benefit articles of quota cheese to submit such information in writing to the Assistant Secretary for Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

This determination and notice are in accordance with section 702(a) of the TAA.

Dated: December 23, 1993.

Barbara R. Stafford,

Acting Assistant Secretary for Import Administration.

APPENDIX—QUOTA CHEESE SUBSIDY PROGRAMS

Country	Program(s)	Gross[1] subsidy	Net[2] subsidy
Belgium	European Community (EC) Restitution Payments	39.2¢/lb.	39.2¢/lb.
Canada	Export Assistance on Certain Types of Cheese	26.1¢/lb.	26.1¢/lb.
Denmark	EC Restitution Payments	56.0¢/lb.	56.0¢/lb.
Finland	Export Subsidy	90.1¢/lb.	90.1¢/lb.
France	EC Restitution Payments	57.5¢/lb.	57.5¢/lb.
Germany	EC Restitution Payments	61.3¢/lb.	61.3¢/lb.
Greece	EC Restitution Payments	0.0¢/lb.	0.0¢/lb.
Ireland	EC Restitution Payments	60.9¢/lb.	60.9¢/lb.
Italy	EC Restitution Payments	85.5¢lb.	85.5¢/lb.
Luxembourg	EC Restitution Payments	39.2¢/lb.	39.2¢/lb.
Netherlands	EC Restitution Payments	42.1¢/lb.	42.1¢/lb.
Norway	Indirect (Milk) Subsidy	17.1¢/lb.	17.1¢/lb.
	Consumer Subsidy	38.0¢/lb.	38.0¢/lb.
		55.1¢/lb.	55.1¢/lb.
Portugal	EC Restitution Payments	40.0¢/lb.	40.0¢/lb.
Spain	EC Restitution Payments	44.9¢/lb.	44.9¢/lb.
Switzerland	Deficiency Payments	151.2¢/lb.	151.2¢/lb.
U.K.	EC Restitution Payments	40.7¢/lb.	40.7¢/lb.

[1] Defined in 19 U.S.C. 1677(5).
[2] Defined in 19 U.S.C. 1677(6).

[FR Doc. 93-31961 Filed 12-29-93; 8:45 am]
BILLING CODE 3510-DS-P

[C-357-052]

Non-Rubber Footwear From Argentina; Intent To Revoke Countervailing Duty Order

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of intent to revoke countervailing duty order.

SUMMARY: The Department of Commerce is notifying the public of its intent to revoke the countervailing duty order on non-rubber footwear from Argentina. Domestic interested parties who object to this revocation must submit their comments in writing not later than 30 days from the publication date of this notice.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Patricia W. Stroup or Lorenza Olivas, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202)482-0983 or 482-2786.

SUPPLEMENTARY INFORMATION:

Background

On January 17, 1979, the Treasury Department published a countervailing duty order on non-rubber footwear from Argentina (44 FR 3474). The Department of Commerce (the Department) has not received a request to conduct an administrative review of this countervailing duty order for at least four consecutive annual anniversary months.

In accordance with 19 CFR 355.25(d)(4)(iii), the Secretary of Commerce will conclude that an order is no longer of interest to interested parties and will revoke the order if no domestic interested party objects to revocation or no interested party requests an administrative review by the last day of the fifth anniversary month. Accordingly, as required by § 355.25(d)(4) of the Department's regulations, we are notifying the public of our intent to revoke this order.

Opportunity To Object

Not later than 30 days after the publication date of this notice, domestic interested parties, as defined in § 355.2 (i)(3), (i)(4), (i)(5), and (i)(6) of the Department's regulations, may object to the Department's intent to revoke this countervailing duty order.

Seven copies of any such objections should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, room B-099, U.S. Department of Commerce, Washington, DC 20230.

If no interested parties request an administrative review (pursuant to the Department's notice of opportunity to request administrative review), or if no domestic interested parties object to the Department's intent to revoke pursuant to this notice, we shall conclude that the order is no longer of interest to interested parties and shall proceed with the revocation.

This notice is in accordance with 19 CFR 355.25(d)(4)(i).

Dated: December 23, 1993.

Roland L. MacDonald,

Acting Deputy Assistant Secretary for Compliance.

[FR Doc. 93-31955 Filed 12-29-93; 8:45 am]
BILLING CODE 3510-DS-P

[C-580-602]

Certain Stainless Steel Cooking Ware From the Republic of Korea; Intent to Revoke Countervailing Duty Order

AGENCY: International Trade Administration/Import Administration Department of Commerce.

ACTION: Notice of intent to revoke countervailing duty order.

SUMMARY: The Department of Commerce is notifying the public of its intent to revoke the countervailing duty order on certain stainless steel cooking ware from the Republic of Korea. Domestic interested parties who object to this revocation must submit their comments in writing not later than 30 days from the publication date of this notice.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Patricia W. Stroup or David Mason, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202)482-0983 or 482-2786.

SUPPLEMENTARY INFORMATION:

Background

On January 20, 1987, the Department of Commerce (the Department) published a countervailing duty order on certain stainless steel cooking ware

from the Republic of Korea (52 FR 2140). The Department has not received a request to conduct an administrative review of this countervailing duty order for at least four consecutive annual anniversary months.

In accordance with 19 CFR 355.25(d)(4)(iii), the Secretary of Commerce will conclude that an order is no longer of interest to interested parties and will revoke the order if no domestic interested party objects to revocation or no interested party requests an administrative review by the last day of the fifth anniversary month. Accordingly, as required by section 355.25(d)(4) of the Department's regulations, we are notifying the public of our intent to revoke this order.

Opportunity to Object

Not later than 30 days after the publication date of this notice, domestic interested parties, as defined in section 355.2(i)(3), (i)(4), (i)(5), and (i)(6) of the Department's regulations, may object to the Department's intent to revoke this countervailing duty order.

Seven copies of any such objections should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, room B-099, U.S. Department of Commerce, Washington, DC 20230.

If no interested parties request an administrative review (pursuant to the Department's notice of opportunity to request administrative review), or if no domestic interested parties object to the Department's intent to revoke pursuant to this notice, we shall conclude that the order is no longer of interest to interested parties and shall proceed with the revocation.

This notice is in accordance with 19 CFR 355.25(d)(4)(i).

Dated: December 23, 1993.

Roland L. MacDonald,

Acting Deputy Assistant Secretary for Compliance.

[FR Doc. 93-3510 Filed 12-29; 8:45 am]

BILLING CODE 3510-DS-P

[C-469-004]

Stainless Steel Wire Rod From Spain; Intent to Revoke Countervailing Duty Order

AGENCY: International Trade Administration/Import Administration, Department of Commerce

ACTION: Notice of intent to revoke countervailing duty order

SUMMARY: The Department of Commerce is notifying the public of its intent to revoke the countervailing duty order on stainless steel wire rod from Spain. Domestic interested parties who object to this revocation must submit their comments in writing not later than 30 days from the publication date of this notice.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Patricia W. Stroup or Maria MacKay, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 482-0983 or 482-2786.

SUPPLEMENTARY INFORMATION:

Background

On January 3, 1983, the Department of Commerce (the Department) published a countervailing duty order on stainless steel wire rod from Spain (52 FR 52). The Department has not received a request to conduct an administrative review of this countervailing duty order for at least four consecutive annual anniversary months.

In accordance with 19 CFR 355.25(d)(4)(iii), the Secretary of Commerce will conclude that an order is no longer of interest to interested parties and will revoke the order if no domestic interested party objects to revocation or no interested party requests an administrative review by the last day of the fifth anniversary month. Accordingly, as required by § 355.25(d)(4) of the Department's regulations, we are notifying the public of our intent to revoke this order.

Opportunity To Object

Not later than 30 days after the publication date of this notice, domestic interested parties, as defined in § 355.2(i)(3), (i)(4), (i)(5), and (i)(6) of the Department's regulations, may object to the Department's intent to revoke this countervailing duty order.

Seven copies of any such objections should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, room B-099, U.S. Department of Commerce, Washington, DC 20230.

If no interested parties request an administrative review (pursuant to the Department's notice of opportunity to request administrative review), or if no domestic interested parties object to the Department's intent to revoke pursuant to this notice, we shall conclude that the order is no longer of interest to interested parties and shall proceed with the revocation.

This notice is in accordance with 19 CFR 355.25(d)(4)(i).

Dated: December 23, 1993.

Roland L. MacDonald,

Acting Deputy Assistant Secretary for Compliance.

[FR Doc. 93-31958 Filed 12-29-93; 8:45 am]

BILLING CODE 3510-DS-P

[C-583-604]

Certain Stainless Steel Cooking Ware From Taiwan; Intent To Revoke Countervailing Duty Order

AGENCY: International Trade Administration/Import Administration Department of Commerce.

ACTION: Notice of intent to revoke countervailing duty order.

SUMMARY: The Department of Commerce is notifying the public of its intent to revoke the countervailing duty order on stainless steel cooking ware from Taiwan. Domestic interested parties who object to this revocation must submit their comments in writing not later than 30 days from the publication date of this notice.

EFFECTIVE DATE: December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Patricia W. Stroup or Alexander Braier, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 482-0983 or 482-2786.

SUPPLEMENTARY INFORMATION:

Background

On January 20, 1987, the Department of Commerce (the Department) published a countervailing duty order on stainless steel cooking ware from Taiwan (52 FR 2141). The Department has not received a request to conduct an administrative review of this countervailing duty order for at least four consecutive annual anniversary months.

In accordance with 19 CFR 355.25(d)(4)(iii), the Secretary of Commerce will conclude that an order is no longer of interest to interested parties and will revoke the order if no domestic interested party objects to revocation or no interested party requests an administrative review by the last day of the fifth anniversary month. Accordingly, as required by § 355.25(d)(4) of the Department's regulations, we are notifying the public of our intent to revoke this order.

Opportunity To Object

Not later than 30 days after the publication date of this notice, domestic interested parties, as defined in § 355.2(i)(3), (i)(4), (i)(5), and (i)(6) of the

Department's regulations, may object to the Department's intent to revoke this countervailing duty order.

Seven copies of any such objections should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, room B-099, U.S. Department of Commerce, Washington, DC 20230.

If no interested parties request an administrative review (pursuant to the Department's notice of opportunity to request administrative review), or if no domestic interested parties object to the Department's intent to revoke pursuant to this notice, we shall conclude that the order is no longer of interest to interested parties and shall proceed with the revocation.

This notice is in accordance with 19 CFR 355.25(d)(4)(i).

Dated: December 23, 1993.

Holly A. Kuga,

Acting Deputy Assistant Secretary for Compliance.

[FR Doc. 93-31957 Filed 12-29-93; 8:45 am]

BILLING CODE 3510-DS-P

United States-Canada Free-Trade Agreement, Article 1904 Binational Panel Reviews; Decision of Panel

AGENCY: United States-Canada Free-Trade Agreement, Binational Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of decision of Panel.

SUMMARY: On December 14, 1993, the Binational Panel issued its decision in the review of the Final Affirmative Countervailing Duty Determination on Remand made by the Department of Commerce, International Trade Administration, Import Administration, respecting Pure Magnesium and Alloy Magnesium from Canada, Secretariat File No. USA-92-1904-03. A copy of the complete panel decision is available from the Binational Secretariat.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, United States Secretary, Binational Secretariat, suite 2061, 14th and Constitution Avenue, Washington, DC 20230, (202) 377-5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the United States-Canada Free-Trade Agreement ("Agreement") establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from the other country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1989, the Government of the United States and the Government of Canada established Rules of Procedure for Article 1904 Binational Panel Reviews ("Rules"). These Rules were published in the **Federal Register** on December 30, 1988 (53 FR 53212). The Rules were amended by Amendments to the Rules of Procedure for Article 1904 Binational Panel Reviews, published in the **Federal Register** on December 27, 1989 (54 FR 53165). The Rules were further amended and a consolidated version of the amended Rules was published in the **Federal Register** on June 15, 1992 (57 FR 26698). The panel review in this matter was conducted in accordance with these Rules.

Background

On July 13, 1992, the Department of Commerce published its final determination which concluded that countervailable benefits had been provided by two programs, the Quebec Industrial Development Program (SDI) and an exemption for Norsk Hydro Canada Inc. from payment of water bills. A final countervailing duty of 21.61 percent was calculated. Panel review under Article 1904 of the Agreement was requested on August 10, 1992 by the Government of Quebec.

On August 16, 1993, the Binational Panel remanded the final determination to the Department of Commerce for action not inconsistent with the Panel's decision as follows:

Commerce must reconsider the exercise of its statutory discretion as to whether its disproportionality analysis should be conducted on an enterprise or industry basis, and provide the Panel a cogent explanation why it has exercised its discretion in a given manner; and

Concerning the appropriate allocation period for grants given to Norsk Hydro for the purchase of pollution control equipment, Commerce must consider the IRS tables and the producer records, in a manner that satisfies the standard articulated in the *IPSCO* case of "an allocation period which will accurately reflect the commercial and competitive benefit received by the plaintiffs in this case," and must provide a satisfactory explanation for its reasoning in support of whatever decision it reaches.

The Binational Panel instructed Commerce to provide its determination on remand within 30 days of the panel decision (by September 15, 1993).

Panel Decision

The Panel hereby remanded the following portions of the final determination to the Department of Commerce for further action as follows:

1. That part of Commerce's determination where it conducted the disproportionality analysis on an enterprise-by-enterprise basis rather than by an industry-by-industry basis for reconsideration of the exercise of its statutory discretion as to whether the disproportionality analysis should be conducted on an enterprise or industry basis, and to provide to the Panel a cogent explanation why it has exercised its discretion in a given manner; and

2. That part of Commerce's determination concerning the appropriate allocation period for grants given to Norsk for the purchase of pollution control equipment with directions to consider the IRS tables and the producers records, in a manner that satisfies the standard articulated in the *IPSCO* case of "an allocation period which will accurately reflect the commercial and competitive benefit received by the plaintiffs in this case," and with further directions to provide a satisfactory explanation for its reasoning in support of whatever decision it reaches.

The Panel affirmed Commerce's determination in all other respects. The Panel directed Commerce to provide the results of the remand within thirty (30) days of the date of the decision (by January 13, 1994).

Dated: December 27, 1993.

Caratina L. Alston,

Deputy U.S. Secretary, FTA Binational Secretariat.

[FR Doc. 93-31959 Filed 12-29-93; 8:45 am]

BILLING CODE 3510-GT-M

United States-Canada Free-Trade Agreement, Article 1904 Binational Panel Reviews; Decision of Panel

AGENCY: United States-Canada Free-Trade Agreement, Binational Secretariat, United States Section, International Trade Administration, Department of Commerce.

ACTION: Notice of decision of Panel.

SUMMARY: By a decision dated December 17, 1993, the Binational Panel remanded the final affirmative countervailing duty determination on remand made by the U.S. Department of Commerce, International Trade Administration respecting Certain Softwood Lumber Products from Canada (Secretariat File

No. USA–92–1904–01). A copy of the complete panel decision is available from the Binational Secretariat.

FOR FURTHER INFORMATION CONTACT: James R. Holbein, United States Secretary, Binational Secretariat, suite 2061, 14th and Constitution Avenue, Washington, DC 20230, (202) 482–5438.

SUPPLEMENTARY INFORMATION: Chapter 19 of the United States-Canada Free-Trade Agreement ("Agreement") establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from the other country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.

Under Article 1904 of the Agreement, which came into force on January 1, 1989, the Government of the United States and the Government of Canada established Rules of Procedure for Article 1904 Binational Panel Reviews ("Rules"). These Rules were published in the **Federal Register** on December 30, 1988 (53 FR 53212). The Rules were amended by Amendments to the Rules of Procedure for Article 1904 Binational Panel Reviews, published in the **Federal Register** on December 27, 1989 (54 FR 53165). The Rules were further amended and a consolidated version of the amended Rules was published in the **Federal Register** on June 15, 1992 (57 FR 26698). The panel review in this matter was conducted in accordance with these Rules.

Background

On May 6, 1993, the Binational Panel reviewing this matter affirmed in part and remanded in part the final affirmative countervailing duty determination issued by the U.S. Department of Commerce ("Commerce") on May 28, 1992. On the remand the Panel ordered that Commerce:

(a) With regard to provincial stumpage programs;

(1) Undertake an express evaluation of weighing of all four factors enunciated in its Proposed Regulations, as well as any other factors relevant to de facto specificity and;

(2) Consider whether or not the provincial programs could and did have a distorting effect on the operation of normal competitive markets before concluding that these governmental policies involve the type of "preferential" pricing that constitutes a countervailable subsidy within the meaning of the Tariff Act, and a review of all the evidence regarding the natural resource market for standing timber in light of the legal principles formulated in the decision;

(b) With regard to log export restrictions (LERs):

(1) Review the record and establish whether the log export restrictions are de jure specific or de facto specific and;

(2) Clarify the meaning of the applicable legal standard for a countervailable subsidy and demonstrate that the standard was met by substantial evidence on the record;

(c) Consider the exclusion request of two Quebec companies, Les Industries Maibec and Materiaux Blanchet; and

(d) Provide further information as to the participation of a former employee of the Coalition for Fair Lumber Imports in the investigation and final determination.

Two of the panelists would have found log exports restrictions not to be countervailable and therefore dissented from the findings of the majority on log export restrictions. In light of their position on this issue, these panelists did not take a position on the following findings concerning certain calculation issues, in which Commerce was directed by the majority of the panel on remand:

(a) To consider whether the areas in British Columbia that Commerce relied upon to calculate the benefit should be expanded;

(b) To recalculate the domestic log prices for the border interior using the log Purchase Price Index;

(c) To determine a species/grade adjustment for logs from the interior of British Columbia supported by substantial evidence on the record;

(d) To expressly consider which of the Margolick-Uhler elasticities assumptions for supply and demand Commerce will adopt for purposes of calculating the equilibrium price factor;

(e) To reconsider the economic adjustment made to export price; and

(f) To either recalculate the export cost adjustment to include the diminished value of the falldown sort or to adopt a within-grade adjustment.

Commerce issued its Determination on Remand on September 17, 1993, in which it affirmed its previous affirmative determinations concerning both stumpage and LERs, and increased the applicable country wide rate from 6.51% to 11.54% ad valorem.

Panel Decision

The Panel's consideration of Commerce's Determination on Remand, in light of the Parties' submissions and the record evidence, led to differing conclusions. The majority of the Panelists concluded as follows

1. Commerce's determination on remand failed to provide a rational basis for its conclusion that provincial stumpage programs are specific, in accordance with the record evidence and existing U.S. law. The Majority remanded this question back to Commerce for a determination that the provincial stumpage programs are not provided to a specific enterprise or industry, or group of enterprises or industries, within the meaning of 19 U.S.C. 1677(5).

2. Commerce's finding that provincial stumpage programs distort the normal competitive markets for softwood lumber was not supported by substantial evidence on the record. The majority remanded this question back to Commerce for a determination that provincial stumpage programs do not distort the normal competitive markets for softwood lumber and therefore are not countervailable.

3. Commerce's determination on remand failed to establish on the record evidence that B.C.'s LERs benefit a specific enterprise or industry or group of enterprises or industries in accordance with U.S. law, both in Commerce's misreliance on its stumpage specificity analysis and on its failure to analyze the range of industries which actually purchase logs. The majority remanded this matter back to Commerce for a finding of non-specificity with respect to log export restrictions.

4. Commerce's determination on remand satisfied the remand instructions set out in the Panel's decision of May 6, 1993 regarding the establishment of a direct and discernible effect between B.C.'s LERs and B.C. log prices. As a result, four of the Panelists affirmed the agency's determination that B.C. LERs confer a benefit which, if specific, would be countervailable.

The Panel also considered Commerce's response for information concerning the participation of Dr. Lange in the *Lumber III* investigation, and concluded that no violation of U.S. due process law was established. The Panel would also, absent the majority finding, have directed that Commerce exclude from its investigation two Québec companies, Les Industries Maibec and Matériaux Blanchet.

Two panelists concurred in the decision of the majority of the Panel with regard to Dr. Lange and the propriety of directing Commerce to exclude Les Industries Maibec and Materiaux Blanchet, the majority's

conclusion that B.C. log export restrictions (LERs) do confer a subsidy to B.C. lumber manufacturers and in particular sections of the majority opinion as addressed in the body of the dissent. The two panelists dissented from the majority's decision with regard to specificity and preferentiality in various Canadian stumpage programs and with regard to specificity in LERs. The dissenters also considered a number of calculation issues which the majority did not reach.

Dated: December 27, 1993.

James R. Holbein,

United States Secretary, FTA Binational Secretariat.

[FR Doc. 93-31960 Filed 12-29-93; 8:45 am]

BILLING CODE 3510-GT-M

National Institute of Standards and Technology

[Docket No. 931062-3262]

Grant Funds—Materials Science and Engineering Laboratory

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The purpose of this notice is to inform potential applicants that the Materials Science and Engineering Laboratory, National Institute of Standards and Technology (NIST), is continuing its program for grants and cooperative agreements in the following fields of research: Ceramics, Metallurgy, Polymer Sciences, Neutron Scattering Research and Spectroscopy. Each applicant must submit one signed original and two copies of each proposal along with a Grant Application, (Standard Form 424 REV. 4/88), as referenced under the provisions of OMB Circular A-110 and 15 CFR part 24.

DATES: Applications will be received through September 30, 1994. Applicants should allow up to 120 days processing time.

ADDRESSES: Applications should be submitted to The National Institute of Standards and Technology, Materials Science and Engineering Laboratory, Building 223, room B344, Gaithersburg, Maryland 20899; Attention: Patty Salpino. Each application package should be clearly marked to identify the field of research.

FOR FURTHER INFORMATION CONTACT: Technical inquiries should be directed to the following Program Managers: George Birnbaum—(301) 975-5727 [Office of Intelligent Processing Materials], Mr. Sandy Dapkunas—(301) 975-6119 [Ceramics Division], Bruno Fanconi—(301) 975-6762 [Polymers Division], John Manning—(301) 975-6157 [Metallurgy Division—transformations, phases, microstructure and kinetic processes in metals and their alloys], Leonard Mordfin—(301) 975-6168 [Metallurgy Division—sensors for analytical models for metallurgical processes], Richard Ricker—(301) 975-6023 [Metallurgy Division—degradation of materials in their service environment, John Rush—(301) 976-6220 [Reactor Radiation Division]. Inquiries should be general in nature. Specific inquiries as to a laboratory's needs, the usefulness or merit of any particular project, or other inquiries with the potential to provide any competitive advantage to an applicant are not acceptable.

SUPPLEMENTARY INFORMATION: Academic institutions, non-Federal agencies, independent and industrial laboratories are eligible to apply. As authorized 15 U.S.C. 272 (b)(6) and (c)(16), the Materials Science and Engineering Laboratory conducts a basic and applied research program directly and through grants and cooperative agreements to eligible recipients. Approximately $500,000 will be available to support grants and cooperative agreements under this program. The Materials Science and Engineering Laboratory Grants Program is limited to innovative ideas generated by the proposal writer on what research will be performed and how. Grants awarded under the MSEL program will generally provide financial assistance to the recipient without substantial NIST involvement in the projects. Cooperative agreements awarded for MSEL projects will generally involve a close working relationship between a group of NIST experts and the recipient. However, any financial assistance whether for grants or cooperative agreements, will be provided on a yearly basis.

Catalog of Federal Domestic Assistance No. 11.609 "Measurement and Engineering Research Standards."

Program Objectives

All proposals submitted must be in accordance with the program objectives listed below. The appropriate Program Manager for each field of research may be contacted for clarification of the program objectives.

I. Office of Intelligent Processing of Materials, 851—The primary objective is to measure the far infrared (FIR) and mid-infrared continuum absorption of primarily nonpolar gases and liquids found in the atmospheres of the outer planets, in particular, gaseous and liquid CH4, and gaseous mixtures of N2 and CH4, and to analyze these data.

II. Ceramics Division, 852—The primary objective is to supplement division activities in the area of ceramic processing, tribology, composites, machining, interfacial chemistry, and microstructural analysis.

III. Polymers Division, 854—The primary objective is to support the synthesis of polymers for research purposes, and collaborative research efforts in which the contractor provides mechanical, electrical, optical, transport, or structure data on polymeric materials.

IV. Metallurgy Division, 855—The primary objective is to develop techniques to predict, measure and control transformations, phases, microstructure and kinetic processes in metals and their alloys.

V. Metallurgy Division, 855—The primary objective is to develop new and improved sensors and analytical models for metallurgical processes in order to facilitate the development and adoption of intelligent processing systems for materials.

VI. Metallurgy Division, 855—The primary objective is to develop techniques to predict, measure and control the degradation of materials in their service environment.

VII. Reactor Radiation Division, 856—The primary objective is to develop cold and thermal neutron research approaches and related physics and materials applications.

Proposal Review Process

Proposals will be reviewed by a panel of individuals knowledgeable about the particular scientific area described above that the proposal addresses. Both the technical value of a proposal and the relationship of the work proposed to the needs of the specific NIST program will be taken into consideration.

Evaluation Criteria

The criteria to be used in evaluating the proposal include: Rationality (coherence of approach, relation to scientific/technical issues), Qualifications of Technical Personnel, Resources Availability, and Technical Merit of Contribution. Each of these factors will be given equal weight in the evaluation process.

Selection Procedures

The chief of each division will make the final award selection, taking into account the score received by the applicant and the compatibility of the applicant's proposal with the needs of the particular division that the proposal addresses. Award will not necessarily

be made to the highest-scored applicants.

Paperwork Reduction Act

The Standard Form 424 and Standard Form LLL mentioned in this notice are subject to the requirements of the Paperwork Reduction Act and have been approved by OMB under Control Numbers 0348–0043 and 0348–0046.

Additional Requirements

All primary applicants must submit a completed form CD–511, "Certifications Regarding Debarment, Suspension and other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying," and the following explanations must be provided:

1. Nonprocurement Debarment and Suspension

Prospective participants (as defined at 15 CFR part 26, section 105) are subject to 15 CFR Part 26, "Nonprocurement Debarment and Suspension" and the related section of the certification form prescribed above applies;

2. Drug-Free Workplace

Grantees (as defined at 15 CFR part 26, section 605) are subject to 15 CFR part 26, subpart F, "Governmentwide Requirements for Drug-Free Workplace (Grants)" and the related section of the certification form prescribed above applies;

3. Anti-Lobbying

Persons (as defined at 15 CFR part 28, section 105) are subject to the lobbying provisions of 31 U.S.C. 1352, "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions," and the lobbying section of the certification form prescribed above applies to applications/bids for grants, cooperative agreements, and contracts for more than $100,000, and loans and loan guarantees for more than $150,000, or the single family maximum mortgage limit for affected programs, whichever is greater.

4. Anti-Lobbying Disclosure

Any applicant that has paid or will pay for lobbying using any funds must submit an SF–LLL, "Disclosure of Lobbying Activities," as required under 15 CFR part 28, appendix B.

5. Lower-Tier Certifications

Recipients shall require applicants/bidders for subgrants, contracts, subcontracts, or other lower tier covered transactions at any tier under the award to submit, if applicable, a completed Form CD–512, "Certifications Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions and Lobbying" and disclosure form, SF–LLL, "Disclosure of Lobbying Activities." Form CD–512 is intended for the use of recipients and should not be transmitted to NIST. SF–LLL submitted by any tier recipient or subrecipient should be submitted to NIST in accordance with the instructions contained in the award document.

Applicants who incur any costs prior to an award being made do so solely at their own risk of not being reimbursed by the Government. Notwithstanding any verbal assurance that may have been provided, there is no obligation on the part of NIST to cover pre-award costs.

If an application is accepted for funding, DoC has no obligation to provide any additional future funding in connection with that award. Renewal of an award to increase funding or extend the period of performance is at the total discretion of NIST.

Unsatisfactory performance under prior Federal awards may result in an application not being considered for funding.

All for-profit and nonprofit applicants will be subject to a name check review process. Name checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges such as fraud, theft, perjury, or other matters which significantly reflect on the applicant's management, honesty, or financial integrity.

A false statement on an application is grounds for denial or termination of funds, and grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001. No award of Federal funds shall be made to an applicant who has an outstanding delinquent Federal debt until either:

1. The delinquent account is paid in full,

2. A negotiated repayment schedule is established and at least one payment is received, or

3. Other arrangements satisfactory to DoC are made.

Awards under the Materials Science and Engineering Laboratory Research Program shall be subject to all Federal laws and Federal and Departmental regulations, policies, and procedures applicable to financial assistance awards.

The Materials Science and Engineering Grants Program does not directly affect any state or local government. Accordingly, the Department of Commerce has determined that Executive order 12372 is not applicable to the Materials Science and Engineering Grants Program.

Dated: December 20, 1993.

Samuel Kramer,

Associate Director.

[FR Doc. 93–31910 Filed 12–29–93; 8:45 am]

BILLING CODE 3510–13–M

[Docket No. 920801–3194]

RIN 0693–AB09

Revision of Federal Information Processing Standard (FIPS) 46–1 Data Encryption Standard (DES)

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: The purpose of this notice is to announce that Federal Information Processing Standard (FIPS) 46–1, Data Encryption Standard, has been revised and that the Data Encryption algorithm specified by the standard has been reaffirmed for five years.

SUMMARY: The Data Encryption Standard, issued as Federal Information Processing Standard 46 on January 15, 1977, specified that a review would be performed by the National Institute of Standards and Technology (NIST) within five years to assess its adequacy. The first review was completed in 1983 and the standard was reaffirmed for Federal Government use (48 FR 41062 dated September 13, 1983). In 1987, NIST announced the second review of the standard (52 FR 7006 dated March 6, 1987), and solicited comments from Government, industry, and the public on the adequacy of the standard to protect computer data. The standard was reaffirmed for Federal government use (52 FR 7006). Following the second reaffirmation, the text of the standard was revised to reflect minor editorial changes, updates to references, addresses, and other non-substantive changes. The revision was issued as FIPS 46–1 in January 1988. On September 11, 1992, NIST announced the third review of the standard (57 FR 41727).

At the next review (1998), the algorithm specified in this standard will be over twenty years old. NIST will consider alternatives which offer a higher level of security. One of these alternatives may be proposed as a replacement standard at the 1998 review.

The written comments submitted by interested parties and other material available to the Department relevant to this standard were reviewed by NIST. On the basis of this review, NIST

recommended that the Secretary approve the revision of this standard as FIPS 46–2 and the reaffirmation of algorithm specified by the standard, and prepared a detailed justification document for the Secretary's review in support of that recommendation.

The detailed justification document which was presented to the Secretary, and which includes an analysis of the written comments received, is part of the public record and is available for inspection and copying in the Central Reference and Records Inspection Facility, room 6020, Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues, NW., Washington, DC 20230.

This FIPS contains two sections: (1) An announcement section, which provides information concerning the applicability, implementation, and maintenance of the standard; and (2) a specifications section, which deals with the technical requirements of the standard. Only the announcement section of the standard is provided in this notice.

EFFECTIVE DATE: This standard became effective July 1977 and was reaffirmed in 1983, 1988, and 1993. The algorithm specified by the standard has been reaffirmed without change. FIPS 46–2, which revises the implementation of the Data Encryption Algorithm to include software, firmware, hardware, or any combination thereof, becomes effective June 30, 1994. This revised standard may be used in the period before the effective date.

ADDRESSES: Interested parties may purchase copies of FIPS 46–1 from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161, telephone (703) 487–4650.

FOR FURTHER INFORMATION CONTACT: Mr. Miles Smid, Computer Systems Laboratory, National Institute of Standards and Technology, Gaithersburg, MD 20899, telephone (301) 975–2938.

Dated: December 23, 1993.

Samuel Kramer,

Associate Director.

Federal Information Processing Standards Publication 46–2

(Date)

Announcing the Data Encryption Standard

Federal Information Processing Standards Publications (FIPS PUBS) are issued by the National Institute of Standards and Technology after approval by the Secretary of Commerce pursuant to section 111(d) of the Federal Property and Administrative Services Act of 1949 as amended by the Computer Security Act of 1987, Public Law 100–235.

1. *Name of standard.* Data Encryption Standard (DES).

2. *Category of standard.* Computer Security.

3. *Explanation.* The Data Encryption Standard (DES) specifies a FIPS approved cryptographic algorithm as required by FIPS 140–1. This publication provides a complete description of a mathematical algorithm for encrypting (enciphering) and decrypting (deciphering) binary coded information. Encrypting data converts it to an unintelligible form called cipher. Decrypting cipher converts the data back to its original form called plaintext. The algorithm described in this standard specifies both enciphering and deciphering operations which are based on a binary number called a key.

A key consists of 64 binary digits ("0"s or "1"s) of which 56 bits are randomly generated and used directly by the algorithm. The other 8 bits, which are not used by the algorithm, are used for error detection. The 8 error detecting bits are set to make the parity of each 8-bit byte of the key odd, i.e., there is an odd number of "1"s in each 8-bit byte [1]. Authorized users of encrypted computer data must have the key that was used to encipher the data in order to decrypt it. The encryption algorithm specified in this standard is commonly known among those using the standard. The unique key chosen for use in a particular application makes the results of encrypting data using the algorithm unique. Selection of a different key causes the cipher that is produced for any given set of inputs to be different. The cyptographic security of the data depends on the security provided for the key used to encipher and decipher the data.

Data can be removed from cipher only by using exactly the same key used to encipher it. Unauthorized recipients of the cipher who know the algorithm but do not have the correct key cannot derive the original data algorithmically. However, anyone who does have the key and the algorithm can easily decipher the cipher and obtain the original data. A standard algorithm based on a secure key thus provides a basis for exchanging encrypted computer data by issuing the key used to encipher it to those authorized to have the data.

Data that is considered sensitive by the responsible authority, data that has a high value, or data that represents a high value should be cryptographically protected if it is vulnerable to unauthorized disclosure or undetected modification during transmission or while in storage. A risk analysis should be performed under the direction of a responsible authority to determine potential threats. The costs of providing cryptographic protection using this standard as well as alternative methods of providing this protection and their respective costs should be projected. A responsible authority then should make a decision, based on these analyses, whether or not to use cryptographic protection and this standard.

4. *Approving authority.* Secretary of Commerce.

5. *Maintenance agency.* U.S. Department of Commerce, National Institute of Standards and Technology, Computer Systems Laboratory.

6. *Applicability.* This standard may be used by Federal departments and agencies when the following conditions apply:

1. An authorized official or manager responsible for data security or the security of any computer system decides that cryptographic protection is required; and

2. The data is not classified according to the National Security Act of 1947, as amended, or the Atomic Energy Act of 1954, as amended.

Federal agencies or departments which use cryptographic devices for protecting data classified according to either of these acts can use those devices for protecting unclassified data in lieu of the standard.

Other FIPS approved cryptographic algorithms may be used in addition to, or in lieu of, this standard when implemented in accordance with FIPS 140–1.

In addition, this standard may be adopted and used by non-Federal Government organizations. Such use is encouraged when it provides the desired security for commercial and private organizations.

7. *Applications.* Data encryption (cryptography) is utilized in various applications and environments. The specific utilization of encryption and the implementation of the DES will be based on many factors particular to the computer system and its associated components. In general, cryptography is used to protect data while it is being communicated between two points or while it is stored in a medium vulnerable to physical theft.

[1] Sometimes keys are generated in an encrypted form. A random 64-bit number is generated and defined to be the cipher formed by the encryption of a key using a key encrypting key. In this case the parity bits of the encrypted key cannot be set until after the key is decrypted.

Communication security provides protection to data by enciphering it at the transmitting point and deciphering it at the receiving point. File security provides protection to data by enciphering it when it is recorded on a storage medium and deciphering it when it is read back from the storage medium. In the first case, the key must be available at the transmitter and receiver simultaneously during communication. In the second case, the key must be maintained and accessible for the duration of the storage period. FIPS 171 provides approved methods for managing the keys used by the algorithm specified in this standard.

8. Implementations. Cryptographic modules which implement this standard shall conform to the requirements of FIPS 140–1. The algorithm specified in this standard may be implemented in software, firmware, hardware, or any combination thereof. The specific implementation may depend on several factors such as the application, the environment, the technology used, etc. Implementations which may comply with this standard include electronic devices (e.g., VLSI chip packages), micro-processors using Read Only Memory (ROM), Programmable Read Only Memory (PROM), or Electronically Erasable Read Only Memory (EEROM), and mainframe computers using Random Access Memory (RAM). When the algorithm is implemented in software or firmware, the processor on which the algorithm runs must be specified as part of the validation process. Implementations of the algorithm which are tested and validated by NIST will be considered as complying with the standard. Note that FIPS 140–1 places additional requirements on cryptographic modules for Government use. Information about devices that have been validated and procedures for testing and validating equipment for conformance with this standard and FIPS 140–1 are available from the National Institute of Standards and Technology, Computer Systems Laboratory, Gaithersburg, MD 20899.

9. Export control. Cryptographic devices and technical data regarding them are subject to Federal Government export controls as specified in title 22, Code of Federal Regulations, parts 120 through 128. Some exports of cryptographic modules implementing this standard and technical data regarding them must comply with these Federal regulations and be licensed by the U.S. Department of State. Other exports of cryptographic modules implementing this standard and technical data regarding them fall under the licensing authority of the Bureau of Export Administration of the U.S. Department of Commerce. The Department of Commerce is responsible for licensing cryptographic devices used for authentication, access control, proprietary software, automatic teller machines (ATMs), and certain devices used in other equipment and software. For advice concerning which agency has licensing authority for a particular cryptographic device, please contact the respective agencies.

10. Patents. Cryptographic devices implementing this standard may be covered by U.S. and foreign patents issued to the International Business Machines Corporation. However, IBM has granted nonexclusive, royalty-free licenses under the patents to make, use and sell apparatus which complies with the standard. The term, conditions and scope of the licenses are set out in notices published in the May 13, 1975 and August 31, 1976 issues of the Official Gazette of the United States Patent and Trademark Office (934 O.G. 452 and 949 O.G. 1717).

11. Alternate modes of using the DES. FIPS PUB 81, DES Modes of Operation, describes four different modes for using the algorithm described in this standard. These four modes are called the Electronic Codebook (ECB) mode, the Cipher Block Chaining (CBC) mode, the Cipher Feedback (CFB) mode, and the Output Feedback (OFB) mode. ECB is a direct application of the DES algorithm to encrypt and decrypt data; CBC is an enhanced mode of ECB which chains together blocks of cipher text; CFB uses previously generated cipher text as input to the DES to generate pseudorandom outputs which are combined with the plaintext to produce cipher, thereby chaining together the resulting cipher; OFB is identical to CFB except that the previous output of the DES is used as input in OFB while the previous cipher is used as input in CFB. OFB does not chain the cipher.

12. Implementation of this standard. This standard became effective July 1977. It was reaffirmed in 1983, 1988, and 1993. It applies to all Federal agencies, contractors of Federal agencies, or other organizations that process information (using a computer or telecommunications system) on behalf of the Federal Government to accomplish a Federal function. Each Federal agency or department may issue internal directives for the use of this standard by their operating units based on their data security requirement determinations. FIPS 46–2 which revises the implementation of the Data Encryption Algorithm to include software, firmware, hardware, or any combination thereof, is effective June 30, 1994. This revised standard may be used in the interim period before the effective date.

NIST provides technical assistance to Federal agencies in implementing data encryption through the issuance of guidelines and through individual reimbursable projects. The National Security Agency assists Federal departments and agencies in communications security for classified applications and in determining specific security requirements. Instructions and regulations for procuring data processing equipment utilizing this standard are included in the Federal Information Resources Management Regulation (FIRMR) subpart 201–8.111–1.

13. Specifications. Federal Information Processing Standard (FIPS) 46–2, Data Encryption Standard (DES) (affixed).

14. Cross index. a. Federal Information Resources Management Regulations (FIRMR) subpart 201.20.303, Standards, and subpart 201.39.1002, Federal Standards.

b. FIPS PUB 31, Guidelines to ADP Physical Security and Risk Management.

c. FIPS PUB 41, Computer Security Guidelines for Implementing the Privacy Act of 1974.

d. FIPS PUB 65, Guidelines for Automatic Data Processing Risk Analysis.

e. FIPS PUB 73, Guidelines for Security of Computer Applications.

f. FIPS PUB 74, Guidelines for Implementing and Using the NBS Data Encryption Standard.

g. FIPS PUB 81, DES Modes of Operation.

h. FIPS PUB 87, Guidelines for ADP Contingency Planning.

i. FIPS PUB 112, Password Usage.

j. FIPS PUB 113, Computer Data Authentication.

k. FIPS PUB 140–1, Security Requirements for Cryptographic Modules.

l. FIPS PUB 171, Key Management Using ANSI X9.17.

m. Other FIPS and Federal Standards are applicable to the implementation and use of this standard. In particular, the Code for Information Interchange, Its Representations, Subsets, and Extensions (FIPS PUB 1–2) and other related data storage media or data communications standards should be used in conjunction with this standard. A list of currently approved FIPS may be obtained from the National Institute of Standards and Technology, Computer Systems Laboratory, Gaithersburg, MD 20899.

15. Qualifications. The cryptographic algorithm specified in this standard

transforms a 64-bit binary value into a unique 64-bit binary value based on a 56-bit variable. If the complete 64-bit input is used (i.e., none of the input bits should be predetermined from block to block) and if the 56-bit variable is randomly chosen, no technique other than trying all possible keys using known input and output for the DES will guarantee finding the chosen key. As there are over 70,000,000,000,000,000 (seventy quadrillion) possible keys of 56 bits, the feasibility of deriving a particular key in this way is extremely unlikely in typical threat environments. Moreover, if the key is changed frequently, the risk of this event is greatly diminished. However, users should be aware that it is theoretically possible to derive the key in fewer trials (with a correspondingly lower probability of success depending on the number of keys tried) and should be cautioned to change the key as often as practical. Users must change the key and provide it a high level of protection in order to minimize the potential risks of its unauthorized computation or acquisition. The feasibility of computing the correct key may change with advances in technology. A more complete description of the strength of this algorithm against various threats is contained in FIPS PUB 74, Guidelines for Implementing and Using the NBS Data Encryption Standard.

When correctly implemented and properly used, this standard will provide a high level of cryptographic protection to computer data. NIST, supported by the technical assistance of Government agencies responsible for communication security, has determined that the algorithm specified in this standard will provide a high level of protection for a time period beyond the normal life cycle of its associated equipment. The protection provided by this algorithm against potential new threats will be reviewed within 5 years to assess its adequacy (See Special Information Section). In addition, both the standard and possible threats reducing the security provided through the use of this standard will undergo continual review by NIST and other cognizant Federal organizations. The new technology available at that time will be evaluated to determine its impact on the standard. In addition, the awareness of any breakthrough in technology or any mathematical weakness of the algorithm will cause NIST to reevaluate this standard and provide necessary revisions.

At the next review (1998), the algorithm specified in this standard will be over twenty years old. NIST will consider alternatives which offer a higher level of security. One of these alternatives may be proposed as a replacement standard at the 1998 review.

16. Comments. Comments and suggestions regarding this standard and its use are welcomed and should be addressed to the National Institute of Standards and Technology, Attn: Director, Computer Systems Laboratory, Gaithersburg, MD 20899.

17. Waiver procedure. Under certain exceptional circumstances, the heads of Federal departments and agencies may approve waivers to Federal Information Processing Standards (FIPS). The head of such agency may redelegate such authority only to a senior official designated pursuant to section 3506(b) of Title 44, United States Code. Waiver shall be granted only when:

a. Compliance with a standard would adversely affect the accomplishment of the mission of an operator of a Federal computer system; or

b. Compliance with a standard would cause a major adverse financial impact on the operator which is not offset by Government-wide savings.

Agency heads may act upon a written waiver request containing the information detailed above. Agency heads may also act without a written waiver request when they determine that conditions for meeting the standard cannot be met. Agency heads may approve waivers only by a written decision which explains the basis on which the agency head made the required finding(s). A copy of each decision, with procurement sensitive or classified portions clearly identified, shall be sent to: National Institute of Standards and Technology; Attn: FIPS Waiver Decisions, Technology Building, room B–154, Gaithersburg, MD 20899.

In addition, notice of each waiver granted and each delegation of authority to approve waivers shall be sent promptly to the Committee on Government Operations of the House of Representatives and the Committe on Government Affairs of the Senate and shall be published promptly in the **Federal Register**.

When the determination on a waiver applies to the procurement of equipment and/or services, a notice of the waiver determination must be published in the Commerce Business Daily as a part of the notice of solicitation for offers of an acquisition or, if the waiver determination is made after that notice is published, by amendment to such notice.

A copy of the waiver, any supporting documents, the document approving the waiver and any accompanying documents, with such deletions as the agency is authorized and decides to make under 5 United States Code section 552(b), shall be part of the procurement documentation and retained by the agency.

18. Special information. In accordance with the Qualifications Section of this standard, reviews of this standard have been conducted every 5 years since its adoption in 1977. The strandard was reaffirmed during each of those reviews. This revision to the text of the standard contains changes which allow software implementations of the algorithm and which permit the use of other FIPS approved cryptographic algorithms.

19. Where to obtain copies of the standard. Copies of this publication are for sale by the National Technical Information Service, U.S. Department of Commerce, Springfield, VA 22161. When ordering, refer to Federal Information Processing Standards Publication 46–2 (FIPS PUB 46–2), and identify the title. When microfiche is desired, this should be specified. Prices are published by NTIS in current catalogs and other issuances. Payment may be made by check, money order, deposit account or charged to a credit card accepted by NTIS.

[FR Doc. 93–31909 Filed 12–29–93; 8:45 am]

BILLING CODE 3510–CN–M

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Establishment of New Export Visa and Certification Requirements for Certain Cotton, Wool and Man-Made Fiber Textile Products Produced or Manufactured in Mexico

December 27, 1993.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing new visa and certification requirements.

EFFECTIVE DATE: January 1, 1994.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212.

SUPPLEMENTARY INFORMATION:

Authority: Executive Order 11651 of March 3, 1972, as amended; section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854).

Pursuant to the North America Free Trade Agreement, the existing export

visa and certification requirements are being superseded and new requirements are being established for textile and apparel products subject to restrictions or consultation levels which are exported from Mexico on and after January 1, 1994.

The current list of the folklore items, certification stamp and commercial invoice remain unchanged. The visa is changed to replace "Bilateral Textile Agreement" with "North American Free Trade Agreement." A facsimile of the visa and certification stamps are on file at the U.S. Department of Commerce, Office of Textiles and Apparel, 14th and Constitution Avenue, NW, room 3106, Washington, DC.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 58 FR 62645, published on November 29, 1993). Also see 53 FR 32421, published on August 25, 1988.

Interested persons are advised to take all necessary steps to ensure that textile and apparel products that are entered into the United States for consumption, or withdrawn from warehouse for consumption, will meet the visa requirements set forth in the letter published below to the Commissioner of Customs.

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

December 27, 1993.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive cancels and supersedes the directive issued to you on August 22, 1988, as amended, by the Chairman, Committee for the Implementation of Textile Agreements. That directive directed to you to prohibit entry of certain cotton, wool and man-made fiber textile products, produced or manufactured in Mexico for which the Government of the United Mexican States has not issued an appropriate visa.

Under the terms of section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854), and the provisions of Executive Order 11651 of March 3, 1972, as amended; and pursuant to the North America Free Trade Agreement (NAFTA) between the Governments of the United States, the United Mexican States and Canada, you are directed to prohibit, effective on January 1, 1994, entry into the Customs territory of the United States (i.e., the 50 states, the District of Columbia and the Commonwealth of Puerto Rico) for consumption and withdrawal from warehouse for consumption of cotton, wool and man-made fiber textile products subject to restrictions or consultation levels in Categories 219, 313, 314, 315, 317, 338/339/638/639, 340/640, 347/348/647/648, 410, 443, 611, 633 and 643, produced or manufactured in Mexico and exported from Mexico on and after January 1, 1994 for which the Government of the United Mexican States has not issued an appropriate export visa fully described below. NAFTA-originating goods are not subject to restrictions or consultation levels.

A visa must accompany each commercial shipment of the aforementioned textile products. A pre-printed original circular stamped marking in blue ink will appear on the front of the textile export visa/invoice. The original invoice with the original visa stamp will be required to enter the shipment into the United States. Duplicates of the invoice and/or visa may not be used for this purpose.

Each visa shall include the following information:

1. The visa number. The visa number shall be in the standard nine digit/letter format, beginning with one numerical digit for the last digit of the year of export, followed by the two character alpha country code specified by the International Organization for Standardization (ISO) (the code for Mexico is "MX"), followed by the number 0 and a five digit numerical serial number identifying the shipment; e.g., 4MX012345.

2. The date of issuance. The date of issuance shall be the day, month and year on which the visa was issued.

3. The signature of the issuing official and the printed name of the issuing official authorized to issue visas by the Government of the United Mexican States.

4. The correct category(s), merged category(s), quantity(s) and unit(s) of quantity of the shipment in the unit(s) of quantity provided for in Schedule 3.1.2 of Annex 300-B of NAFTA and in the U.S. Department of Commerce Correlation and in the Harmonized Tariff Schedule of the United States. Annotated or successor documents shall be reported in the spaces provided within the visa (e.g., "Cat. 340-510 DOZ").

Quantities must be stated in whole numbers. Decimals or fractions will not be accepted. Merged category quota merchandise may be accompanied by either the appropriate merged category visa or the correct category visa corresponding to the actual shipment (e.g., Categories 340/640 may be visaed as 340/640 or if the shipment consists solely of 340 merchandise, the shipment may be visaed as "Cat. 340," but not as "Cat. 640").

U.S. Customs shall not permit entry if the shipment does not have a visa, or if the visa number, date of issuance, signature, printed name of the signer, category, quantity or units of quantity are missing, incorrect or illegible, or have been crossed out or altered in any way. If the quantity indicated on the visa is less than that of the shipment, entry shall not be permitted. If the quantity indicated on the visa is more than that of the shipment, entry shall be permitted and only the amount entered shall be charged to any applicable quota.

The complete name and address of a company actually involved in the manufacturing process of the textile product covered by the visa shall be provided on the textile visa document.

If the visa is not acceptable then a new visa must be obtained by the exporter from the competent authority of Mexico, or a replacement visa from the SECOFI Office in Washington, DC, and presented to the U.S. Customs Service before any portion of the shipment will be released.

If import quotas are in force, the U.S. Customs Service shall charge only the actual quantity in the shipment to the correct category limit. If a shipment from Mexico has been allowed entry into the commerce of the United States with either an incorrect visa or no visa, and redelivery or exportation is not accomplished, U.S. Customs shall charge the shipment to the correct category limit whether or not a replacement visa is provided.

Merchandise imported for the personal use of the importer and not for resale, regardless of value; properly marked commercial sample shipments valued at U.S.$250 or less; and goods entered under U.S. Harmonized Tariff Schedule (HTS) numbers 9801.00.25, 9802.00.40, 9802.00.50, 9802.00.90 and 9813.00.65 or successor tariff lines do not require a visa for entry.

As specified in Section 2(3) and Appendix 3.1(B)(11) of Annex 300-B of NAFTA, imports of hand-loomed fabrics of a cottage industry; hand-made cottage industry goods made of such hand-loomed fabrics; and traditional folklore handicraft textile and apparel goods shall require a certification stamped on the invoice by the competent authority of Mexico. A list of the folklore items, which is unchanged, is attached to this letter.

The certification stamp for folklore items remains unchanged. The visa is changed to replace "Bilateral Textile Agreement" with "North American Free Trade Agreement." For the period from January 1 through January 31, 1994, either visa may be used. After January 31, 1994, only the new visa stating ≥North American Free Trade Agreement≥ will be accepted. Facsimiles of the certification stamp and the visas are attached.

The actions taken concerning the Government of the United Mexican States with respect to imports of textile and apparel products in the foregoing categories have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, these directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1). This letter will be published in the **Foreign Register**.

Sincerely,

Rita D. Hayes,

Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 93-31943 Filed 12-29-93; 8:45 am]

BILLING CODE 3510-DR-M

DEPARTMENT OF DEFENSE

Public Information Collection Requirement Submitted to OMB for Review

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Title, applicable form, and applicable OMB control number: Defense FAR Supplement, 227, Patents, Data and Copyrights; OMB Control Number 0704–0240.

Type of request: Extension of a previously approved collection.

Average burden hours/minutes per response: 79 hours and 28 minutes.

Responses per respondent: 1.

Number of respondents: 16,560.

Annual burden hours (including recordkeeping): 2,307,240.

Annual responses: 16,560.

Needs and uses: This request concerns information collection and recordkeeping requirements related to Technical Data, Software, Copyrights, and Contracts.

Affected public: Businesses or other for-profit, Non-profit institutions, and Small businesses or organizations.

Frequency: On Occasion.

Respondents obligation: Required to obtain or retain a benefit.

Desk officer: Mr. Peter N. Weiss. Written comments and recommendations on the proposed information collection should be sent to Mr. Weiss at the Office of Management and Budget, Desk Officer for DOD, room 3235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. William P. Pearce. Written requests for copies of the information collection proposal should be sent to Mr. Pearce, WHS/DIOR, 1215 Jefferson Davis Highway, suite 1204, Arlington, Virginia, 22202–4302.

Dated: December 27, 1993.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 93–31927 Filed 12–29–93; 8:45 am]

BILLING CODE 5000–04–M

Department of the Army

Corps of Engineers

Intent to Prepare a Draft Environmental Impact Statement (DEIS) for the proposed Baltimore Harbor Anchorages and Channels, Baltimore, Maryland Feasibility Study

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent.

SUMMARY: The Baltimore District U.S. Army Corps of Engineers is investigating the feasibility of widening and/or deepening the Baltimore Harbor anchorages and branch channels. The anchorage area were initially authorized between 1909 and 1945 and were designed to accommodate the types of vessels calling on the Port at that time. In recent years, however, the trend toward using larger, more efficient vessels has taken precedent over using smaller vessels. For this reason, the size of the existing anchorage areas at Baltimore are not sufficient in depth or width. The feasibility study of potential modification actions is being conducted under authority of a U.S. Senate, Committee on Environmental and Public Works resolution adopted June 23, 1988. The non-Federal sponsor for the feasibility phase of the project is the Maryland Port Administration (MPA), a part of the Maryland Department of Transportation.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and DEIS can be addressed to Mr. Wes Matheau, Project Manager, Baltimore District, U.S. Army Corps of Engineers, ATTN: CENAB–PL–PC, P.O. Box 1715, Baltimore, Maryland 21203–1715, telephone (410) 962–4399.

SUPPLEMENTARY INFORMATION:

1. The U.S. House of Representatives, Committee on Public Works and Transportation, authorized the Baltimore Harbor Anchorages and Channels study in a resolution adopted on June 23, 1988. The resolution requested the Board of Engineers for Rivers and Harbors to determine if further improvements for navigation, including anchorages and branch channels, are advisable at this time. A reconnaissance study was completed in April 1992 which recommended further study of navigation related improvements and preparation of a feasibility report. The three year feasibility study was initiated in July 1993.

2. The Port of Baltimore is located on a 32 square mile area of the Patapsco River and its tributaries, approximately 12 miles northwest of the Chesapeake Bay. Total drainage area for the Patapsco River is approximately 547 square miles, with a mean discharge of 675 cubic feet per second. The Patapsco River originates near Westminister, in Carroll County, Maryland, and flows southeasterly for 65 miles to enter the Chesapeake Bay 9 miles south of Forth McHenry. The lower 15 miles of the river are tidal. Navigation for deep draft vessels is limited to the area south of the Hanover Street Bridge, where the width of the river increases abruptly to nearly 1 mile. From this point to the mouth, the width gradually increases to about 4 miles.

3. The port can be reached from the Atlantic Ocean by two distinct shipping routes; from the south through the Virginia Capes and the Chesapeake Bay, or from the east through the Delaware Bay, Delaware River, C&D Canal, and the Chesapeake Bay. The Port sits in the heart of the Baltimore/Washington Common Market and is a three hour drive or less from such metropolitan centers at Washington, DC, Philadelphia and New York City. Baltimore remains the closest east coast port to the Midwest, and serves as the gateway to America's industrial heartland. Baltimore can easily serve east coast markets from Boston, Massachusetts to Charlotte, North Carolina from its central location on the Chesapeake Bay.

4. Since 1824, the Baltimore District of the U.S Army Corps of Engineers (COE) has been actively involved in constructing and maintaining a system of channels to allow large, deep draft commercial shipping vessels to call on the Port of Baltimore. In addition to the shipping channels, a number of anchorage areas have been established within the Port for vessels requiring layover for various reasons. Since the anchorage areas were initially authorized between 1909 and 1945, larger, more efficient vessels have come into use.

5. The larger vessels currently in use are sometimes required to anchor in naturally deep water 25 miles south of the Port of Baltimore when an adequate berthing area is not available at Baltimore. Cost associated with resulting vessel delays totaled approximately $822,000 in 1989. The exiting widths of the branch channels at the Seagirth and Dundalk marine terminals are also inadequate for some of the vessels calling on the Port of Baltimore. This results in an increase in the total time required for pilots to safely navigate during berthing and deberthing operations. Costs associated with these delays totaled $874,000 in 1989. The configuration of the branch

channels at the South Locus Point Marine Terminal is inadequate for larger vessels calling on the terminal. Costs associated with delays in maneuvering vessels at the South Locust Point Marine Terminal in 1989 totaled $567,000.

6. Various alternative actions will be considered in the feasibility study, including the "no action" alternative. The alternatives to be considered will include selective anchorage and branch channel widening, deepening, and realignment, and the provision of navigation aids. Based on the findings of the reconnaissance study, the alternatives that will be investigated in the feasibility study include, but are not limited to:

Plan A—Enlarge the anchorages near Seagirt and Dundalk (Anchorages 2 and 3), to approximately 38 feet deep and an area 4,200 feet long by 2,100 feet wide.

Plan B—Same modifications as Plan A, plus improving an adjacent anchorage (Anchorage 4) to approximately 30 or 34 feet deep and an area 1,500 feet long and wide.

Plan C—Deepening and widening a remnant branch channel at South Locust Point.

Plan D—Widening two branch channels at the Seagirt and Dundalk terminals from 350 feet to approximately 500 feet and one from 300 feet to approximately 350 feet, and providing two cutoff angles, one at the intersection of the connecting channel and berths at Dundalk and the other at the intersection of the west Dundalk branch channel and the main shipping channel.

7. The Baltimore District is preparing a DEIS which will describe the impacts of the proposed projects on environmental and cultural resources in the study area and the overall public interest. If applicable, the DEIS will also apply guidelines issued by the Environmental Protection Agency, under authority of Section 404 of the Clean Water Act of 1977 (Pub. L. 95–217). Potential effects of the project on water quality, fish and wildlife resources, recreation, aesthetics, cultural resources and hazardous and toxic contaminants will be investigated. The DEIS will provide an assessment of expected beneficial and adverse impacts associated with moving and containing chemically contaminated sediment from the harbor.

8. The public involvement will include meetings and close coordination with interested private individuals and organizations, as well as concerned Federal, state and local agencies. A public notice requesting comments on the proposed project and DEIS will be provided to appropriate agencies and the public through printed media and mailings. A scoping meeting is not planned at this time. The Baltimore District invites potentially affected Federal, state and local agencies, and other interested organizations and parties to participate in this study. Agencies that are currently involved in the feasibility study and EIS process include, but are not limited to the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Maryland Department of Natural Resources, Maryland Department of the Environment, and the Maryland Port Administration.

9. The DEIS is tentatively scheduled to be available for public review in the spring of 1996.

J. Richard Capka,

Colonel, Corps of Engineers, District Engineer.

[FR Doc. 93–31964 Filed 12–29–93; 8:45 am]

BILLING CODE 3710–41–M

Intent to Prepare a Draft Environmental Impact Statement (DEIS) for a Proposed Flood Control Project on the Rio Fajardo in the Municipio of Fajardo, Puerto Rico.

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Notice.

SUMMARY: The Jacksonville District, U.S. Army Corps of Engineers, is preparing a Detailed Project Report (DPR) for the Rio Fajardo, Fajardo Flood Control Study. A Draft Environmental Impact Statement will be prepared for the project.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and Draft EIS can be answered by Barbara Cintron, (904) 232–1692.

ADDRESS: U.S. Army Corps of Engineers District, Planning Division, P.O. Box 4970, Jacksonville, Florida 32232–0019.

SUPPLEMENTARY INFORMATION: The study of flooding on the lower Fajardo River at Fajardo, Puerto Rico, is authorized under Section 205 of the 1945 Flood Control Act, as amended. Prior studies led to publication of a Detailed Project Report in 1981. This Report concluded that several alternative flood control plans were economically justified, but all were more costly than the upper limit for Section 205 (Continuing authorities) studies. Continued economic growth and flooding problems in Fajardo have led to a reassessment of the earlier study's conclusions.

All flood reduction alternatives under study are structural and comprise combinations of earthen levees or floodwalls to protect densely developed areas, with the possible addition of a pilot channel near the river mouth. A total of four reaches of the river levee or floodwall protection for residential communities of the north river bank. They are:

(1) San Pedro Community, located west and north of the town center, where proposed protection would be a straight earthen levee passing through undeveloped pasturelands;

(2) The "Pueblo" segment, extending from highway P.R. #3, near the town center, to the southwest corner of Jerusalen community and passing through abandoned agricultural lands;

(3) The "Santa Isidra" segment, located east of Segment (2) and passing through abandoned sugarcane lands; and

(4) The "Punta Fajardo" segment, extending from a hill east of Valle Puerto Real development to the river mouth.

1. Most of the areas that would be impacted by levee construction are pasturelands or inactive agricultural lands. However, the "Punta Fajardo" segment includes the Ceiba commonwealth forest, a mangrove forest. Ceiba Forest is a significant natural resource; it has been continuously protected under Federal and Commonwealth laws since 1918. It is also a Puerto Rico Planning Board-designated Coastal Zone Natural Reserve, and an "otherwise protected" coastal barrier segment under the 1990 amendments to the Coastal barrier Resources Act. Five alternatives of the river mouth (Punta Fajardo) levee alignment are under study; three of these would impact the Fajardo River estuary and the Ceiba Forest to a greater or lesser degree, while the other two would require greater or lesser removals of residences and businesses in the north bank community. The river mouth itself has been recognized as habitat for the endangered West Indian Manatee and the Ceiba Forest may be habitat for Category 1 candidate species for Federal listing under the Endangered Species Act. Levee alternatives that would not affect the Forest are also under study, but they would require removal of up to 100 residences and 3 commercial structures.

2. In response to preliminary scoping and studies undertaken in accordance with the Fish and Wildlife Coordination Act, the wetlands of the Ceiba forest have been identified as a highly

significant resource. The Commonwealth Department of Natural Resources, co-sponsor of the study, requested minimization of structural impacts on the Ceiba Forest. The U.S. Fish and Wildlife Service strongly urged avoidance of the Forest, described potential impacts of south bank levee alternatives on mangrove and salt flat habitats as "unprecedented," and recommended mitigation ratios of 10:1 or higher, while expressing doubts that sufficient or suitable lands were available near the site for so large a mitigation project.

3. Public involvement to date has been limited to initial scoping of issues, completed in December 1992. Scoping responses indicated the environmental sensitivity of the Punta Fajardo environment. Significant issues identified to date that will be addressed in the EIS include effects on the Commonwealth Forest; effects on Federally listed threatened and endangered species; effects on native and migratory wildlife; effects on estuarine productivity, effects on water quality; effects on upstream habitats, including migratory fish resources; and effects on Maternillo and Masion del Sapo communities, both beneficial and adverse.

4. Coordination with the U.S. Fish and Wildlife Service has begun under section 7 of the U.S. Endangered Species Act and the Fish and Wildlife Coordination Act. Coordination required under applicable Federal and Commonwealth laws and policies will be conducted.

5. A scoping meeting is not scheduled. The Draft EIS will be available to the public in May 1994.

Kenneth L. Denton,

Army Federal Register Liaison Officer.

[FR Doc. 93-31965 Filed 12-29-93; 8:45 am]

BILLING CODE 3710-AJ-M

Construction Productivity Advancement Research (CPAR) Program

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Notice of availability.

SUMMARY: The purpose of this notice is to inform potential applicants of a program of a cost-shared research, development, demonstration and commercialization and technology transfer (R&D) projects between the U.S. Army Corps of Engineers and the U.S. construction industry. The purpose of the Construction Productivity Advancement Research (CPAR) Program is to assist the U.S. construction industry in enhancing its productivity and competitive position through the development and commercialization of advanced technologies, materials and construction management systems.

DATES: Effective date is January 19, 1994. Proposals will be accepted until April 1, 1994.

ADDRESSES: Proposals for the Fiscal Year 1994 CPAR Program should be submitted to the Corps laboratories identified in the CPAR Guidelines for Participation, dated January 1994. The Guidelines provide information about the CPAR Program and how to participate, and should be read carefully by those wishing to propose a project before contact is made with a Corps laboratory. Copies of the Guidelines may be obtained by writing to: HQUSACE, ATTN: CERD-C, 20 Massachusetts Avenue NW., Washington, DC 20314-1000, or by calling 202-272-0257.

FOR FURTHER INFORMATION CONTACT: Mr. David B. Mathis; HQUSACE, CERD-C; 20 Massachusetts Avenue, NW., Washington, DC 20314-1000, or call (202) 272-1846 or 272-0257.

SUPPLEMENTARY INFORMATION: CPAR is a program consisting of cost-shared R&D projects executed by collaborative partnerships between the Corps, the U.S. construction industry (contractors, equipment and material manufacturers and suppliers, architects, engineers, and financial organizations), public and private foundations, trade and professional organizations, state and local governments, academic institutions and other entities who are interested in enhancing construction productivity and competitiveness. The objective of CPAR is to facilitate research, development and application of advanced technologies through collaborative R&D, field demonstration, licensing agreements, commercialization, technology transfer and other means of reducing technology to practice in the U.S. construction industry.

R&D efforts conducted under CPAR will be based on proposals received from U.S. construction industry entities and others, as noted above, which can be addressed effectively by a partnership between an industry partner and a Corps laboratory, with both performing a mutually defined portion of the required R&D, and which will benefit both the construction industry and the Corps.

Participation in CPAR is open to any U.S. private firm, including corporations, partnerships, limited partnerships and industrial development organizations; public and private foundations; non-profit organizations; units of state and local governments; academic institutions; and others who have an interest in and the resources and capability to address CPAR objectives. Consortia of industry firms and organizations are encouraged, with emphasis on inclusion of construction contractors and other practitioners to ensure the product of each CPAR project is useful and beneficial to the industry.

As provided by law, special consideration will be given to small business firms and consortia involving small business firms. Preference will be given to business units located in the United States that agree to substantially manufacture, market and apply to products in the United States. Consideration will be given to a potential partner that is subject to the control of a foreign company or government if that foreign government permits U.S. agencies, organizations, or other persons to enter into cooperative research and development agreements and licensing agreements.

The cost of each CPAR project will be shared by the Corps and the construction industry partner. Specific cost-sharing terms will be defined for each proposed project prior to submission of the proposal to Corps Headquarters (HQUSACE) for approval. "In-kind" services and/or use of facilities may be considered in arriving at a cost-sharing agreement. As required by law, not more than fifty (50) percent of the total cost of a CPAR project will be provided by the Corps and not less than five (5) percent of the construction industry partner's share of the cost must be contributed in cash. The Corps and the construction industry partner may each contribute personnel, services, facilities, property, patent licenses (or assignment or options to the patent license) and money. Corps funds for each project will be provided to the Corps laboratory for in-house performance of the laboratory's share of the collaborative R&D. No costs previously incurred by the Corps or the construction industry partner on the subject matter of the CPAR project may be recovered in the cost-sharing agreement.

A CPAR Cooperative Research and Development Agreement (CPAR-CRDA) specific to each project will be negotiated between the Corps and the U.S. construction industry partner. The CPAR-CRDA is defined by law as neither a procurement contract nor an assistance agreement (grant or cooperative agreement). The CPAR-CRDA will contain, in addition to the cost-sharing terms, all other conditions

and responsibilities necessary to complete the project and commercialize/transfer the technology, including rights to inventions. Those considering proposing a CPAR project should review the CPAR–CRDA given in Appendix B of the CPAR Guidelines for Participation before proposing a project to ensure that the proposer can agree to the terms and conditions of the CPAR–CRDA.

It is recognized that the industry partner will do more to push the technology into use in the construction industry if the industry partner is provided a marketable interest in the product of a CPAR project. Therefore, to the extent permitted by law, the Corps will generally grant to the industry partner an option to licenses or assignments for any intellectual property made in whole or in party by a Federal employee under the CPAR–CRDA, retaining a nonexclusive, non-transferable, irrevocable, paid-up license to practice the invention or have the invention practiced throughout the world on behalf of the Government. The Corps may, without further notice to others, agree to negotiate an exclusive license to intellectual property if such action would facilitate commercialization and use of the product. However, to the greatest extent possible and appropriate, licensing and assignments will be on a non-exclusive basis. In appropriate cases, royalties will be negotiated and collected by the Government in exchange for licenses or assignments. The industry partner will retain title to all inventions created by industry partner employees under the CPAR–CRDA and, generally, will grant a non-exclusive, non-transferable, irrevocable, royalty-free license to the Government on such inventions.

CPAR is designed to promote and assist in the advancement of ideas and technology which will have a direct, positive impact on construction productivity and Corps mission accomplishment. The intent of each CPAR project is to produce a discrete, field-demonstrated product ready for use by the U.S. construction industry at the end of the project. CPAR is focused on three major technology areas: planning and design improvement, improved construction site productivity and advanced materials. However, any idea for improving construction productivity will be considered. Ideas that cannot define a direct and demonstrable link to the enhancement of construction productivity will not be accepted into the CPAR Program. Areas of interest include, but are not limited to:

Planning and Design Improvement

- Computer-Aided Planning and Engineering Tools.
- Advanced Site Investigation Technology.
- Knowledge-Based Cost Estimating Systems.
- Computer-Aided Design Systems.
- Total Integrated Design Systems.
- Expert Systems/Artificial Intelligence.
- Materials Selection Systems.
- Advanced Technology Selection Systems.

Improved Construction Site Productivity

- Construction Management Methods.
- Materials Handling.
- Automated Construction/Robotics.
- Expert Systems.
- Marine Construction.
- Advanced Excavating, Tunneling and Other Construction Technologies.
- Cold Weather Construction.
- Automated Inspection and Quality Control.
- Computer-Aided Construction Management Systems.
- Advanced Environmental Compliance Systems.

Advanced Materials

- High-Performance Cementitious Materials.
- Structural Polymers.
- Advanced Ceramics.
- Metal Matrix Composites.
- Advanced Fabrication Systems.
- Coatings.
- Adhesives/Fasteners.
- Geomodifiers/Geotextiles.

Proposal Review Process

Proposals received by the Corps laboratories which meet CPAR criteria may be discussed and further developed, as necessary, by the laboratory and the prospective construction industry partner. The following criteria will be used to evaluate the proposals. The first two evaluation factors are of equal importance and are more significant than the remaining factors, which are listed in descending order of importance:

1. Potential Impact on U.S. Construction Industry Productivity

High—Technological advancement which would have major beneficial impact on current construction industry processes, materials and/or equipment and will have a demonstrable major beneficial impact on construction industry productivity and effectiveness.

Medium—Technological advancement which would improve on and/or demonstrate currently available processes, materials and/or equipment not in widespread construction industry use and which would have a demonstrable beneficial impact on construction industry productivity and effectiveness.

Low—Technological advancement which would upgrade construction industry processes, materials and/or equipment in current use and which would have a limited but beneficial impact on construction industry productivity and effectiveness.

2. Potential Impact on the Corps of Engineers

High—Technological advancement which would be a major improvement in technology and procedures currently used by the Corps or Corps contractors and which would have a demonstrable major beneficial impact on the Corp's ability to carry out its missions.

Medium—Technological advancement which would significantly improve Corps/contractor technology and procedures and which would result in demonstrable benefits for the Corps.

Low—Technological innovation which would upgrade current Corps/contractor standard technology and procedures and which would have a limited but beneficial impact on the Corps.

3. Commercialization and Technology Transfer

High—Plan and concepts stated for broad-scale use and adoption of the product by non-Federal and Federal organizations and the production, marketing and dissemination of the product by the industry partner.

Medium—Plans and concepts stated for some beneficial use and adoption of the product by non-Federal and Federal organizations.

Low—Plans and concepts stated for limited but beneficial use and adoption of the product by non-Federal and Federal organizations.

4. Ease of Adoption

High—Technology provides construction industry productivity and effectiveness improvement with minimal equipment, training, materials and operating costs beyond the cost of current practice.

Medium—Technology provides construction industry productivity and effectiveness improvements, but requires moderate additional equipment, training, materials and operating costs beyond the cost of current practice.

Low—Technology provides construction industry productivity and

effectiveness improvement, but with substantially higher costs for additional equipment, training, materials and operating costs beyond the cost of current practice.

5. Probability of Achieving Projected Productivity and Effectiveness Enhancement

High—Some risk, requires innovative application of current knowledge, high probability of success.

Medium—Moderate risk, concepts exist but are unproven, good probability of success.

Low—High risk, basic concepts must be developed and proven, uncertain probability of success.

6. Project Duration

High—Project, including demonstration of benefits, can be completed in 3 years or less.

Medium—Project, including demonstration of benefits, can be completed in 4 years or less.

Low—Project, including demonstration of benefits, will require more than 4 years to complete.

7. R&D Investment

High—Project will obligate the Corps to invest less than $300,000 per year.

Medium—Project will obligate the Corps to invest between $300,000 and $500,000 per year.

Low—Project will obligate the Corps to invest more than $500,000 per year.

After discussions between the laboratory and the prospective construction industry partner, a CPAR Executive Summary of the proposal will be prepared by the laboratory. The Executive Summary will contain the project objective and approach to be followed in developing the specific end product, all expected costs and cost-sharing arrangements, time needed to complete, expected productivity benefits to the U.S. construction industry and the Corps, and a proposed commercialization and technology transfer plan.

Corps laboratories will submit their recommended Executive Summaries to HQUSACE for consideration under the CPAR Program. The CPAR Executive Summaries will be reviewed and recommendations made by the CPAR Executive Committee in HQUSACE. The CPAR Executive Committee is composed of senior-level HQUSACE managers. The Director of Civil Works, HQUSACE, will act on the recommendations of the CPAR Executive Committee in approving the Fiscal Year 1994 CPAR Program.

All information and data furnished by the prospective construction industry partner will be used for evaluation purposes only and will be safeguarded from unauthorized disclosure in accordance with applicable laws. Protection of information during and after completion of a CPAR project will be defined and agreed to in the CPAR-CRDA. Classified information and data will be handled in accordance with Army regulations.

Additional Requirements

Applicants are reminded that a false statement may be grounds for denial or termination of funds and grounds for possible punishment by a fine or imprisonment. Except where declared by law or approved by the head of agency, no award of Federal funds shall be made to an applicant who is delinquent on a Federal debt until the delinquent account is made current or satisfactory arrangements are made between affected agencies and the debtor. No award will be made to a debarred or suspended firm or organization.

Classification

This document is not a major rule requiring a regulatory analysis under Executive Order 12291 because it will not have an annual impact on the economy of $100 million or more, nor will it result in a major increase in costs or prices for any group, nor have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. It is not a major Federal action requiring an environmental assessment under the National Environment Policy Act. The CPAR Program does not involve the mandatory payment of any matching funds from a State or local government, and does not affect directly any State or local government. Accordingly, the Corps determined that Executive Order 12372 is not applicable to CPAR. This notice does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612. CPAR is being carried out under the authority of Section 7, Water Resources Development Act of 1988 (Pub. L. 100–676) (33 U.S.C. 2313).

Kenneth L. Denton,

Army Federal Register Liaison Officer.

[FR Doc. 93–31963 Filed 12–29–93; 8:45 am]

BILLING CODE 3710–92–M

Army Science Board; Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following Committee Meeting:

Name of committee: Army Science Board (ASB).

Date of meeting: 18–19 January 1994.

Time of meeting: 1400–1630, 18 January 1994; 0800–1500, 19 January 1994.

Place: U.S. Army Combined Arms Support Command, Combat Service Support Battle Lab, Fort Lee, VA 23801–6000.

Agenda: The ASB's Logistics and Sustainment Issue Group, the Command, Control and Communications Issue Group, and the Battle Lab Ad Hoc Study Group will visit the Combined Arms Support Command and the Combat Service Support Battle Lab on 18–19 January 1994. Discussion will be focused on changing philosophy, mission, functions, budget and technology challenges facing the Army. Additionally, the Groups will receive the Total Distribution Advanced Technology Demonstration and overview briefing. This meeting will be open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. The ASB Administrative Officer, Sally Warner, may be contacted for further information (703) 695–0781.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 93–31883 Filed 12–29–93; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF ENERGY

[FE Dockets PP–99 and EA–99]

Application for Presidential Permit PP–99 and Electricity Export Authorization EA–99 by Detroit Edison Co.

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Notice of application.

SUMMARY: Detroit Edison Company (Detroit) has applied for a Presidential Permit in order to construct a new electric transmission facility at the U.S. border with Canada. In addition Detroit has requested authorization to export electric energy to Canada over those facilities.

DATES: Comments, protests or requests to intervene must be submitted on or before January 31, 1994.

ADDRESSES: Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Electricity (FE–52), Office of Fuels Programs, Office of Fossil Energy, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Ellen Russell (Program Office) 202–586–9624 or Lise Howe (Program Attorney) 202–586–2900.

SUPPLEMENTARY INFORMATION: The construction, connection, operation, and maintenance of facilities at the international border of the United States for the transmission of electrical energy is prohibited in the absence of a Presidential permit pursuant to Executive Order No. 12038. Exports of electricity from the United States to a foreign country are also regulated and require authorization under section 202(e) of the Federal Power Act.

On October 29, 1993, Detroit filed an application with the Office of Fossil Energy (FE) of the Department of Energy (DOE) for a Presidential permit and an electricity export authorization. These applications have been docketed as PP–99 and EA–99, respectively.

In Docket No. PP–99, Detroit proposes to construct a new 4,800-volt electrical tie from a pole 200 meters north of a tunnel being constructed beneath the St. Clair River between Port Huron, Michigan, and Sarnia, Ontario, Canada, by Grand Trunk Western Railroad Company, a subsidiary of Canadian National Railroad. Detroit proposes to connect the 4,800-volt tie to a U.S. electrical room located in the tunnel. These facilities would be used to supply power to wall-mounted receptacles, tunnel ventilation fans and drainage pumps located in the U.S., as well as tunnel lighting along the south wall of the tunnel in both the U.S. and Canada. Sarnia Hydro will provide the same services for the Canadian side of the tunnel. An emergency tie cable will be maintained between the U.S. and Canadian electrical rooms to permit continued operation of tunnel services in the event of a disruption of power from either Sarnia Hydro or Detroit. The electrical distribution system within the tunnel has been designed to allow tunnel operations to continue in the event of a power failure at either utility.

According to the filing in Docket EA–99, Detroit does not propose to export electricity for distribution on the Sarnia Hydro system, but rather to provide emergency electrical service on an as needed basis to the Canadian side of the tunnel upon loss of power from Sarnia Hydro. The level of such exports will not exceed the capacity of the tie line.

Procedural Matters

Any person desiring to be heard or to protest this application should file a petition to intervene or protest at the address provided above in accordance with § 385.211 or 385.214 of the Rules of Practice and Procedure (18 CFR 385.211, 385.214).

Any such petitions and protests should be filed with the DOE on or before the date listed above. Additional copies of such petitions to intervene or protests also should be filed directly with: Bruce R. Maters, Attorney—Regulatory Affairs, Detroit Edison Legal Department, 2000 Second Avenue, 688 WCB, Detroit, Michigan 48226.

Pursuant to 18 CFR 385.211, protests and comments will be considered by the DOE in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a petition to intervene under 18 CFR 385.214. Section 385.214 requires that a petition to intervene must state, to the extent known, the position taken by the petitioner and the petitioner's interest in sufficient factual detail to demonstrate either that the petitioner has a right to participate because it is a State Commission; that it has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a consumer, customer, competitor, or security holder of a party to the proceeding; or that the petitioner's participation is in the public interest.

A final decision will be made on this application after a determination is made by the DOE that the proposed actions will not adversely impact on the reliability of the U.S. electric power supply system.

Before a Presidential permit or electricity export authorization may be issued or amended, the environmental impacts of the proposed DOE action must be evaluated pursuant to the National Environmental Policy Act of 1969 (NEPA).

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above.

Issued in Washington, DC, on December 23, 1993.

Anthony J. Como,

Director, Office of Coal & Electricity, Office of Fuels Programs, Office of Fossil Energy.

[FR Doc. 93–31931 Filed 12–29–93; 8:45 am]

BILLING CODE 6450–01–P

Federal Energy Regulatory Commission

[Docket No. RP94–85–000]

Colorado Interstate Gas Co.; Proposed Changes in FERC Gas Tariff

December 23, 1993.

Take notice that on December 20, 1993, Colorado Interstate Gas Company (CIG), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets, to become effective January 20, 1994:

Original Sheet No. 369A
Original Sheet No. 369B

CIG states that the above-referenced tariff sheets are being filed to implement recovery of Buyout-Buydown costs incurred by CIG as a result of the settlement and litigation of producer and supplier claims in conformance with the procedures reflected in the Commission's Order Nos. 528 and 528–A.

CIG states that, pursuant to the provisions of Order Nos. 528 and 528–A, CIG will allocate its Buyout-Buydown costs between its jurisdictional and nonjurisdictional customers, absorb 50 percent of the jurisdictional portion of the Buyout-Buydown costs, and recover 50 percent of such costs through fixed surcharges applicable to its jurisdictional firm sales customers. CIG states that the total and the jurisdictional portion of the Buyout-Buydown costs related to this filing are $6,085,935 and $6,059,936, respectively. Therefore, CIG is proposing to recover $3,029,968 from its affected jurisdictional firm sales customers.

CIG states that copies of the filing were served upon all of its affected firm sales customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with §§ 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before January 3, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are

available for public inspection in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 93-31877 Filed 12-29-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP94-34-003]

Colorado Interstate Gas Co., Compliance Filing

December 23, 1993.

Take notice that on December 20, 1993, in compliance with the Commission's order issued December 3, 1993, in Docket No. RP94-35-001 et al., Colorado Interstate Gas Company (CIG) submitted for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Second Revised Sheet No. 14 and First Revised Sheet No. 338. CIG requests that these proposed tariff sheets be made effective on January 1, 1994.

CIG states that copies of this filing have been served on parties to the proceeding, and the filing is available for public inspection at CIG's offices in Colorado Springs, Colorado.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with § 385.211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). All such protests should be filed on or before January 3, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 93-31874 Filed 12-29-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP94-66-001]

Texas Eastern Transmission Corp.; Proposed Changes in FERC Gas Tariff

December 23, 1993.

Take notice that on December 20, 1993, Texas Eastern Transmission Corporation (Texas Eastern) submitted for filing as part of its FERC Gas Tariff, Sixth Revised Volume No. 1, the following tariff sheets, proposed to be effective January 1, 1994:

Sub Eighth Revised Sheet No. 41
Sub Sixth Revised Sheet No. 68

Texas Eastern states that on December 1, 1993 in Docket No. RP94-66, it filed tariff sheets to recover gas supply realignment costs incurred as a consequence of Texas Eastern's implementation of Order No. 636 pursuant to Section 15.2(C) of the General Terms and Conditions of Texas Eastern's FERC Gas Tariff, Sixth Revised Volume No. 1 and in accordance with the Commission's orders issued April 22, 1993 and September 17, 1993 in Docket Nos. RS92-11-000, RS92-11-003, RS92-11-004, RP88-67, et al., (Phase I/Rates) and RP92-234-001 ("Third Quarterly GSR Filing").

Texas Eastern states that on December 20, 1993 in Docket Nos. RP88-67, et al., (Phase II/PCBs), it filed tariff sheets to reflect the resolution of the concerns expressed by Brooklyn Union Gas Company ("Brooklyn Union") in its pleading filed on November 19, 1993 in Docket No. RP88-67-070 and styled as "Protest of Brooklyn Union Gas Company and Request for Partial Summary Rejection" ("December 20 PCB Filing"). Texas Eastern states that in the protest Brooklyn Union argued that Texas Eastern's proposal to include PCB costs in its Rate Schedule PTI rates is improper because some Rate Schedule PTI service is a non-firm replacement service for Rate Schedule SCQ. Brooklyn Union states in footnote 3 on page 3 of the protest that "Brooklyn Union is not claiming that Rate Schedule PTI should be completely exempt from an allocation of PCB costs. Brooklyn Union's position instead is that it should not be allocated any PCB-related costs under Rate Schedule PTI up to the level of its Rate Schedule SCQ annual entitlement * * *." Texas Eastern states that the tariff sheets in the December 20 PCB Filing proposed the exclusion of customers of Rate Schedule SCQ as of May 31, 1993 from PCB-related costs under Rate Schedule PTI up to the level of their Rate Schedule SCQ annual contractual entitlement on November 1, 1991, as provided in the Stipulation and Agreement in Texas Eastern's Docket Nos. RP88-67, et al., (Phase II/PCBs).

Accordingly, Texas Eastern states that it is filing herewith tariff sheets for the purpose of conforming the tariff sheets filed in the Third Quarterly GSR Filing to those tariff sheet modifications proposed in the December 20 PCB Filing. The immediate tariff sheets include the Applicable Shrinkage Adjustment usage surcharge rates filed by Texas Eastern on October 29, 1993 and approved by the Commission to be effective December 1, 1993 in its November 30, 1993 order in Docket Nos. TM94-2-17-000 and TM94-2-17-001. The immediate tariff sheets also include the rates attributable to the approved 1994-1995 Gas Research Institute funding mechanism which were filed by Texas Eastern on November 29, 1993 to be effective January 1, 1993 pursuant to the Commission's orders issued on March 22, 1993 and June 23, 1993 in Docket Nos. RP92-133-000, et al., and Section 15.4 of the General Terms and Conditions of Texas Eastern's FERC Gas Tariff, Sixth Revised Volume No. 1.

The proposed effective date of the tariff sheets are January 1, 1994, the effective date of the Third Quarterly GSR Filing. Copies of the filing were served on firm customers of Texas Eastern and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure. All such protests should be filed on or before January 3, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93-31876 Filed 12-29-93; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP88-67-071]

Texas Eastern Transmission Corp.; Proposed Changes in FERC Gas Tariff

December 23, 1993.

Take notice that on December 20, 1993, Texas Eastern Transmission Corporation (Texas Eastern) submitted for filing as part of its FERC Gas Tariff, Sixth Revised Volume No. 1, the following tariff sheets, proposed to be effective December 1, 1993:

Sub Sixth Revised Sheet No. 41
Sub Fifth Sixth Revised Sheet No. 68

Texas Eastern states that on October 28, 1993, it filed tariff sheets which reflect the base tariff rates applicable for the period December 1, 1993 through November 30, 1994, pursuant to the terms of the Stipulation and Agreement in Texas Eastern's Docket Nos. RP88-67, et al., (Phase II/PCBs) ("Year 4 PCB Filing").

Texas Eastern states that this filing reflects the resolution of the concerns expressed by Brooklyn Union Gas Company ("Brooklyn Union") in its

pleading filed on November 19, 1993 in Docket No. RP88–67–070 and styled as "Protest of Brooklyn Union Gas Company and Request for Partial Summary Rejection". Texas Eastern states that in the protest Brooklyn Union argued that Texas Eastern's proposal to include PCB costs in its Rate Schedule PTI rates is improper because some Rate Schedule PTI service is a non-firm replacement service for Rate Schedule SCQ. Brooklyn Union states in footnote 3 on page 3 of the protest that "Brooklyn Union is not claiming that Rate Schedule PTI should be completely exempt from an allocation of PCB costs. Brooklyn Union's position instead is that it should not be allocated any PCB-related costs under Rate Schedule PTI up to the level of its Rate Schedule SCQ annual entitlement * * *."

Texas Eastern states that on December 16, 1993, it filed with the Commission in the captioned docket a letter indicating that as a result of discussions with representatives of Brooklyn Union and further review of the Stipulation and Agreement, Texas Eastern would file revised Rate Schedule PTI tariff sheets to exempt former SCQ customers from the PCB-related cost component of Rate Schedule PTI.

Accordingly, Texas Eastern states that it is filing herewith tariff sheets for the purpose of excluding customers of Rate Schedule SCQ as of May 31, 1993, from PCB-related costs under Rate Schedule PTI up to the level of their Rate Schedule SCQ annual contractual entitlement on November 1, 1991, as provided in the Stipulation and Agreement in Texas Eastern's Docket Nos. RP88–67, et al., (Phase II/PCBs). The tariff sheets include the Applicable Shrinkage Adjustment usage surcharge rates filed by Texas Eastern on October 29, 1993 and approved by the Commission to be effective December 1, 1993 in its November 30, 1993, order in Docket Nos. TM94–2–17–000 and TM94–2–17–001.

The proposed effective date of the tariff sheets are December 1, 1993, the effective date of the Year 4 PCB Filing. Copies of the filing were served on firm customers of Texas Eastern and interested state commissions. Copies were also served on all parties in Docket Nos. RP88–67, et al., (Phase II/PCBs).

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure. All such protests should be filed on or before January 3, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93–31873 Filed 12–29–93; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. CP92–719–001, et al.]

Texas Eastern Transmission Corp., Texas Gas Transmission Corp.; Site Visit

December 23, 1993.

In the matter of Texas Eastern Transmission Corp., Docket Nos. CP92–719–001, CP92–720–001, and CP93–108–001; Texas Gas Transmission Corp., Docket Nos. CP92–730–001 and CP92–734–001.

Notice is hereby given that the staff of the Federal Energy Regulatory Commission will conduct a site visit with the applicants for the above-named upstream facilities proposed in the Liberty Project. The location of the proposed facilities is in Kentucky, Indiana, Ohio, Pennsylvania and New Jersey. This site visit will take place January 10 through 13, 1994.

Parties to the proceeding may attend. Those planning to attend must provide their own transportation. For further information, call Jeff Gerber, (202) 208–0282.

Lois D. Cashell,

Secretary.

[FR Doc. 93–31872 Filed 12–29–93; 8:45 am]

BILLING CODE 6717–01–M

[Docket No. RP94–60–001]

Transwestern Pipeline Co.; Proposed Changes in FERC Gas Tariff

December 23, 1993.

Take notice that on December 21, 1993, Transwestern Pipeline Company (Transwestern) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheet, with a proposed effective date of January 1, 1994:

4th Revised Sheet No. 5A.05

Transwestern states that on November 30, 1993 Transwestern filed tariff sheets in which it sought to modify its take-or-pay, buy-out and buy-down mechanism ("Transition Cost Recovery" or "TCR" mechanism) in order to recover certain take-or-pay, buy-out, buy-down, and contract reformation costs. Transwestern states that the above-referenced tariff sheet, which provides currently effective transportation rates for firm shippers under Rate Schedule FTS–2, was inadvertently omitted in the initial filing. Transwestern notes that the only proposed change to this tariff sheet is an increase in the TCR Surcharge C FTS–2 rate from $0.0026 to $0.0035, consistent with changes to TCR rates made in Transwestern's initial filing. All other information on this sheet will stay the same.

Transwestern states that copies of the filing were served on its gas utility customers, interested state commissions, and all parties to this proceeding.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC, 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure. All such protests should be filed on or before January 3, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 93–31875 Filed 12–29–93; 8:45 am]

BILLING CODE 6717–01–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–4820–5]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden; where appropriate, it includes the actual data collection instrument.

DATES: Comments must be submitted on or before January 31, 1994.

FOR FURTHER INFORMATION CONTACT: For further information, or to obtain a copy of this ICR, contact Sandy Farmer at EPA, (202) 260–2740.

SUPPLEMENTARY INFORMATION:

Office of Water

Title: The Public Water Supply System Supervision Program. (EPA ICR No:270.30; OMB No:2040–0090) This ICR requests renewal of the existing clearance.

Abstract: Sections 1401 and 1412 of the Safe Drinking Water Act (SDWA) require EPA to establish National Primary Drinking Water regulations to ensure a supply of drinking water which dependably complies with the maximum contaminant levels (MCLs) stipulated in 40 CFR part 141, subpart B.

In order to ensure compliance with these regulations and to protect public health, EPA will impose certain information requirements on State and local officials. Public Water Systems (PWSs) will be required to maintain records of compliance with treatment and monitoring standards. These records will enable them to identify system needs, alter monitoring frequencies, and notify the public when their systems are not in compliance with Federal and State regulations.

States will have to set up and maintain records of PWS data, including the results of drinking water tests and a list of systems out of compliance with standards. The States will use this information for program implementation and oversight purposes. States must also keep records of their actions concerning plans, enforcement, variances and exemptions for each PWS.

The PWS information will also be used by the primacy authority, either an EPA region or an approved State, for monitoring those PWSs trying to achieve compliance and for deciding which systems are likely for remedial or enforcement actions.

Reports are submitted by the States to EPA for oversight of State implementation of the regulations and to determine when to take enforcement action in cases where States have not done so. The State information will be stored in the Federal Reporting Data System (FRDS), where EPA and the States can retrieve it. The FRDS allows for year-to-year analysis of compliance treads at the system, State, and national level, and it will also allow the Agency to determine what policy changes are needed to increase compliance nationally.

In addition to the renewal of the 1990 base ICR, this ICR merges burden and cost estimates from the following final rules that were promulgated after the base was written:

—Phase II Synthetic Organic and Inorganic Chemicals (ICR# 270.24);
—Monitoring for Synthetic Organic Chemicals; MCLGs and MCLs for Aldicarb, Aldicarb Sulfone, Aldicarb Sulfoxide, Pentachlorophenol, and Barium (Phase IIB) (ICR# 270.27);
—Phase V Synthetic Organic and Inorganic Chemicals (ICR# 270.29);
—Lead and Copper (ICR# 270.26)

Burden Statement: Public reporting burden for this collection of information is estimated to average 1 hour per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the needed data, completing and reviewing the collection of information, and recordkeeping.

Respondents: Public Water Systems, States.

Estimated No. of Respondents: 200,624.

Estimated No. of Responses per Respondent: 59.

Estimated Total Annual Burden on Respondents: 11,141,565 hours.

Frequency of Collection: Quarterly, annually, triennially and every nine years.

Send comments regarding the burden estimate, or any other aspect of this information collection, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM–223Y), 401 M Street, SW., Washington, DC 20460,
and
Matt Mitchell, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20530.

Dated: December 23, 1993.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 93–31919 Filed 12–29–93; 8:45 am]
BILLING CODE 6560–50–M

[FRL–4820–4]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.), this notice announces that the Information Collection Request (ICR) abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describes the nature of the information collection and its expected cost and burden.*

DATES: Comments must be submitted on or before January 31, 1994.

FOR FURTHER INFORMATION CONTACT: For further information, or to obtain a copy of the ICR, contact Sandy Farmer at EPA, (202) 260–2740.

SUPPLEMENTARY INFORMATION

Office of Administration and Resources Management

Title: Invitation for Bids (IFBs) and Requests for Proposals (RFPs) (EPA No. 1038.08; OMB No. 2030–0006).

Abstract: This ICR is an extension of existing information collection activities required under Federal Acquisition Regulations (FAR) for IFBs and RFPs, as promulgated at 48 CFR parts 14 and 15, respectively. The FAR requires vendors seeking to supply or provide services to the Agency to submit information that will be used by EPA contract officers to evaluate their proposal or bid. The information is necessary to ensure that EPA acquisitions are consistent with the FAR and the selection of the vendor is appropriate for the Agency's needs.

Vendors responding to IFBs must provide information that includes: (1) Prices for the supplies or services offered; and (2) a list of contracts, by number, for the same or similar supplies or services that includes the product description, the type of contract awarded, and the agencies for which it was provided. Vendors responding to RFPs must provide: (1) Information on previous supplies or services the vendor has provided to the EPA, (2) cost and pricing data, (3) technical information, and (4) general financial and organizational information. In addition, vendors will submit reports when the Agency announces a need for supplies or services they are capable of providing. There are no recordkeeping requirements for vendors.

The EPA will store this information in the contract file after it has been used for the vendor selection process.

Burden Statement: Public reporting burden for this collection of information is estimated to average 235 hours per response, including time for reviewing instructions, searching existing information sources, and completing and reviewing the collection of information.

Respondents: Businesses or other for-profit organizations, non-profit institutions, small businesses or organizations.

Estimated Number of Respondents: 1615.

Frequency of Collection: On occasion.

Estimated Number of Responses per Respondent: 1.

Estimated Annual Burden on Respondents: 379,520 hours.

Send comments regarding the burden estimate, or any other aspect of this

collection of information, including suggestions for reducing the burden, to:

Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (2136), 401 M Street, SW., Washington DC 20460,

and

Tim Hunt, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th St., NW., Washington, DC 20530.

Dated: December 23, 1993.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 93-31920 Filed 12-29-93; 8:45 am]

BILLING CODE 6560-50-M

[FRL-4820-8]

Proposed Settlement, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposal settlement; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended ("Act"), notice is hereby given of a proposed consent order in the following cases: *NRDC* versus *U.S. EPA*, No. CV-92-2093 (E.D.N.Y.) and *Sierra Club* versus *U.S. EPA*, No. CV-93-0284 (E.D.N.Y.).

These citizen suits were filed under section 304(a) of the Clean Air Act, 42 U.S.C. 7604, and allege that EPA failed to meet certain mandatory deadlines under section 129 of the Clean Air Act, which relate to EPA's requirement to issue standards of performance for municipal solid waste and medical waste incinerators.

For a period of thirty (30) days followed the date of publication of this notice, the Agency will receive written comments relating to the proposed consent order from persons who were not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withhold or withdraw consent to the proposed order if the comments disclose facts or circumstances that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act.

A copy of the proposed order has been lodged with the clerk of the United States District court for the Eastern district of New York. Copies are also available from Diane Weeks, Air and Radiation Division (2344), Office of General Counsel, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, (202) 260-7620. Written comments should be sent to Robert J. Martineau, Jr., at the above address and must be submitted on or before January 31, 1994.

Dated: December 23, 1993.

Jean C. Nelson,

General Counsel.

[FR Doc. 93-31983 Filed 12-29-93; 8:45 am]

BILLING CODE 6560-50-M

[ER-FRL-4707-1]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared December 13, 1993 through December 17, 1993 pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities at (202) 260-5076.

An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in the **Federal Register** dated April 10, 1993 (58 FR 18392).

Draft EISs

ERP No. D-AFS-L65213-ID

Rating EC2, Savant Sage Resource Area, Land and Resource Management Plan, Implementation, Idaho Panhandle National Forests, Fernan Ranger District, Bonner and Kootenai Counties, ID.

Summary: EPA expressed environmental concerns regarding the project's impact on water quality and has requested additional information. Also requested was information regarding the air quality, mitigation, threatened and endangered species, road management and postsale activities.

ERP No. D-AFS-L67031-ID

Rating EC2, Black Pine Gold Mine Expansion Project, Implementation, Plan of Operation Approval and Right-of-Way Permits, Sawtooth National Forest, Burley Ranger District, Cassia County, ID.

Summary: EPA had environmental concerns based on the potential impacts to ground water from storm water runoff and mine drainage. EPA requested clarification about the need to complete confirmation testing and modeling for the heap leach vertical expansion before the final EIS is completed.

ERP No. D-FHW-F40338-MI

Rating EC2, New Interchange at M-59/Squirrel Road and the Relocation of the M-59/Adams Road Interchange, Construction, Funding, NPDES and COE Section 404 Permits, Cities of Rochester Hills and Auburn Hills, Oakland County, MI.

Summary: EPA expressed environmental concerns relating to the air quality impact assessment and wetlands compensation. EPA requested that additional information be provided in the Final EIS.

ERP No. D-FTA-L54003-OR

Rating LO, New Eugene Transfer Station, Site Selection and Construction, Funding, McDonald Site or IHOP Site, Lane County, OR.

Summary: EPA had no objections to the proposed action. EPA requested additional information about mitigation effectiveness and about the adequacy of funding for potential clean-up of hazardous substances.

ERP No. D-NPS-L61197-OR

Rating LO, Fort Clatsop National Memorial General Management and Development Concept Plans, Implementation, Astoria, Clatsop County, OR.

Summary: EPA had no objections to the proposed alternative. Cultural and natural resources would be better protected under the proposed alternative than under the no action and minimum action alternatives. Acquisition of land and NPS management of that land would prevent private development and the environmental consequences associated with development. Expansion of the visitor center, maintenance facilities and trail construction are not likely to have significant long-term consequences to vegetation, air quality and water quality.

Final EISs

ERP No. F-AFS-L65188-00

Pacific Yew (Taxus brevifolia) Harvesting Program, Implementation, WA, OR, ID and CA.

Summary: Review of the final EIS has been completed and the project found to be satisfactory.

ERP No. F-BLM-G65055-OK

Oklahoma Comprehensive Land and Resource Management Plan for Oil and Gas Leasing and Development, Coal Tract Leasing, Townsite Disposal and Red River Management, Tulsa District, several counties, OK.

Summary: Review of the final EIS has been completed and the project found to be satisfactory.

ERP No. F-BOP-L81008-WA

King County Federal Detention Center, Site Selection, Operation and Construction, City of Seattle or the City of SeaTac, King County, WA.

Summary: EPA had no objections to the final EIS. The final EIS provides a detailed response to our concerns regarding land acquisition, storm water runoff, the identification of wetlands and the stated exemption from zoning regulations. The final EIS adequately addresses our primary concerns regarding project-related issues.

ERP No. F-MMS-G02002-00

1994 Central and Western Gulf of Mexico Outer Continental Shelf (OCS) Oil and Gas Sales 147 (March 1994) and 150 (August 1994), Lease Offering, AL, MS, LA and TX.

Summary: EPA had no objections to the proposed project.

Dated: December 27, 1993.

Richard E. Sanderson,

Director, Office of Federal Activities.

[FR Doc. 93-31941 Filed 12-29-93; 8:45 am]

BILLING CODE 6560-50-P

[ER-FRL-4706-9]

Environmental Impact Statements; Notice of Availability

RESPONSIBLE AGENCY: Office of Federal Activities, General Information (202) 260-5076 or (202) 260-5075. Weekly receipt of Environmental Impact Statements Filed December 20, 1993 Through December 24, 1993 Pursuant to 40 CFR 1506.9.

EIS No. 930457, FINAL EIS, COE, LA, Louisiana

Coastal Wetlands Comprehensive Restoration Plan, Implementation and Funding, several Parishes, LA, Due: January 31, 1994, Contact: Richard Boe (504) 862-1505.

Amended Notices

EIS No. 930415, DRAFT EIS, NRC, LA, Claiborne

Uranium Enrichment Center, Construction and Operation, (NUREG-1482), NPDES Permit and Licensing, Homer, Claiborne Parish, LA, Due: January 10, 1994, Contact: Merri Horn (301) 504-2606. Published FR 11-26-93—Review period extended.

EIS No. 930426, FINAL EIS, FAA, AZ, Phoenix Sky

Harbor International Airport Master Plan Update Improvements, Runway 8L/26R Extension, Funding, City of Phoenix, Maricopa County, AZ, Due: January 10, 1994, Contact: David B. Kessler (310) 297-1534.

Published FR 12-03-93—EIS refiled.

Dated: December 27, 1993.

Richard E. Sanderson,

Director, Office of Federal Activities.

[FR Doc. 93-31942 Filed 12-29-93; 8:45 am]

BILLING CODE 6560-50-M

[FRL-4820-3]

Meeting Environmental Statistics Technical Advisory Committee

The Environmental Statistics Technical Advisory Committee will hold a conference call January 20, 1994 from 1 pm to 4 pm Eastern Standard Time. The main topic of the discussion will be a review of the statistical data bases for the National Environmental Goals Project. Any member of the public wishing to address the committee should contact the Executive Secretary (Designated Federal Official), Dr. C. Richard Cothern, telephone 202-260-2734, FAX 202-260-4968 at least a week in advance. Public presentations will be limited to five minutes. Information on how to connect to this call can be obtained from Dr. Cothern. Information concerning the National Environmental Goals Project can be obtained from Dr. Tim Stuart At 202-260-0725.

Dated: December 23, 1993.

Arthur T. Koines,

Deputy Director, Office of Strategic Planning and Environmental Data.

[FR Doc. 93-31921 Filed 12-29-93; 8:45 am]

BILLING CODE 6560-50-M

[FRL-4820-2]

Gulf of Mexico Program Policy Review Board Meeting

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Notice of meeting of the Policy Review Board of the Gulf of Mexico Program.

SUMMARY: The Gulf of Mexico Program's Policy Review Board will hold a meeting on February 1, 1994 at the Marriott Bayfront Hotel in Corpus Christi, Texas.

FOR FURTHER INFORMATION CONTACT: Dr. Douglas Lipka, Acting Director, Gulf of Mexico Program Office, Building 1103, John C. Stennis Space Center, Stennis Space Center, MS 39529-6000, at (601) 688-3726.

SUPPLEMENTARY INFORMATION: A meeting of the Policy Review Board of the Gulf of Mexico Program will be held on February 1, 1994, at the Marriott Bayfront Hotel in Corpus Christi, Texas. The board will meet from 8:30 a.m. to 4:30 p.m. Agenda items will include: FY94 Program Update and Proposed Objectives; Management Committee Report; Business Council for Sustainable Development, Gulf of Mexico Program Presentation on Current & Future Activities/Directions; Citizens Advisory Committee Report; Priority Program Action Items—Management Committee Proposal; 1995 Symposium Steering Committee Proposal; Establishment of 1994 and 1995 Program Goals; and Conversion of State Co-Chairperson.

The meeting is open to the public.

Douglas A. Lipka,

Acting Director, Gulf of Mexico Program.

[FR Doc. 93-31922 Filed 12-27-93; 8:45 am]

BILLING CODE 6560-50-M

[FRL-4818-7]

Nevada; Adequacy Determination of State Municipal Solid Waste Permit Program

AGENCY: Environmental Protection Agency.

ACTION: Notice of tentative determination on application of Nevada for full program adequacy determination, public hearing and public comment period.

SUMMARY: Section 4005(c)(1)(B) of the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments (HSWA) of 1984, 42 U.S.C. 6945 (c)(1)(B), requires States to develop and implement permit programs to ensure that municipal solid waste landfills (MSWLFs) which may receive hazardous household waste or small quantity generator hazardous waste will comply with the revised Federal MSWLF Criteria (40 CFR part 258). RCRA section 4005(c)(1)(C), 42 U.S.C. 6945(c)(1)(C), requires the Environmental Protection Agency (EPA) to determine whether States have adequate "permit" programs for MSWLFs.

Approved State/Tribe permit programs provide interaction between the State/Tribe and the owner/operator regarding site-specific permit conditions. Only those owners/operators located in States/Tribes with approved permit programs can use the site-specific flexibility provided by 40 CFR part 258 to the extent the State/Tribal permit program allows such flexibility. EPA notes that regardless of the approval status of a State/Tribe and

the permit status of any facility, the federal landfill criteria will apply to all permitted and unpermitted MSWLF facilities.

Nevada applied for a determination of adequacy under section 4005 of RCRA. EPA reviewed Nevada's application and made a tentative determination of adequacy for those portions of the State's MSWLF permit program that are adequate to assure compliance with the revised MSWLF Criteria. These portions are described later in this notice. The State has drafted revisions to the remainder of its permit program to assure complete compliance with the revised MSWLF Criteria and gain full program approval. EPA has determined that the Nevada's revised requirements, if fully adopted before EPA makes a final determination and effective on or before the relevant effective dates of the Federal Criteria, would be adequate to ensure compliance with the Federal Criteria.

Although RCRA does not require EPA to hold a public hearing on any determination to approve a State/Tribe's MSWLF program, the Region has tentatively scheduled a public hearing on this determination. If a sufficient number of people express interest in participating in a hearing by writing the Region or calling the contact given below within 30 days of the date of publication of this notice, the Region will hold a hearing. The Region will notify all persons who express such interest or who submit comments on this notice if it decides to hold the hearing. In addition, anyone who wishes to learn whether the hearing will be held may call the person listed in the "CONTACTS" section below. Representatives from the Nevada Division of Environmental Protection will participate in the public hearing on this subject, if one is held.

DATES: All comments on Nevada's application for a determination of adequacy must be received by the close of business on January 31, 1994.

ADDRESSES: Copies of Nevada's application for adequacy determination are available during the hours of 9 a.m. to 5 p.m. at the following addresses for inspection and copying: Nevada Division of Environmental Protection, Solid Waste Branch, Capitol Complex, 333 W. Nye Lane, Carson City, Nevada 89710; or U.S. EPA Region 9 Library, 75 Hawthorne Street, 13th floor, San Francisco, California 94105, telephone 415–744–1510. Written comments should be sent to Rebecca Jamison, Mailcode H–3–1, EPA Region 9, 75 Hawthorne Street, San Francisco, California 94105.

FOR FURTHER INFORMATION CONTACT: EPA Region 9, 75 Hawthorne Street, San Francisco, California, 94105. Attn: Ms. Rebecca Jamison, Mailcode H–3–1, telephone (415) 744–2099.

SUPPLEMENTARY INFORMATION:

A. Background

On October 9, 1991, EPA promulgated revised Criteria for MSWLFs (40 CFR Part 258). Subtitle D of RCRA, 42 U.S.C. 6941–6949(a), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), requires States to develop permitting programs to ensure that MSWLFs comply with the Federal Criteria under Part 258. Section 4005 of RCRA, U.S.C. 6945, also requires that EPA determine the adequacy of State municipal solid waste landfill permit programs to ensure that facilities comply with the revised Federal Criteria. To facilitate this requirement, the Agency has drafted and is in the process of proposing a State/Tribal Implementation Rule (STIR) that will provide procedures by which EPA will approve, or partially approve, State/Tribal landfill permit programs.

EPA intends to approve State/Tribal MSWLF permit programs prior to the promulgation of the STIR. Prior to promulgation of the STIR, adequacy determinations will be made based on the statutory authorities and requirements. EPA interprets the statutory requirements for States or Tribes to develop "adequate" permit programs to impose several minimum standards. First, each State/Tribe must have enforceable standards for new and existing MSWLFs that are technically comparable to EPA's revised MSWLF criteria. Next, the State/Tribe must have the authority to issue a permit or other notice of prior approval to all new and existing MSWLFs in its jurisdiction. The State/Tribe must also provide for public participation in permit issuance and enforcement as required in section 7004(b) of RCRA. Finally, the State/Tribe must show that it has sufficient compliance monitoring and enforcement authorities to take specific action against any owner or operator that fails to comply with an approved MSWLF program.

EPA Regions will determine whether a State/Tribe has submitted an "adequate" program based on the interpretation outlined above. EPA expects States/Tribes to meet all of the criteria for all elements of a MSWLF program before it gives full approval to a MSWLF program. In addition, States/Tribes may use the draft STIR as an aid in interpreting these requirements.

B. State of Nevada

On June 24, 1993, Nevada submitted an application for program adequacy determination. EPA Region 9 reviewed Nevada's application and tentatively determined that all portions except those outlined below ensure compliance with the revised Federal Criteria. Nevada needs to revise aspects of its permit program to ensure compliance with the following provisions of the Federal Criteria:

1. Ground water detection monitoring, assessment monitoring, assessment of corrective measures, selection of remedy, and implementation of the corrective action program (40 CFR 258.54, 258.55, 258.56, 258.57, 258.58).
2. Operating criteria, explosive gas control (40 CFR 258.23).
3. Financial assurance applicability (40 CFR 258.70).

Nevada submitted an amended application for program adequacy determination on November 18, 1993. EPA Region 9 reviewed Nevada's amended application and provided comments to the State. Nevada then submitted draft revised requirements to EPA on November 30, 1993. EPA reviewed the draft revised requirements and determined that these requirements would be adequate to ensure compliance with the Federal Criteria.

If the draft permit requirements submitted to EPA on November 30, 1993 are fully adopted before EPA makes a final determination and are effective on or before the relevant effective dates of the Federal Criteria, then EPA proposes to fully approve Nevada's MSWLF program. If all the necessary draft requirements are not adopted with the relevant effective dates or are adopted with altered language that would not clearly assure compliance with the Federal Criteria, then EPA proposes to partially approve Nevada's program. Partial approval would be only for those portions of the State's program that assure compliance with the Federal Criteria.

The State of Nevada has the authority to enforce the requirements of the Revised Federal MSWLF Criteria at all MSWLFs in the State, with the exception of those located on Tribal Lands.

The public may submit written comments on EPA's tentative determination until January 31, 1994. Copies of Nevada's application are available for inspection and copying at the location indicated in the "ADDRESSES" section of this notice. If there is sufficient public interest, the Agency will hold a public hearing on February 14, 1994 at 10 a.m. in the

Capitol Complex, room 217, 123 W. Nye Lane, Carson City, Nevada. For information on how to express interest in a public hearing, see the last paragraph of the "SUMMARY" section.

EPA will consider all public comments on its tentative determination received during the public comment period and during any public hearing held. Issues raised by those comments may be the basis for a determination of inadequacy for Nevada's program. EPA will make a final decision on whether or not to approve Nevada's program and will give notice of it in the **Federal Register**. The notice will include a summary of the reasons for the final determination and a response to all major comments.

Section 4005(a) of RCRA, 42 U.S.C. 6945(a), provides that citizens may use the citizen suit provisions of section 7002 of RCRA to enforce the Federal MSWLF criteria in 40 CFR part 258 independent of any State/Tribal enforcement program. As EPA explained in the preamble to the final MSWLF criteria, EPA expects that any owner or operator complying with provisions in a State/Tribal program approved by EPA should be considered to be in compliance with the Federal Criteria. See 56 FR 50978, 50995 (October 9, 1991).

Compliance with Executive Order 12291:

The Office of Management and Budget has exempted this notice from the requirements of section 3 of Executive Order 12291.

Certification Under the Regulatory Flexibility Act:

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this approval will not have a significant economic impact on a substantial number of small entities. It does not impose any new burdens on small entities. This notice, therefore, does not require a regulatory flexibility analysis.

Authority: This notice is issued under the authority of section 4005 of the Solid Waste Disposal Act as amended; 42 U.S.C. 6945.

Dated: December 15, 1993

John Wise,

Acting Regional Administrator.

[FR Doc. 93-31620 Filed 12-29-93; 8:45 am]

BILLING CODE 6560-50-P

[FRL 4819-6]

Proposed Administrative Settlement Under Section 122(h) of the Comprehensive Environmental Response, Compensation, and Liability Act; Gallup's Quarry Superfund Site, Plainfield, CT

AGENCY: U.S. Environmental Protection Agency.

ACTION: Notice of proposed administrative settlement and request for public comment.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is proposing to enter into an administrative settlement to address claims under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. 9601. Notice is being published to inform the public of the proposed settlement and of the opportunity to comment. The settlement is intended to resolve the liability under CERCLA of the twenty-three parties listed below for costs incurred by EPA in conducting response actions at the Gallup's Quarry Superfund Site in Plainfield, Connecticut as of February 23, 1993.

DATES: Comments must be provided on or before January 31, 1994.

ADDRESSES: Comments should be addressed to the Docket Clerk, U.S. Environmental Protection Agency, Region I, JFK Federal Building—RCG, Boston, Massachusetts 02203, and should refer to: In the Matter of Gallup's Quarry Superfund Site, Plainfield, CT, U.S. EPA Docket No. I-93-1079.

FOR FURTHER INFORMATION CONTACT: Margery Adams, U.S. Environmental Protection Agency, Office of Regional Counsel, RCU, J.F.K. Federal Building, Boston, Massachusetts 02203, (617) 565-3746.

SUPPLEMENTARY INFORMATION: In accordance with section 122(i)(1) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. 9622(i)(1), notice is hereby given of a proposed administrative settlement concerning the Gallup's Quarry Superfund Site in Plainfield, CT. The settlement was approved by EPA Region I on November 18, 1993, subject to review by the public pursuant to this Notice. The following twenty-three Settling Parties have executed signature pages committing them to participate in the settlement: Acco-Bristol Division/ Bristol Babcock Inc.; American Cyanamid Company; Bedoukian Research, Inc.; Better Formed Metals/ Illinois Tool Works Inc.; Bryant Electric, Inc.; Connecticut Hard Rubber/CHR Industries, Inc.; Consolidated Controls Corporation; Dorr-Oliver; Energy Research Corporation; Ferro Corporation; Instapak Corporation/ Sealed Air Corporation; Kanthal Corporation; King Industries, Inc.; Pitney Bowes, Inc.; Polymer Industries, Inc./Colonial Heights Packaging Inc.; Quality Rolling and Deburring, Inc.; Reichhold Chemical, Inc.; Risdon Manufacturing Company/Risdon Corp.; R.T. Vanderbilt Company, Inc.; Stamford Wall Paper Company, Inc.; Union Carbide Corporation; Warner Packaging; and Waterbury Plating Company.

Under the proposed settlement, the Settling Parties are required to pay $345,000 to the Hazardous Substances Superfund. EPA believes the settlement is fair and in the public interest.

EPA is entering into this agreement under the authority of section 122(h) of CERCLA. Section 122(h) of CERCLA provides EPA with authority to consider, compromise, and settle a claim under section 107 of CERCLA for costs incurred by the United States if the claim has not been referred to the U.S. Department of Justice for further action. The U.S. Department of Justice approved this settlement in writing on November 1, 1993.

EPA will receive written comments relating to this settlement for thirty (30) days from the date of publication of this Notice.

A copy of the proposed administrative settlement may be obtained in person or by mail from Margery Adams, U.S. Environmental Protection Agency, Office of Regional Counsel, JFK Federal Building—RCU, Boston, Massachusetts 02203, (617) 565-3746.

The Agency's response to any comments received will be available for public inspection with the Docket Clerk, U.S. Environmental Protection Agency, Region I, JFK Federal Building—RCG, Boston, Massachusetts

(U.S. EPA Docket No. I-93-1079.)

Dated: November 24, 1993.

Patricia L. Meaney,

Acting Regional Administrator.

[FR Doc. 93-31918 Filed 12-29-93; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL MARITIME COMMISSION

Ocean Freight Forwarder License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the

Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR part 510).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, DC 20573.

Associated Int'l. Consultants, Inc. Texas, 13606 Sunswept Way, Houston, TX 77082, Norma Farkas, Sole Proprietor

Districargo Forwarding Inc., 8015 N.W. 29th Street, Miami, FL 33122, Officers: Astrid Flaherty, President, Liliana Campillo, Secretary, Juan Jose Piedrabita, Stockholder

Graebel/Houston Movers, Inc. dba Graebel, Logistics International, 10901 Tanner Rd., Houston, TX 77041, Officers: David W. Graebel, Chairman/Treasurer/CEO/Director; Benjamin D. Graebel, President/COO/Director/Stockholder; G. Lane Ware, Senior V. President/Asst. Secr./Director; A. Robert Kral, Vice President/General Manager

Roy T. Page dba Page, 106 Shamrock Circle, Savannnah, GA 31406, Sole Proprietor

Dated: December 27, 1993.

By the Federal Maritime Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 93-31898 Filed 12-29-93; 8:45 am]

BILLING CODE 6730-01-M

[Docket No. 93-25]

Cancellation of Tariffs for Failure to Comply with Automated Tariff Filing and Information System (ATFI) Filing Requirements (European Trade); Order to Show Cause

Section 8 of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1707, requires the filing of tariffs with the Federal Maritime Commission ("Commission") by common carriers by water and conferences in the foreign commerce of the United States showing all rates, charges, classifications, rules and practices. Section 8 of the 1984 Act further provides that the Commission may by regulation prescribe the form and manner in which tariffs shall be filed. Section 17 of the 1984 Act, id. app. 1716, authorizes the Commission to prescribe rules and regulations necessary to carry out the 1984 Act.

The Commission instituted Docket No. 90-23, Automated Tariff Filing and Information System ("ATFI"), to establish regulations governing the conversion of tariff filing to an electronic system. Proposed Rules were issued on September 9, 1991 (56 FR 46,044) and Interim Rules were issued on August 12, 1992 (57 FR 36,248). The rules issued in Docket No. 90-23 are codified in 46 CFR part 514. This new part modifies and combines all non-obsolete tariff regulations of 46 CFR parts 515, 550, 580 and 581, and establishes regulations to facilitate and implement the conversion of tariffs to ATFI.[1]

On December 17, 1992, the Commission issued Supplemental Report No. 3 and Notice ("Supplemental Report No. 3") (57 FR 59,999) in Docket No. 92-23. Supplemental Report No. 3 prescribed the schedule by which entities serving specific trades must convert tariff data into ATFI, and defined the geographic areas subject to each ATFI filing time frame ("window"). It also provided that tariffs which are not filed in ATFI by the close of the applicable filing window are subject to cancellation by order of the Commission in a show-cause proceeding, unless temporarily exempted.

In January, 1993, the Commission's Bureau of Tariffs, Certification and Licensing ("BTCL") mailed Information Bulletin No. IB 4-93 to over 4,000 firms. This Bulletin included the schedule of filing windows and a statement regarding cancellation of unconverted tariffs by show-cause order. In May, 1993, the Commission issued Supplemental Report No. 4 in Docket No. 90-23 and again advised the public of the filing schedule and that failure to file in ATFI would subject entities to a proceeding for the cancellation of tariffs. In addition, Supplemental Report No. 4 permitted entities to petition the Commission to postpone ATFI filings for up to 90 days from the currently established date for completion of a filing window.

The second ATFI filing window, covering tariffs in European trade areas, closed on August 27, 1993. Thirteen petitions for temporary exemption from that completion date were filed on behalf of approximately 60 carriers and conferences. All of these petitions have been granted. On October 1, 1993, letters were sent from BTCL to entities that had failed to register for ATFI and that had not petitioned for temporary exemption. These letters again warned of a show-cause proceeding to cancel affected tariffs for failure to comply with ATFI filing requirements. The entities listed in the Attachment to this Order have tariffs with European scope, but have not registered for ATFI, filed a petition for temporary exemption from the completion date of August 27, 1993, or responded to the letter of October 1, 1993.

[1] Section 502(b)(1) of Public Law 102-582 requires all tariffs and essential terms of service contracts to be filed electronically with the Commission. 106 Stat. 4900, 4910-11.

Now therefore, it is ordered That pursuant to section 11 of the 1984 Act, 46 U.S.C. app. 1710, the entities listed in the Attachment to this Order are directed to show cause, within 45 days after the publication of this Order in the **Federal Register**, why the Commission should not cancel their tariffs or portions of tariffs currently on file with the Commission with European scope for failure to conform to the requirements of section 8 of the 1984 Act, 46 CFR part 514, and Supplemental Reports Nos. 2, 3, and 4 issued in Docket No. 90-23;

It is further ordered, That a copy of this Order be sent by certified mail to the last known address of the entities listed in the Attachment;

It is further ordered, That this Order be published in the **Federal Register.**

By the Commission.

Joseph C. Polking,

Secretary.

Attachment

Air-Mar Shipping, Inc.
American Contract Freight Line, Ltd.
Arrow-Service
Bangladesh Shipping Corporation
Caramerica S.R.L.
Cargo America Corp.
Cargo Overseas Limited
CMB Transport NV
Combimar & Agemar S.R.L.
Compania Transatlantic Espanola, S.A.
DFDS Chelmer, Inc.
EOL (UK) Ltd.
Euro-Gulf International, Inc.
Harbour-Link International Inc.
Henry Johnson Sons & Co., Ltd.
Hermann Ludwig GMBH & Co.
Intersped Systems Inc.
Irano Misr Shipping Co.
Lane Shipping Company
Maritima Euroship, S.A.
Maritime Consolidators Holland (MCH) B.V.
Maromar Inc.
Mineral Shipping (PTE.) Ltd.
Multimodal Shipping, Ltd.
Nichiro Corp.
Nordisk Transport and Spedition AB
Ralex International Corp.
Rokuchu Marine Corporation
Rotterdam Waterway
Sagatrans S.A.
Shenk, David W.
Surinam Navigation Co.
Unsworth International Container Line
Van Ommeren Bulk Shipping BV
Webster Miller Freight Services Ltd.

[FR Doc. 93-31897 Filed 12-29-93; 8:45 am]

BILLING CODE 6730-01-M

GENERAL SERVICES ADMINISTRATION

Change in Solicitation Procedures Under the Small Business Competitiveness Demonstration Program

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Notice.

SUMMARY: Title VII of the "Business Opportunity Development Act of 1988" (Pub. L. 100–656) established the Small Business Competitiveness Demonstration Program and designated nine (9) agencies, including GSA, to conduct the program over a four (4) year period from January 1, 1989 to December 31, 1992. The Small Business Opportunity Enhancement Act of 1992 (Pub. L. 102–366) extended the demonstration program until September 1996 and made certain changes in the procedures for operation of the demonstration program. The law designated four (4) industry groups for testing whether the competitive capabilities of the specified industry groups will enable them to successfully compete on an unrestricted basis. The four (4) industry groups are: Construction (except dredging); architectural and engineering (A&E) services (including surveying and mapping); refuse systems and related services (limited to trash/garbage collection); and non-nuclear ship repair. Under the program, when a participating agency misses its small business participation goal, restricted competition is reinstituted only for those contracting activities that failed to attain the goal. The small business goal is 40 percent of the total contract dollars awarded for construction, trash/garbage collection services, and non-nuclear ship repair and 35 percent of the total contract dollars awarded for architect-engineer services. This notice announces modifications to GSA's solicitation practices under the demonstration program based on a review of the agency's performance during the period from October 1, 1992 to September 30, 1993. Modifications to solicitation practices are outlined in the Supplementary information section below and apply to solicitations issued on or after January 1, 1994.

EFFECTIVE DATE: January 1, 1994.

FOR FURTHER INFORMATION CONTACT: Ida Ustad, Office of GSA Acquisition Policy (202) 501–1224.

SUPPLEMENTARY INFORMATION:

Procurements of construction or trash/garbage collection with an estimated value of $25,000 or less will be reserved for emerging small business concerns in accordance with the procedures outlined in the interim policy directive issued by the Office of Federal Procurement Policy (58 FR 13513, March 11, 1993).

Procurements of construction or trash/garbage collection with an estimated value that exceeds $25,000 by GSA contracting activities will be made in accordance with the following procedures:

Construction Services in Groups 15, 16, and 17

Procurements for all construction services (except solicitations issued by GSA contracting activities in Regions 2, 3, 5, and 9 in SIC 1794) will be conducted on an unrestricted basis.

Procurements for construction services in SIC 1794 issued by GSA contracting activities in Regions 2, 3, 5, and 9 will be set aside for small business when there is a reasonable expectation of obtaining competition for two or more small businesses. If no expectation exists, the procurements will be conducted on an unrestricted basis.

Region 2 encompasses the states of Connecticut, Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, New Jersey, New York, Puerto Rico, and Virgin Islands.

Region 3 encompasses the states of Pennsylvania, Delaware, West Virginia, Maryland (except Montgomery and Prince Georges counties) and Virginia (except the city of Alexandria and the counties of Arlington, Fairfax, Loudoun and Prince William).

Region 5 encompasses the states of Illinois, Indiana, Ohio, Michigan, Minnesota, and Wisconsin.

Region 9 encompasses the states of Arizona, California, Hawaii, and Nevada.

Trash/Garbage Collection Services in PSC S205

Procurements for trash/garbage collection services in PSC S205 will be conducted on an unrestricted basis.

Architect-Engineer Services (All PSC Codes Under the Demonstration Program

Procurements for all architect-engineer services (except solicitations issued by contracting activities in GSA Central Office and Regions 2, 3, 4, 6, and 10) shall be conducted on an unrestricted basis.

Procurements for architect-engineer services issued by GSA contracting activities in GSA Central Office and Regions 2, 3, 4, 6, and 10 will be set aside for small business when there is a reasonable expectation of obtaining competition from two or more small businesses. If no expectation exists, the procurement will be conducted on an unrestricted basis.

Central Office is located in Washington, DC. Region 2 encompasses the states of Connecticut, Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, New Jersey, New York, Puerto Rico, and Virgin Islands. Region 3 encompasses the states of Pennsylvania, Delaware, West Virginia, Maryland (except Montgomery and Prince Georges counties) and Virginia (except the city of Alexandria and the counties of Arlington, Fairfax, Loudoun and Prince William). Region 4 encompasses the states of Alabama, Florida, Georgia, Kentucky, North Carolina, South Carolina, Mississippi, and Tennessee. Region 6 encompasses the states of Iowa, Kansas, Missouri, and Nebraska. Region 10 encompasses the states of Alaska, Idaho, Oregon, and Washington.

Non-Nuclear Ship Repair

GSA does not procure non-nuclear ship repairs.

Dated: December 20, 1993.

Richard H. Hopf, III,

Associate Administrator for Acquisition Policy.

[FR Doc. 93–31886 Filed 12–29–93; 8:45 am]

BILLING CODE 6820–61–M

Intent to Prepare An Environmental Impact Statement For the Suitland Federal Center Master Development Plan, Suitland, MD

Pursuant to section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969 as implemented by the Council on Environmental Quality regulations (40 CFR parts 1500–1508), and the General Services Administration (GSA) guidelines PBS P 1095.4B, GSA announces its intent to prepare an Environmental Impact Statement (EIS) for the Draft Suitland Federal Center (SFC) Master Development Plan. The Suitland Federal Center is a Federally owned site located in the Suitland community of Prince George's County, Maryland, approximately ¾ of a mile southeast of the District of Columbia. The SFC Master Plan area under GSA control consists of 185 acres bounded by Suitland Parkway to the south, Suitland Road to the north, Silver Hill Road to the east, and Washington National and Lincoln Park Memorial Cemeteries to the west. The project area does not include approximately 16 acres of the site's southeast corner GSA is planning

to transfer to the Washington Metropolitan Area Transit Authority for construction of the Suitland Metro Rail Station as required by Public Law 103–123, October 28, 1993.

The Suitland Federal Center's suburban office park setting is comprised of approximately 2.5 million gross square feet (GSF) of office space housing an on-site population of more than 7,000 persons. Currently, the site consists of four major office buildings and one record storage building. Other structures at the SFC include a converted historic residence, the Center's heating and refrigeration plant, a water tower, and two small buildings used for record and film storage. Much of the site is surrounded by a perimeter security fence which encloses most of the approximately 4,730 surface parking spaces available to employees and visitors.

GSA's Draft Master Development Plan for the Suitland Federal Center establishes two currently open sites for new development and two sites for redevelopment. The design of the Plan can be classified as a linear office park infill scheme which will consolidate most of the surface parking spaces into several on-grade parking structures. The Plan will ultimately add 1.4 million (GSF) of new Federal office space and over 6,000 employees to the SFC for a total build-out of 3.9 million GSF and a population of almost 14,000 persons.

The National Capital Planning Commission (NCPC) will act as a cooperating agency during preparation of the EIS pursuant to 40 CFR 1501.6.

The EIS will be developed in two phases. Phase I will consist of a scoping process that will identify issues to be addressed in the EIS and provide a review of those issues already identified by the Draft Environmental Assessment (EA) prepared for the SFC Master Development Plan. Potential impacts related to the proposed action and identified by the EA include transportation, stormwater management, and short term impacts during construction. Phase I will also include an economic analysis to determined the feasibility to the government of implementing the proposed Master Development Plan over a ten year period.

Phase II will examine the affected environment, environmental consequences, and mitigation measures of the proposed action. The analysis will be based on at least three different development alternatives including a Master Plan alternative (build-out) as described above and a "no action" alternative. At least one other alternative within this range will be examined based upon recommendations from the scoping process.

During Phase I, a public scoping meeting will be held at 7:30 pm, Monday, January 31, 1994, at Suitland High School, 5200 Silver Hill Road, District Heights, MD. A formal presentation will precede the request for public comments. GSA representatives will be available at this meeting to receive comments from the public regarding issues of concern. The intention of the meeting is *not* to debate the merits of the proposed action. Instead, it is intended that affected Federal, state, and county agencies, as well as interested community groups and individuals identify environmental concerns that should be addressed during the preparation of the EIS. All who wish to speak must either first register by mail or in person at the meeting. Those who register will speak in the order of registration followed by those who did not register. In the interest of available time, each speaker will be asked to limit oral comments to five (5) minutes.

Agencies and the general public are also invited and encouraged to provide written comments in addition to, or in lieu of, oral comments at the public meeting. To be most helpful, scoping comments should clearly describe specific issues or topics which the commentator believes the EIS should address.

All written statements regarding the EIS scoping process should be received no later than February 10, 1994. Written statements, as well as additional information and/or questions about the scoping process, should be directed towards: Ms. Judith Binder or Mr. Bill Fiander, General Services Administration—National Capital Region, Planning Staff, 7th and D Streets, SW., room #7618, Washington, DC 20407. They also can be reached by telephone at (202) 708–5334.

This Notice of Intent will be published in local newspapers at the beginning of January, 1994. Announcements for the public scoping meeting will also be mailed at this time to interested agencies, groups, and individuals.

Dated: December 14, 1993.

Thurman M. Davis,

Regional Administrator, National Capital Region.

[FR Doc. 93–31967 Filed 12–29–93; 8:45 am]

BILLING CODE 6820–23–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Vessel Sanitation Program (Cruise Ship Industry, etc.); Current Status Meeting

The National Center for Environmental Health (NCEH) of the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Current Status of the Vessel Sanitation Program and Experience to Date with Program Operations—Public meeting between CDC and the cruise ship industry, private sanitation consultants, and other interested parties.

Time and Date: 9 a.m –12 noon, Wednesday, February 2, 1994.

Place: Miami Port Authority Passenger Terminal No. 12, 1120 Port Boulevard, Miami, Florida 33132.

Status: Open.

Purpose: To discuss current status of the Vessel Sanitation Program and experience to date with program operations.

Matters to be discussed: During the past 7 years, as part of the revised Vessel Sanitation Program, CDC has conducted a series of public meetings with members of the cruise ship industry, private sanitation consultants, and other interested parties. This meeting is a continuation of that series of public meetings.

For a period of 15 days following the meeting, through February 17, 1994, the official record of the meeting will remain open so that additional material or comments may be submitted to be made part of the record of the meeting. The meeting will be open to the public for participation, comment, and observation, limited only by space available

Contact person for more information: Thomas E. O'Toole, Deputy Chief, Special Programs Group (F29), NCEH, CDC, 4770 Buford Highway, NE, Atlanta, Georgia 30341–3724, telephone 404/488–7070.

Dated: December 22, 1993.

Elvin Hilyer,

Associate Director for Policy Coordination, Centers for Disease Control and Prevention (CDC).

[FR Doc. 93–31751 Filed 12–29–93; 8:45 am]

BILLING CODE 4160–18–M

Food and Drug Administration

[Docket No. 92N-0465]

Kun Chae Bae; Denial of Hearing; Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is issuing an order under section 306(a)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 335a(a)(2)) permanently debarring Mr. Kun Chae Bae, 19 Rolling Ridge Rd., Northfield, IL 60093, from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Mr. Bae was convicted of a felony under Federal law for conduct relating to the development or approval, including the process for development or approval, of a drug product; and relating to the regulation of a drug product under the act. Mr. Bae has failed to file with the agency information and analyses sufficient to create a basis for a hearing concerning this action.

EFFECTIVE DATE: December 30, 1993.

ADDRESSES: Application for termination of debarment to the Dockets Management Branch (HFA-305), Food and Drug Administration, rm. 1-23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Tamar S. Nordenberg, Center for Drug Evaluation and Research (HFD-366), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301-594-2041.

SUPPLEMENTARY INFORMATION:

I. Background

On December 13, 1990, the United States District Court for the District of Maryland entered judgment against Mr. Kun Chae Bae, former president of My-K Laboratories (My-K), for one count of interstate travel in aid of racketeering, a Federal felony offense under 18 U.S.C. 1952. As a result of this conviction, FDA served Mr. Bae by certified mail on April 6, 1993, a notice proposing to permanently debar him from providing services in any capacity to a person that has an approved or pending drug product application and offered him an opportunity for a hearing on the proposal. The proposal was based on a finding, under section 306(a)(2)(A) and (a)(2)(B) of the act, that he was convicted of a felony under Federal law for conduct relating to the development or approval of a drug product and relating to the regulation of a drug product.

The certified letter informed Mr. Bae that his request for a hearing could not rest upon mere allegations or denials but must present specific facts showing that there was a genuine and substantial issue of fact requiring a hearing. The letter also notified Mr. Bae that if it conclusively appeared from the face of the information and factual analyses in his request for a hearing that there was no genuine and substantial issue of fact which precluded the order of debarment, FDA would enter summary judgment against him and deny his request for a hearing.

Mr. Bae filed a written request for a hearing dated May 4, 1993. He filed information on which he relied to justify a hearing in a legal memorandum dated June 3, 1993, and a supplemental legal memorandum dated July 15, 1993. In the memoranda, Mr. Bae contended that the debarment statute is punitive in nature and so its retroactive application to him violates the ex post facto clause of the U.S. Constitution. The Deputy Commissioner for Operations has considered Mr. Bae's argument and concludes that it is unpersuasive and fails to raise a genuine and substantial issue of fact requiring a hearing. The constitutional argument that Mr. Bae offers does not create a basis for a hearing because hearings are not granted on matters of policy or law, but only on genuine and substantial issues of fact (see 21 CFR 12.24(b)(1)). The argument is, in any event, unconvincing, for the reasons discussed below.

II. Mr. Bae's Argument in Support of a Hearing

Mr. Bae argues that the ex post facto clause of the U.S. Constitution prohibits application of section 306(a)(2) of the act to him because this section was not in effect at the time of Mr. Bae's criminal conduct. With the enactment of the Generic Drug Enforcement Act (GDEA) on May 13, 1992, Congress amended the act to include section 306(a)(2), and Mr. Bae was convicted on December 13, 1990.

An ex post facto law is one that reaches back to punish acts that occurred before enactment of the law or that adds a new punishment to one that was in effect when the crime was committed. (*Ex parte Garland*, 4 Wall. 333, 377, 18 L. Ed. 366 (1866); *Collins v. Youngblood*, 110 S. Ct. 2715 (1990).) Mr. Bae's claim that application of the mandatory debarment provisions of the act is prohibited by the ex post facto clause is unpersuasive. Because the intent behind debarment under section 306(a)(2) of the act is remedial rather than punitive, the ex post facto clause is inapplicable.

The congressional intent with respect to actions under section 306(a)(2) of the act is clearly remedial. Congress created the GDEA in response to findings of fraud and corruption in the generic drug industry. Both the language of the GDEA itself and its legislative history reveal that the purpose of the debarment provisions set forth in the GDEA is "* * * to restore and to ensure the integrity of the abbreviated drug application approval process and to protect the public health * * *." (See section 1 of the GDEA.) This is a remedial rather than a punitive goal. (See *Manacchio* v. *Kusserow*, 961 F.2d 1539, 1542 (11th Cir. 1992) (exclusion of physician from participation in medicare programs because of criminal conviction is remedial, not punitive).) Supporting the remedial character of debarment is a statement by Senator Hatch in the Congressional Record of April 10, 1992, at S 5616, "* * * [t]he legislation * * * provides a much-needed remedy for the blatant fraud and corruption uncovered in the generic drug industry * * * during the last 3 years."

The Supreme Court has long held that statutes that deny future privileges to convicted offenders because of their previous criminal activities in order to ensure against corruption in specified areas do not impose penalties for past conduct and, therefore, do not violate the ex post facto law prohibitions. (See, e.g., *Hawker* v. *New York*, 170 U.S. 189, 190 (1898) (physician barred from practicing medicine for a prior felony conviction); *DeVeau* v. *Braisted*, 373 U.S. 154 (1960) (convicted felon's exclusion from employment as officer of waterfront union).)

In DeVeau, the Court upheld a law that prohibited a convicted felon's employment as an officer in a waterfront union. The purpose of the law was to remedy the past corruption and to ensure against future corruption in the waterfront unions. The Court in DeVeau, 363 U.S. at 160, stated:

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession * * *.

As in *DeVeau*, the legislative purpose of the relevant statute is to ensure that fraud and corruption are eliminated from the drug industry. The restrictions placed on individuals convicted of a felony under Federal law are not

intended as punishment but are "incident to a regulation of a present situation" (*DeVeau*, 363 U.S. at 160) and necessary in order to remedy the pastfraud and corruption in the industry.

Due to the potentially serious consequences to the public health of fraud and corruption in the drug industry, the permanent debarment of convicted felons like Mr. Bae is not an excessive means to eliminate fraud from the industry. The legislative history of the GDEA is replete with statements, some cited above, that the act provides a reasonable means of ridding the drug industry of widespread corruption and restoring consumer confidence in generic drugs.

Contrary to Mr. Bae's contention that the breadth of the phrase "in any capacity" in section 306(c)(1)(B) of the act is indicative of a punitive intent, in fact this section is crucial to the realization of the previously discussed remedial ends. The pertinent portion of section 306(c)(1)(B) of the act provides that a debarred individual may not "provid[e] services in any capacity to a person that has an approved or pending drug product application * * *." An attempt at a determination of specifically which positions are closed to debarred persons would cause serious administrative difficulties, including the problem of ascertaining the exact nature of the employee's relationship with the employer and defining what constitutes a sufficient nexus with the regulatory scheme under all circumstances. (See the House Committee on Agriculture's H. Rept. 1546, 87th Cong., 2d sess. 8 (1962), U.S. Code Congressional and Administrative News, 1962, p. 2749, for Congress' explanation of similar expansive language in debarment provision of the Perishable Agricultural Commodities Act, discussed further below.)

The United States Court of Appeals for the District of Columbia Circuit has upheld a comparable provision of the Perishable Agricultural Commodities Act, as amended (PACA) (7 U.S.C. sections 499a–499s), which bars certain persons implicated in wrongdoing under PACA from being employed by any person licensed under PACA, even in positions unrelated to that act's regulatory scheme. (*Siegel* v. *Lyng*, 851 F.2d 412 (D.C. Cir. 1988).) The court stated that the "investigatory difficulty * * * confirms the reasonableness of Congress' amendment barring *any* employment for the proscribed period." (Id. at 416) (Emphasis in original.)

Mr. Bae asserts that the special termination provision of section 306(d)(4)(C) of the act is evidence of a punitive intent. The provision gives FDA authority to limit the period of debarment if the Secretary finds that the individual has provided "substantial assistance in the investigations or prosecutions" of certain offenses which relate to matters under FDA's jurisdiction.

The special termination provision is not evidence of a punitive intent. To the contrary, the provision will advance the remedial objective of ensuring the safety and efficacy of the country's drug supply. The cooperation fostered by this special termination provision will enable FDA to eliminate from the drug industry many actors who are corrupting the industry, endangering the public health, and destroying consumers' confidence in the nation's drug supply. Convictions based on debarred persons' assistance can, of course, form the basis for other debarments if the terms of the act are satisfied, which further serves the act's remedial objectives.

An individual's debarment will not be terminated if FDA finds that the remedial intent of the act will be undermined by such termination. The power to terminate debarment is discretionary with FDA, and the agency is bound by the provision's terms to exercise this authority in a manner consistent with the interest of justice and protection of the integrity of the drug approval process (21 U.S.C. 335a(d)(4)(D)). Mr. Bae does not dispute the fact that he was convicted as alleged by FDA in its proposal to debar him, and he has raised no genuine and substantial issue of fact regarding his conviction. Also, Mr. Bae's legal arguments do not create a basis for a hearing and, in any event, are unpersuasive. Accordingly, the Deputy Commissioner for Operations denies Mr. Bae's request for a hearing.

III. Findings and Order

Therefore, the Deputy Commissioner for Operations, under section 306(a) of the act, and under authority delegated to her (21 CFR 5.20), finds that Mr. Kun Chae Bae has been convicted of a felony under Federal law for conduct (1) relating to the development or approval, including the process for development or approval, of a drug product (21 U.S.C. 335a(a)(2)(A)); and (2) relating to the regulation of a drug product under the act (21 U.S.C. 335a(a)(2)(B)). As a result of the foregoing findings, Mr. Kun Chae Bae is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application under section 505, 507, 512, or 802 of the act (21 U.S.C. 355, 357, 360b, or 382), or under section 351 of the Public Health Service Act (42 U.S.C. 262), effective on December 30, 1993 (21 U.S.C. 335a(c)(1)(B) and (c)(2)(A)(ii) and 21 U.S.C. 321(ee)). Any person with an approved or pending drug product application who knowingly uses the services of Mr. Bae in any capacity, during his period of debarment, will be subject to civil money penalties. If Mr. Bae, during his period of debarment, provides services in any capacity to a person with an approved or pending drug product application, he will be subject to civil money penalties. In addition, FDA will not accept or review any abbreviated new drug applications submitted by or with the assistance of Mr. Bae during his period of debarment.

Any application by Mr. Bae for termination of debarment under section 306(d)(4) of the act should be identified with Docket No. 92N–0465 and sent to the Dockets Management Branch (address above). All such submissions are to be filed in four copies. The public availability of information in these submissions is governed by 21 CFR 10.20(j). Publicly available submissions may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 1, 1993.

Jane E. Henney,

Deputy Commissioner for Operations.

[FR Doc. 93–31915 Filed 12–29–93; 8:45 am]

BILLING CODE 4160–01–F

National Institutes of Health

Meeting of Panel

Notice is hereby given that the Forum on Sponsored Research Agreements: Perspectives, Outlook, and Policy Development, convened as an ad hoc group of consultants to the Advisory Committee to the Director, NIH, will meet in public session on January 25 and 26 at the Marriott Hotel in Bethesda, Maryland. The meeting will begin at 8:30 a.m. each day and will end at 8:30 p.m. on January 25 and at 4 p.m. on January 26.

The purpose of the Forum is to provide recommendations that will be used in NIH's development of general principles to guide grantee institutions as they negotiate research-support agreements with prospective industrial sponsors. The Forum Panel members will discuss the following issues: the scope and size of sponsored research agreements; the U.S. manufacturing requirement, preference for U.S. industry, and foreign access; the preference for small business; the utilization and licensing requirements

for inventions made with Federal funding; and research freedom. Case studies will be presented to illustrate important issues of concern under the Bayh-Dole Act. At the conclusion of its work, the Panel will transmit its report to the Advisory Committee to the Director, NIH, for review.

Concerned organizations and individuals are invited to present their views on January 26, from 10 a.m. to 12 p.m. To reserve a 5-minute presentation time, please contact Ms. Peggy Schnoor at (301) 496–1454. Organizations and individuals are also invited to submit written views of any length to the Panel in advance of the meeting. Written materials should be forwarded to Ms. Peggy Schnoor by FAX (301) 402–0280 or by mail to the NIH, Shannon Building, room 218, 9000 Rockville Pike, Bethesda, MD 20892. To assist optimally the work of the Panel, written materials should be received by January 15. Comments and questions related to the proposed Forum meeting also should be addressed to Ms. Peggy Schnoor at (301) 496–1454.

Dated: December 22, 1993.

Harold Varmus,

Director, NIH.

[FR Doc. 93–31868 Filed 12–28–93; 8:45 am]

BILLING CODE 4140–01–M

Health Care Financing Administration

Privacy Act of 1974

AGENCY: Health Care Financing Administration (HCFA), Department of Health and Human Services (HHS).

ACTION: Notice of a matching program—between HCFA and the Wisconsin Bureau of Workers' Compensation—HCFA will receive information from the State concerning work-related injuries and diseases.

SUMMARY: Section 1862(b)(2) of the Social Security Act (42 U.S.C. 1395(b)(2)) prohibits Medicare payment with respect to any item or service to the extent that payment has been made, or can reasonably be expected to be made promptly, under a workers' compensation law or plan of the United States or a State.

HCFA has developed a model agreement to be used in negotiating individual agreements with State Workers' Compensation Boards. The agreement will allow HCFA to seek recovery of identified mistaken payments that are the liability of workers' compensation agencies.

The matching report set forth below is in compliance with the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503).

EFFECTIVE DATE: No match will begin sooner than 40 days after the date of publication in the **Federal Register**, and a copy of the model Data Match Agreement will be sent to the Senate Committee on Governmental Affairs, the House Committee on Government Operations, and the Office of Management and Budget (OMB). Any individual matching agreement will remain in effect for 18 months from the date a notice is published in the **Federal Register.**

ADDRESSES: Please address comments to: Richard A. DeMeo, HCFA Privacy Act Officer, Health Care Financing Administration, Office of Budget and Administration, room 2–H–4, East Low Rise Building, 6325 Security Boulevard, Baltimore, Maryland 21207–5187.

FOR FURTHER INFORMATION CONTACT: Herb Shankroff, Division of Entitlement and Benefit Coordination, Bureau of Program Operations, HCFA, room 367 Meadows East Building, 6325 Security Boulevard, Baltimore, Maryland 21207–5187. His telephone number is (410) 966–7171.

SUPPLEMENTARY INFORMATION: One of the priorities of HCFA is to encourage high quality and effective health care while pursuing strategies to contain or moderate health care costs and Medicare program expenditures. As required by the Social Security Act, one approach that HCFA employees to limit Medicare expenditures is the implementation of the Medicare Secondary Payer (MSP) provisions (42 U.S.C. 1395y(b)).

HCFA primarily relies upon providers, physicians, or other suppliers, and beneficiaries themselves, to identify situations where payment should be made by workers' compensation. In addition. Medicare contractors are instructed to identify and investigate claims for which the diagnosis or procedure is suggestive of accidental injury or of work-related illness. Often, however, Medicare contractors are unaware of the availability of workers' compensation and make primary payment by mistake. In these situations, the Medicare contractors must recover the mistaken primary payments to restore them to the Medicare Trust Funds. The identification of MSP situations and the recovery of mistaken Medicare payments frequently entail demonstrating to the other third party payer, such as a worker's compensation agency, its primary liability under 42 U.S.C. 1395y(b).

The purpose of this matching program is to allow HCFA to identify workers' compensation cases that otherwise have gone undetected by the Medicare contractors. HCFA will receive, on a quarterly basis, computer listings of approved workers' compensation cases from the State of Wisconsin. These listings will be matched against the Carrier Medicare Claims Records (System of Records No. 09–70–0501) and the Intermediary Claims Records (System of Records No. 09–70–0503).

After the match, HCFA will further develop the situation and determine whether a mistaken payment of Medicare funds has been made. Such determinations generate demand letters to the identified insurer or payer. If the insurer or payer proves that it did pay primary, in addition to Medicare's mistaken primary payment, the beneficiary or provider is contacted by Medicare with a request for return of the duplicate payment.

At this time, the beneficiary or provider will be provided an opportunity to respond to HCFA's finding that a mistaken payment was made and will be given an explanation of appeal rights. The determination that the beneficiary or provider is responsible to refund Medicare is subject to all the appropriate Medicare review and due process procedures.

In addition, HCFA will add what is known as an auxiliary record indicating those beneficiaries identified as being entitled to workers' compensation. This will prevent future erroneous Medicare payments.

The Privacy Act permits disclosure of information from HCFA's records without a beneficiary's consent if the information issued for purposes that are consistent with the purpose for which the information was collected, such as establishing a beneficiary's claim for Medicare benefits and determining the correct amount of the Medicare payment. The information must also be collected and used in a manner consistent with Privacy Act procedures. Disclosure of information is permitted when the benefit of the use of the information outweighs the effect, or risk of an effect, on the privacy of individuals.

Set forth below is the information required by the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503). A copy of this notice will be provided to the Chairman of the Committee on Government Operations of the House of Representatives, the Chairman of the Committee on Government Affairs of the Senate, and the Acting Administrator of the Office of

Information and Regulatory Affairs in OMB.

Dated: December 20, 1993.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Computer Matching Notice

A. Name of Participating Agencies

Health Care Financing Administration (HCFA) and the State of Wisconsin Bureau of Workers' Compensation.

B. Purpose of the Match

The match will allow HCFA to identify claims for which workers' compensation was the primary payer, but Medicare made primary payments by mistake. It will also facilitate HCFA's attempts to seek recovery of identified mistaken Medicare payments that are the primary responsibility of workers' compensation. It will also assist HCFA from making mistaken primary payments on future claims.

C. Authority for the Match

The match is required to enable HCFA to implement more fully section 1862(b)(2) of the Social Security Act (42 U.S.C. 1395(b)(2)).

D. Records to be Matched

- The Wisconsin Workers' Compensation Board will disclose to HCFA records of the identity of individuals who have been approved for workers' compensation reimbursement.
- HCFA will match information from these records against the Carrier Medicare Claims Records, HHS/HCFA/BPO No. 09–70–0501, and the Intermediary Medicare Claims Records, HHS/HCFA/BPO No. 09–70–0503, to identify possible erroneous Medicare payments.

E. Period of the Match

Beginning no sooner than 40 days from the date of this notice and lasting 18 full calendar months from the beginning date.

F. Address of Contact

Herb Shankroff, Division of Entitlement and Benefit Coordination, Bureau of Program Operations, HCFA, Room 367, Meadows East Building, 6325 Security Boulevard, Baltimore, Maryland 21207–5187. His telephone number is (410) 966–7171.

[FR Doc. 93–31901 Filed 12–29–93; 8:45 am]

BILLING CODE 4120–03–M

Privacy Act of 1974; Matching Program

AGENCY: Health Care Financing Administration (HCFA), Department of Health and Human Services (HHS).

ACTION: Notice of a matching program—between HCFA and the Office of Personnel Management (OPM) concerning active, non-postal, Federal civilian employees who have health insurance through their Federal employment.

SUMMARY: Section 1862(b) of the Social Security Act (42 U.S.C. 1395y(b)) provides that Medicare is the secondary payer for certain individuals who have primary health insurance through their employers. Although the majority of the Medicare population is retired, there are a significant number of beneficiaries who have primary health insurance coverage through an employer group health plan (EGHP). Some disabled beneficiaries continue to have primary coverage through the large group health plan (LGHP) of the employer for whom they used to work actively. Also, Medicare is secondary payer to EGHP's for 18 months for beneficiaries who have Medicare solely because of permanent kidney failure. When primary coverage is available through an EGHP or an LGHP, Medicare benefits are available only to make secondary payments for Medicare covered services also covered under that primary coverage, or to cover eligible services not covered under the primary plan.

The Federal Employees Health Benefits Program (FEHB) qualifies as both a EGHP and a LGHP. This means that active Federal employees who are enrolled in a FEHB plan and who are also Medicare beneficiaries must look to their FEHB plan as the primary health insurance payer. In the case of beneficiaries with permanent kidney failure, Medicare is secondary for only 18 months.

HCFA and OPM have developed a computer matching agreement, the purpose of which is to enable HCFA to identify Medicare beneficiaries who are also current Federal employees enrolled in a FEHB plan.

The matching report set forth below is in compliance with the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503).

EFFECTIVE DATE: No match will begin sooner than 40 days after the date of publication in the **Federal Register**, or 40 days after a copy of the Matching Agreement has been sent to the Senate Committee on Governmental Affairs and the House Committee on Government Operations, whichever is later. The Matching Agreement will remain in effect for 18 months.

ADDRESSES: Please address comments to: Richard A. DeMeo, HCFA Privacy Act Officer, Health Care Financing Administration, room 2–H–4, East Low Rise Building, 6325 Security Boulevard, Baltimore, Maryland 21207–5187.

FOR FURTHER INFORMATION CONTACT: Herb Shankroff, Division of Operational Initiatives, Bureau of Program Operations, HCFA, room 368, Meadows East Building, 6325 Security Boulevard, Baltimore, Maryland 21207, telephone (410) 966–7171.

SUPPLEMENTARY INFORMATION: One of the priorities of HCFA is to encourage high quality and effective health care while pursuing strategies to contain or moderate health care costs and Medicare program expenditures. As required by the Social Security Act, one approach that HCFA employs to limit Medicare expenditures is the implementation of the Medicare Secondary Payer (MSP) provisions (42 U.S.C. 1395y(b)).

HCFA primarily relies upon providers, physicians or other suppliers, and beneficiaries themselves, to identify situations where payment should be made by other primary insurers. Often, however, Medicare contractors are unaware of the availability of other primary coverage and make primary payment when Medicare was actually only the secondary payer. In these situations, the Medicare contractors must recover the mistaken primary payments to restore them to the Medicare Trust Funds. The identification of MSP situations and the recovery of mistaken Medicare payments frequently entail demonstrating to the other third party payer, its primary liability under 42 U.S.C. 1395y(b).

The purpose of this matching program is to allow HCFA to identify current, non-postal, Federal civilian employees who are also Medicare beneficiaries and who have primary health insurance coverage through the FEHB. HCFA will receive, on a semi-annual basis, computer listings of current Federal employees enrolled in a FEHB. OPM will provide extracts from the Central Personnel Data File portion of OPM/GOVT–1 General Personnel Records, system published at 55 FR 3938 (February 5, 1990). These listings will be matched against HCFA's Health Insurance Master Record (System of Records No. 09–70–0502).

After the match, HCFA will create an auxiliary record for each affected Medicare beneficiary, indicating the identity of the FEHB in which the

current Federal employee is enrolled. These auxiliary records will prevent Medicare from making incorrect primary payments in the future. Medicare will also determine whether a mistaken payment of Medicare funds has been made. Such determinations generate demand letters to the identified insurer or payer. If the insurer or payer proves that it did pay primary, in addition to Medicare's mistaken primary payment, the beneficiary or provider is contacted by Medicare with a request for return of the duplicate payment. At that time, the beneficiary or provider will be provided an opportunity to respond to HCFA's finding that a mistaken payment was made and will be given an explanation of appeal rights. The determination that the beneficiary or provider is responsible for refunding the Medicare Trust Funds is subject to all the appropriate Medicare review and due process procedures.

The Privacy Act permits disclosure of information from HCFA's records without a beneficiary's prior written consent if the information is used for purposes that are consistent with the purpose for which the information was collected, such as establishing a beneficiary's claim for Medicare benefits and determining the correct amount of the Medicare payment. The information must also be collected and used in a manner consistent with Privacy Act procedures. Disclosure of information is permitted when the benefit of the use of the information outweighs the effect, or risk of an effect, on the privacy of individuals. In this instance, disclosure is authorized under 5 U.S.C. section 552a(b)(3) and under 42 U.S.C. 1395y(b).

Set forth below is the information required by the Computer Matching and Privacy Protection Act of 1988 (Pub. L. 100–503). A copy of this notice will be provided to the Chairman of the Committee on Government Operations of the House of Representatives, the Chairman of the Committee on Government Affairs of the Senate, and the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget.

Dated: December 20, 1993.

Bruce C. Vladeck,

Administrator, Health Care Financing Administration.

Computer Matching Notice

A. Name of Participating Agencies

Health Care Financing Administration (HCFA) and the Office of Personnel Management (OPM).

B. Purpose of Match

The match will assist HCFA to refrain from making primary payments on future claims in instances when Medicare is only the secondary payer. The match will also assist HCFA in identifying claims for which an FEHB plan was primary payer, but for which Medicare made primary payments by mistake. It will also facilitate HCFA's attempts to identify mistaken Medicare payments that were the primary responsibility of a FEHB plan.

C. Authority for the Match

The match is required to enable HCFA to implement more fully section 1862(b) of the Social Security Act (42 U.S.C. 1395y(b)).

D. Records To Be Matched

- OPM will disclose to HCFA records of the identity of individuals who are current Federal employees enrolled in a FEHB plan. These records are contained in OPM/GOVT–1, "General Personnel Records."
- HCFA will match information from these records against the "Health Insurance Master Record," No. 09–70–0502, HHS/HCFA/BPO, to create an auxiliary record where necessary. (Note: the "Health Insurance Master Record" is being replaced by the Medicare Enrollment Data Base (MED) with the same system number.)

E. Period of Match

Beginning no sooner than 40 days from the date of this notice and lasting 18 full calendar months from the beginning date.

F. Address of Contact

Herb Shankroff, Division of Operational Initiatives, Bureau of Program Operation, HCFA, room 368 Meadows East Building, 6325 Security Boulevard, Baltimore, Maryland 21207–5187, Telephone (410) 966–7171.

[FR Doc. 93–31902 Filed 12–29–93; 8:45 am]
BILLING CODE 4120–03–M

Office of Consumer Affairs

Hearings on Preserving Privacy in the National Information Infrastructure

AGENCY: U.S. Office of Consumer Affairs, HHS.

ACTION: Notice of open hearing.

SUMMARY: The Privacy Working Group of the Information Infrastructure Task Force (IITF) will hold hearings in January in California and Washington, DC, to obtain advice from individuals and organizations who will be affected by the development and implementation of the National Information Superhighway system: the National Information Infrastructure (NII). The focus of the hearings is on identifying privacy concerns from the particular viewpoint of the participants.

The Privacy Working Group is part of the Information Policy Task Force constituted as part of a larger Task Force on the NII chaired by the Secretary of Commerce.

The hearings will consist of a series of panels on specific areas, e.g., telecommunications, information technology, financial services, law enforcement, research and academic records, and public records. A final panel will consider the development of fair information practices in the NII.

Panelists are expected to give a brief (10–15 minute) presentation covering the following points:

- How does your organization see the development of a NII affecting the way you carry out your business or your organizational responsibilities?
- What are the most critical privacy or security concerns the NII will bring to your issue area?
- What must be built into the NII to accommodate those concerns?
- What activities do you currently have underway to anticipate and deal with those concerns?
- What recommendations do you have for the working group?

Following the presentation, the audience will be invited to ask questions or make comments.

DATES: Hearings will be held in Sacramento, California on January 10 and 11, 1994, from 8:30 a.m. to 5 p.m. In Washington, DC, hearings will be held on January 26 and 27, from 8:30 a.m. to 5:30 p.m..

PLACE: The California hearings will be located in the California Department of Consumer Affairs First Floor Hearing Room, 400 R Street, Sacramento. The hearings in Washington, DC will be held in the Departmental Auditorium of the Department of Commerce, 14th & Constitution Avenue, NW.

FOR FURTHER INFORMATION CONTACT: Pat Faley, U.S. Office of Consumer Affairs, (202) 634–4329.

REGISTRATION: The public is invited to attend, question speakers and to make brief comments. No advance registration, but space may be limited. Participants are expected to make their own arrangements for travel and accommodations. Concise written statements for consideration by the Privacy Working Group should be sent to "Privacy," USOCA, 1620 L Street,

NW., Washington, DC 20036, or faxed to (202) 634–4135.

Patricia Faley,

Acting Director, U.S. Office of Consumer Affairs.

[FR Doc. 93–31925 Filed 12–29–93; 8:45 am]

BILLING CODE 4190–04–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing—Federal Housing Commissioner

[Docket No. N–93–3591 FR–3408–N–02 and N–93–3590; FR–3409–N–02]

Announcement of Funding Awards for Supportive Housing for the Elderly and Persons with Disabilities FY 1993

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Annoucement of Funding awards.

SUMMARY: In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding award decisions made by the Department as a result of competitions for funding under the following two notices of funding availability: Supportive Housing for the Elderly and Supportive Housing for Persons with Disabilities. This announcement contains the names and addresses of the award winners and the amount of the awards.

FOR FURTHER INFORMATION CONTACT: Robert Ratcliffe, Acting Director, Housing for Elderly and Handicapped People Division, Department of Housing and Urban Development, Room 6116, 451 Seventh Street, SW., Washington, DC 20410, telephone (202) 708–2730 or (202) 708–4594 (TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: The purposes of these competitions were to (1) provide assistance to private nonprofit organizations and nonprofit consumer cooperatives to expand the elderly; and (2) provide assistance to private nonprofit organizations to expand the supply of supportive housing for persons with disabilities.

The 1993 awards announced in this Notice were selected for funding in competitions announced in the **Federal Register** notices published on May 5, 1993 at 58 FR 26843 and 26824.

A total of $571,821,000 of capital advances, with $31,104,700 in project rental assistance was awarded to Supportive Housing for the elderly. A total of $141,597,800 of capital advances, with $7,853,000 in project rental assistance was awarded to Supportive Housing for Persons with Disabilities.

In accordance with section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, the Department is publishing the names, addresses, and the amount of those awards, as set out at the end of this Notice.

Dated: December 20, 1993.

Nicolas P. Retsinas,

Assistant Secretary for Housing—Federal Housing Commissioner.

SECTION 202 PROGRAM FOR THE ELDERLY (TO ACCOMPANY HUD 93–99)

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Capital advance amount	Rental assistance contract authority
BOSTON								
Connecticut								
Hartford	017–EE005/CT26–S931–001, Order of Ahepa Nat, 7202 North Shadeland Ave, Indianapolis, IN 46250.	Waterford Town, CT	M		1	54	4,254,700	222,200
Hartford	017–EE006/CT26–S931–002, Lavissiere Associa, 318 Main St, Farmington, CT 06034.	Danbury, CT	M		1	45	3,445,000	181,100
Subsubtotal					2	99	7,699,700	403,300
Massachuetts								
Boston	023–EE021/MA06–S921–001, First Baptist Church, 221 Cabot Street, Beverly, MA 01915.	Beverly, MA	M		1	67	5,259,500	299,900
Boston	023–EE034/MA06–S931–001, Cath Archbishop of Boston, 2121 Commonwealth Avenue, Brighton, MA 02135.	Malden, MA	M		1	75	5,883,900	341,900
Boston	023–EE035/MA06–S931–002, Springfield Hobby, 1475 Roosevelt Avenue, Springfield, MA 01109.	Springfield, MA	M		1	62	4,368,400	282,600
Boston	023–EE036/MA06–S931–003, S. Shore Hsg., 169 Summer Street, Kingston, MA 02364.	Plympton, MA	M		1	40	2,689,100	182,300
Boston	023–EE037/MA06–S931–004, Church of the Holy Spirit, 525 River Street, Mattapan, MA 02126.	Mattapan, MA	M	2	1	45	3,410,200	205,100
Boston	023–EE039/MA06–S931–006, Jamaica Plain Dev, 31 Germania Street, Jamaica Plain, MA 02130.	Jamaica Plain, MA	M		1	45	3,930,300	205,100

SECTION 202 PROGRAM FOR THE ELDERLY (TO ACCOMPANY HUD 93–99)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Capital advance amount	Rental assistance contract authority
Subsubtotal	.....	.....		.....	6	334	25,541,400	1,516,900
Maine								
Manchester ...	024–EE010/ME36–S931–001, Statewide Affordab, 19 Spring Street, Newport, RI 02840.	Boothbay Harbor CE, ME.	NM	.....	1	20	1,257,800	68,400
Subsubtotal	.....	.....		.....	1	20	1,257,800	68,400
New Hampshire								
Manchester ...	024–EE008/NH36–S931–002, Souther NH Service, PO Box 5040, Manchester, NH 03018.	Nashua, NH	M	.....	1	70	4,166,100	227,300
Manchester ...	024–EE011/NH36–S931–004, Cap Belknap-Merrim, PO Box 1016—2 Industri, Concord, NH 03302.	Belmont, NH	NM	.....	1	40	2,275,300	136,700
Subsubtotal	.....	.....		.....	2	110	6,441,400	364,000
Rhode Island								
Providence ...	016–EE006/RI43–S931–003, Jewish Home for the Aged, 99 Hillside Avenue, Providence, RI 02906.	Warwick, RI	M	.....	1	53	4,050,400	215,700
Providence	016–EE007/RI43–S931–004, Federal Housing As, P.O. Box 8171 Garden Cit, Cranston, RI 02920.	Providence, RI	M	.....	1	53	4,050,400	211,700
Subsubtotal	.....	.....		.....	2	106	8,100,800	427,400
Vermont								
Manchester ...	024–EE007/VT36–S931–001, White River Counci, P.O. Box 158, White River Junction, VT 05001.	White River Junction, VT.	NM	.....	1	14	793,300	46,700
Subsubtotal	.....	.....		.....	1	14	795,300	46,700
Subtotal	.....	.....		.....	14	683	49,836,400	2,826,700
NEW YORK								
New Jersey								
Newark	031–EE015/NJ39–S931–003, New Community Corp., 233 West Market Street, Newark, NJ 07103.	Jersey City, NJ	M	2	1	81	6,371,600	377,100
Newark	035–EE008/NJ39–S931–011, SO N.J. Cncl B'nai, 2201 Route 35, Cherry Hill, NJ 08002.	Evesham Twp, NJ	M	.....	1	75	5,315,800	316,300
Newark	035–EE009/NJ39–S931–012, BCCAP, 718 South Route 130, Burlington, NJ 08016.	Burlington TWP, NJ ..	M	2	1	72	5,103,800	303,400
Newark	035–EE010/NJ39–S931–013, National Church Re, 2335 North Bank Drive, Columbus, OH 43220.	Haddon TWP, NJ	M	.....	1	58	4,114,400	243,600
Newark	035–EE012/NJ39–S931–015, Test City Child CA, 143 W. Broad Street, Bridgeton, NJ 08302.	Vineland, NJ	M	2	1	125	8,579,000	529,800
Subsubtotal	.....	.....		.....	5	411	29,484,600	1,770,200
New York								
New York	012–EE072/NY36–S931–005 Beth Abraham Hospital, 612 Allerton Ave. Bronx, NY 10467.	Bronx, NY	M	.....	1	66	5,239,300	317,100
New York	012–EE074/NY36–S931–007 Mount Sinai Hosp Geriatric, P.O. Box 1070 1 Gus L LE New York, NY 10029.	New York, NY	M	.....	1	71	5,779,700	341,500
New York	012–EE082/NY36–S931–015, United Help, Inc., Self Help Comm Svc.; Inc., 440 Ninth Avenue, New York, NY 10001.	Queens, NY	M	.....	1	66	5,218,600	317,100

SECTION 202 PROGRAM FOR THE ELDERLY (TO ACCOMPANY HUD 93–99)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Capital advance amount	Rental assistance contract authority
New York	012–EE087/NY36–S931–020, Progress of People, 191 Joralemon St., Brooklyn, NY 11201.	Queens, NY	M		1	93	7,565,200	448,800
New York	012–EE088/NY36–S931–021, Progress of People, 191 Joralemon St., Brooklyn, NY 11201.	Brooklyn, NY	M		1	100	8,133,300	482,900
New York	012–EE092/NY36–S931–025, Harlem Churches for Community Improvement, 55 W 125th Street, New York, NY 10027.	New York, NY	M	2	1	110	8,944,900	531,700
New York	012–EE093/NY36–S931–026, Metropolitan Jewish Geriatrics, 6323 Seventh Ave., Brooklyn, NY 11220.	Brooklyn, NY	M	7	1	116	9,431,900	561,000
New York	012–EE094/NY36–S931–027, SFDS Development Corp., 135 E. 96 St., New York, NY 10128.	New York, NY	M		1	63	5,130,500	302,400
New York	012–EE095/NY36–S931–028, Metro NY Council on Jewish Poverty, 9 Murray St., New York, NY 10007.	Brooklyn, NY	M	7	1	122	9,918,800	590,200
New York	012–EE100/NY36–S931–033, Wartburg Lutheran, 50 Sheffield Ave., Brooklyn, NY 11207.	Pawling, NY	M		1	76	5,911,300	365,900
Buffalo	014–EE043/NY06–S931–002, NCSC. 1331 F St., NW Washington, DC 20004.	Bath, NY	NM		1	40	2,407,600	143,600
Buffalo	014–EE047/NY06–S931–006, Capital District Y, 1492 Central Avenue, Albany, NY 12205.	Schenectady, NY	M		1	50	3,212,500	185,000
Buffalo	014–EE052/NY06–S931–011, Delta Development, 525 Washington Street, Buffalo, NY 14203.	Batavia, NY	NM		1	40	2,559,900	144,400
Buffalo	014–EE054/NY06–S931–013, People Inc., 1219 North Forest Road, Williamsville, NY 14221.	Blasdell, NY	M		1	50	3,345,200	181,400
Buffalo	014–EE057/NY06–S931–016, Catholic Charities, 240 East Onondaga Street, Syracuse, NY 13202.	Gates, NY	M		1	56	3,706,900	203,500
Buffalo	014–EE059/NY06–S931–018, United Church Home, 170 East Center Street, Marion, OH 43302.	Fredonia, NY	M		1	40	2,420,600	143,600
Subsubtotal					16	1159	88,926,200	5,260,100
Subtotal					21	1570	118,410,800	7,030,300
PHILADELPHIA								
District of Columbia								
Washington	000–EE015/DC39–S931–002, Natl Council on Ag; 2731 Ontario Rd. NW., Washington, DC 20009.	Washington, DC	M	4	1	40	2,651,100	144,800
Washington	000–EE019/DC39–S931–005, NBC Hsg Bd., Inc., 383 Washington Street, Newark, OH 43055.	Washington, DC	M	2	1	55	2,996,800	159,300
Subsubtotal					2	95	5,647,900	304,100
Maryland								
Baltimore	052–EE004/MD06–S931–002, The Associated, 101 West Mount Royal Ave., Baltimore, MD 21201.	Pikesville,	M		1	84	52,226,500	285,300

SECTION 202 PROGRAM FOR THE ELDERLY (TO ACCOMPANY HUD 93-99)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Capital advance amount	Rental assistance contract authority
Baltimore	052-EE005/MD06-S931-003, Presbyterian Homes, 1217 Slate Hill Road, Camp Hill, PA 17011.	Baltimore, MD	M		1	40	2,488,800	135,900
Subsubtotal					2	124	7,715,300	421,200
Pennsylvania								
Pittsburgh	033-EE029/PA28-S931-001, SRS-St Joseph-NWPA, 5031 West Ridge Road, Erie, PA 16506.	Erie, PA	M		1	44	2,618,700	136,100
Pittsburgh	033-EE030/PA28-S931-002, Natl Bap Conv Hsg, 383 Washington St., Newark, OH 43055.	Erie, PA	M	2	1	55	3,286,200	170,900
Pittsburgh	033-EE032/PA28-S931-004, NCSC, 1331 F Street, NW, Washington, DC 20004.	Pittsburgh, PA	M		1	47	2,810,100	145,600
Pittsburgh	033-EE033/PA28-S931-005, Alpha Hsghlth Care, 12 Sylvan Hgts Dr., New Castle, PA 16101.	Neshannock, PA	NM		1	40	2,380,600	126,600
Philadelphia	034-EE015/PA26-S931-002, Supreme C.B. Found, 1514 Fitzwater Street, Philadelphia, PA 19142.	Philadelphia, PA	M	2	1	107	8,407,700	4,500,200
Philadelphia	034-EE018/PA26-S931-005, Friends Rehabilita, 1221 Fairmount Avenue, Philadelphia, PA 19123.	Philadelphia, PA	M		1	87	691,200	369,500
Philadelphia	034-EE020/PA26-S931-007, Philadelphia Presb, One Aldwyn Center, P.O. B, Villanova, PA 19085.	Philadelphia, PA	M		1	117	9,318,900	492,600
Subsubtotal					7	497	35,783,400	1,891,500
Virginia								
Richmond	051-EE021/VA36-S931-005, Virginia Mountain, 930 Cambria Street, N.E., Christiansburg, VA 24073.	Kilmarnock, VA	NM		1	40	2,042,600	118,500
Richmond	051-EE022/VA36-S931-006, United Order of TE, 1620 Church Street Norfolk, VA 23540.	Norfolk, VA	M	2	1	40	2,137,100	121,500
Richmond	051-EE023/VA36-S931-007, VA United Methodis, 308 Hanover Street, Fredericksburg, VA 22401.	Spotssylvania County, VA.	NM		1	40	2,148,700	118,500
Subsubtotal					3	120	6,328,400	358,500
West Virginia								
Charleston	045-EE002/WV15-S931-001, United Church Home, 170 East Center Street, Marion, OH 43302.	Moundsville, WV	M		1	41	2,330,600	130,800
Subsubtotal					1	41	2,330,600	130,800
Subtotal					15	877	57,805,600	3,106,100
ATLANTA								
Alabama								
Birmingham	062-EE015/AL09-S931-002, Baptist Hospitals Foundation of Birmingham, Post Office Box 830605, Birmingham, AL 35283.	Oxford, AL	M		1	43	1,963,000	117,000
Birmingham	062-EE016/AL09-S931-003, Bay Minette Rotary Club, 703 D Olive Street, Bay Minette, AL 36507.	Bay Minette, AL	M		1	50	2,434,000	133,300

SECTION 202 PROGRAM FOR THE ELDERLY (TO ACCOMPANY HUD 93–99)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Capital advance amount	Rental assistance contract authority
Birmingham ...	062–EE017/AL09–S931–004, Federation of Southern Cooperatives, Post Office Box 95, Epes, AL 35460.	EUtaw, AL	NM	2	1	30	1,317,900	81,600
Subsubtotal	.....	.....		.....	3	123	5,714,900	331,900
Florida								
Jacksonville ...	066–EE017/FL29–S931–017, Jewish Fed of Greater Ft. Lauderdale, 8358 West Park Blvd., Ft Lauderdale, FL 33315.	Sunrise, FL	M	.....	1	77	4,400,400	220,800
Jacksonville ...	066–EE019/FL29–S931–003, Codec, Inc, 300 SW 12th Ave, Miami, FL 33130.	Dade County, FL	M	4	1	100	5,693,200	283,900
Jacksonville ...	066–EE022/FL29–S931–016, Deedco, 141 NE Third Ave., Bayside Miami, FL 33132.	Homestead, FL	M	2	1	78	4,443,400	220,800
Jacksonville ...	066–EE023/FL29–S931–017, Ahepa National Housing Corp, 10333 N. Meridian St, Indianapolis, IN 46290.	West Palm Beach, FL	M	.....	1	98	5,600,600	281,000
Jacksonville ...	067–EE023/FL29–S931–010, Diocese of Orlando, 421 E Robinson St, Orlando, FL 32802.	Volusia County, FL	M	.....	1	70	3,607,900	174,800
Jacksonville ...	067–EE036/FL29–S931–018, Osceola County Council on Aging, 1099 Shady Lane, Kissimmee, FL 32744.	Kissimmee, FL	M	.....	1	50	2,586,900	126,600
Jacksonville ...	067–EE037/FL29–S931–020, National Church Residences, 2335 North Bank Drive, Columbus, OH 43220.	Palmetto, FL	M	.....	1	72	3,614,100	179,800
Subsubtotal	.....	.....		.....	7	545	29,946,500	1,487,700
Georgia								
Atlanta	061–EE013/GA06–S931–002, Hamilton Medical Center, 1200 Memorial Drive, Dalton, GA 30722.	Dalton, GA	NM	.....	1	48	2,327,200	132,600
Atlanta	061–EE014/GA06–S931–003, United Church Homes, 170 East Center Street, Marion, OH 43302.	Rome, GA	NM	.....	1	40	1,950,300	107,800
Atlanta	061–EE015/GA06–S931–004, United Church Homes, 170 East Center Street, Marion, OH 43302.	Winder, GA	M	.....	1	40	1,950,300	107,800
Atlanta	061–EE018/GA06–S931–007, Catholic HSG Initiatives & Cath Social Serv, 680 West Peachtree Street, Atlanta, GA 30308.	Fulton County, GA	M	.....	1	48	2,327,200	129,900
Subsubtotal	.....	.....		.....	4	176	8,555,000	478,100
Kentucky								
Louisville	083–EE025/KY36–S931–004, Florence United Methodist Church, 213 Main Street, Florence, KY 41042.	Florence, KY	M	.....	1	40	2,299,400	114,300
Louisville	083–EE027/KY36–S931–006, Pennyrile Housing Corporation, 300 Hammond Drive, Hopkinsville, KY 42240.	Smithland, KY	NM	.....	1	12	608,900	35,100
Louisville	083–EE031/KY36–S931–010, Mercy Health System, 2335 Grandview Avenue, Cincinnati, OH 45206.	Louisville, KY	M	.....	1	50	2,634,500	146,600
Subsubtotal	.....	.....		.....	3	102	5,542,800	296,000

SECTION 202 PROGRAM FOR THE ELDERLY (TO ACCOMPANY HUD 93–99)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Capital advance amount	Rental assistance contract authority
MISSISSIPPI								
Jackson	065–EE008/MS26–S931–001, Catholic Diocese of Biloxi, 120 Reynoir Street, Biloxi, MS 39530.	Harrison County, MS .	M	.....	1	40	2,094,200	108,600
Jackson	065–EE009/MS26–S931–002, United Church Homes, 170 East Center Street, Marion, OH 43302.	Horn Lake, MS	M	.....	1	41	1,837,800	111,400
Subsubtotal	.....	.....		.....	2	81	3,932,000	220,000
NORTH CAROLINA								
Greensboro ...	053–EE029/NC19–S931–005, Johnston Co. Council of Aging, Inc., PO Box 2235, Smithfield, NC 27577.	Pine Level, NC	NM	.....	1	37	2,277,100	108,500
Greensboro ...	053–EE030/NC19–S931–006, St. Josephs of the Pines, Inc., 590 Central Drive, Southern Pine, NC 28387.	Aberdeen, NC	NM	.....	1	24	1,396,200	70,400
Greensboro ...	053–EE032/NC19–S931–008, John H. Wellons Foundation, PO Box 1254, Dunn, NC 28335.	Greenville, NC	NM	.....	1	40	2,326,500	1,175,300
Greensboro ...	053–EE033/NC19–S931–009, Laodicea United Church of Christ, 2004 Rock Quarry Rd, Raleigh, NC 27610.	Fayetteville, NC	M	2	1	47	2,892,600	137,900
Subsubtotal	.....	.....		.....	4	148	8,892,400	434100
PUERTO RICO								
Caribbean	056–EE011/RQ46–S931–003, Primera Iglesia Bautista De Ponce, PO Box 1308, Ponce, PR 00733.	Ponce Municipio, PR .	M	4	1	67	3,828,900	182,300
Subsubtotal	.....	.....		.....	1	67	3,828,900	182,300
SOUTH CAROLINA								
Columbia	054–EE009/SC16–S931–004, John H. Wellons Foundation, Post Office Box 1254, Dunn, NC 28335.	Myrtle Beach, SC	NM	.....	1	41	2,190,600	111,600
Columbia	054–EE010/SC16–S931–005, Volunteers of America, 3939 North Causeway Boulevard, Metairie, LA 70002.	Charleston, SC	M	.....	1	62	3,156,500	166,000
Subsubtotal	.....	.....		.....	2	103	5,347,100	277,600
TENNESSEE								
Nashville	081–EE014/TN40–S931–005, Catholic Diocese of Memphis TN, 85 N. Cleveland, Memphis, TN 38104.	Camden, TN	NM	.....	1	40	1,999,100	107,800
Nashville	086–EE004/TN43–S931–001, Christian Towers of Gallatin Inc., 138 E. Franklin St., Gallatin, TN 37066.	Gallatin, TN	M	.....	1	55	2,688,700	140,200
Knoxville	087–EE012/TN37–S931–004, Douglas Cherokee Economic Authority, PO Box 1218, Morristown, TN 37816.	Sevierville, TN	M	.....	1	55	2,605,000	145,800
Subsubtotal	.....	.....		.....	3	150	7,292,800	393,800
Subtotal	.....	.....		.....	29	1,495	79,052,400	4,101,500
CHICAGO								
ILLINOIS								
Chicago	071–EE039/IL06–S931–001, Chinese American, 310 West 24th Place, Chicago, IL 60616.	Chicago, IL	M	5	1	91	6,261,200	301,400

SECTION 202 PROGRAM FOR THE ELDERLY (TO ACCOMPANY HUD 93-99)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Capital advance amount	Rental assistance contract authority
Chicago	071-EE0042/IL06-S931-004, Lutheran Soc. Svc., 1001 E. Touhy Ave., Des Plaines, IL 60018.	Chicago, IL						
Chicago	071-EE043/IL06-S931-005, Catholic Charities, NW Cor Stewart Av64th, Chicago, IL 60600.	Chicago, IL	M		1	82	5,643,800	271,200
Chicago	071-EE044/IL06-S931-006, Catholic Charities, 1571 W. Ogden Ave, LaGrange Park, IL 60525.	Chicago, IL	M		1	120	8,252,300	398,500
Chicago	071-EE047/IL06-S931-009, Franciscan Ministr, P.O. Box 667, Wheaton, IL 60189.	Chicago, IL	M		1	60	4,118,700	200,900
Chicago	071-EE056/IL06-S931-018, New Pisgah Mission, 8130 South Racine St., Chicago, IL 60620.	Chicago, IL	M	2	1	61	4,202,200	200,900
Subsubtotal					6	473	32,009,600	1,567,100
INDIANA								
Indianapolis	073-EE029/IN36-S931-006, UCR, 170 East Center Street, Marion, OH 43302.	Indianapolis, IN	M		1	50	2,377,300	153,000
Indianapolis	073-EE032/IN36-S931-009, Garden Court, Inc., 400 West Washington Street, Plymouth, IN 46563.	Plymouth, IN	NM		1	41	1,951,200	124,900
Indianapolis	073-EE034/IN36-S931-011, Ahepa National HSG, 10333 N Meridian, Indianapolis, IN 46290.	Merrillville, IN	M		1	50	2,367,100	156,100
Subsubtotal					3	141	6,695,600	43,400
MICHIGAN								
Detroit	044-EE016/MI28-S931-003, National Church Re, 2335 Northbank Drive, Columbus, OH 48220.	Canton Township, MI	M		1	56	3,478,300	192,600
Detroit	044-EE017/MI28-S931-004, Evangelical Homes, P.O. Box 351015, Detroit, MI 48235.	Detroit, MI	M		1	65	4,123,900	224,100
Detroit	044-EE018/MI28-S931-005, St. Joseph Mercy H, 34605 Twelve Mile Road, Farmington Hills, MI 48331.	White Lake-Seven H, MI.	M		1	40	2,543,000	136,600
Detroit	044-EE019/MI28-S931-006, Presbyterian Villa, 25300 West Six Mile Road, Redford, MI 48240.	Clinton Township, MI	M		1	56	3,554,800	192,600
Subsubtotal					4	217	13,700,000	745,900
MINNESOTA								
Minn/St Paul	092-EE013/MN46-S931-001, Ebenezer Society, 2722 Park Avenue, Minneapolis, MN 55407.	Burnsville, MN	M		1	42	2,712,300	139,300
Minn/St Paul	092-EE014/MN46-S931-002, St. Benedicts Ctr, 1810 Mn Blvd SE, St Cloud, MN 56304.	St. Cloud, MN	M		1	40	2,447,900	132,500
Minn/St Paul	092-EE016/MN46-S931-004, Good Shepherd Luth, 1115 No. 4th Avenue, Sauk Rapids, MN 55379.	Sauk Rapids, MN	M		1	42	2,556,400	142,700
Subsubtotal					3	124	7,716,600	414,500
OHIO								
Cleveland	042-EE027/OH12-S931-002, Natl Council of Se, 1331 F Street, N.W., Washington, DC 20004.	Canton, OH	M		1	67	3,964,900	231,100

SECTION 202 PROGRAM FOR THE ELDERLY (TO ACCOMPANY HUD 93–99)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Capital advance amount	Rental assistance contract authority
Cleveland	042–EE031/OH12–S931–006; Volunteers of America, 3939 North Causeway Blvd, Metairie, LA 70002.	Fremont, OH	NM	.....	1	21	1,124,000	70,100
Cleveland	042–EE034/OH12–S931–009, Our Lady of Angels, 3644 Rocky River Drive, Cleveland, OH 44111.	Cleveland, OH	M	.....	1	41	2,564,900	143,600
Cleveland	042–EE040/OH12–S931–015, Eta Tau Lambda Cha, 695 Dunbar Drive, Akron, OH 44311.	Wooster, OH	NM	2	1	40	2,131,100	136,600
Cleveland	042–EE042/OH12–S931–017, Eta, Tau Lambda Cha, 695 Dunbar Drive, Akron, OH 44311.	Stow, OH	M	2	1	40	2,274,100	136,600
Cleveland	042–EE044/OH12–S931–019, Claymont Jaycees I, 1000 Claymont Drive, Uhrichsville, OH 44683.	Uhrichsville, OH	M	.....	1	20	1,071,000	66,600
Columbus	043–EE023/OH16–S931–001, Washington Sq. HSG, 383 Washington Street, Newark, OH 43055.	Pataskala, OH	M	.....	1	42	2,199,200	130,300
Columbus	043–EE024/OH16–S931–002, Washington Sq. HSG, 383 Washington Street, Newark, OH 43055.	Utica, OH	M	2	1	40	2,094,400	124,100
Columbus	043–EE025/OH16–S931–003, Luth. Soc. Ser. of, 57 East Main Street, Columbus, OH 43215.	Delaware, OH	M	.....	1	44	2,455,000	136,500
Cincinnati	046–EE011/OH10–S931–003, Mercy Health Sys, 2335 Grandview Avenue, Cincinnati, OH 45206.	Silverton, OH	M	.....	1	50	2,835,800	154,000
Cincinnati	046–EE012/OH10–S931–004, Warren Co. Comm. S, 570 N. State Route 741, Lebanon, OH 45036.	Waynesville, OH	M	.....	1	40	2,258,900	125,700
Cincinnati	046–EE015/OH10–S931–007, Sycamore Sr. Adult, 4131 Cooper Road, Cincinnati, OH 45242.	Cincinnati, OH	M	.....	1	44	2,484,800	138,300
Subsubtotal	.....	.....		.....	12	489	27,458,100	1,593,500
WISCONSIN								
Milwaukee	075–EE014/WI39–S931–002, Calvary HSG Dev, 1555 W. Chambers St, Milwaukee, WI 53206.	Milwaukee, WI	M	2	1	40	2,448,200	127,400
Milwaukee	075–EE017/WI39–S931–005, Independent Living, 4375 Yellowstone Drive, Madison, WI 53719.	Fitchburg, WI	M	.....	1	42	2,541,000	130,600
Milwaukee	075–EE019/WI39–S931–007, St Mary's Nursing, 3516 W Center Street, Milwaukee, WI 53210.	Milwaukee, WI	M	.....	1	60	3,672,300	191,100
Subsubtotal	.....	.....		.....	3	142	8,661,500	449,100
Subtotal	.....	.....		.....	31	1,586	96,241,400	5,204,100
Fort Worth								
ARKANSAS								
Little Rock	082–EE041/AR37–S931–005, AAA of Southeast Arkansas, P.O. Box 8569, Pine Bluff, AR 71611.	Crossett, OH	NM	.....	1	20	866,200	50,200

SECTION 202 PROGRAM FOR THE ELDERLY (TO ACCOMPANY HUD 93–99)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Capital advance amount	Rental assistance contract authority
Little Rock	082–EE045/AR37–S931–009, White River Area Agency on Aging, P.O. Box 2637, Batesville, AR 72503.	Quitman, AR	NM		1	16	692,900	40,200
Little Rock	082–EE046/AR37–5931–010, AAA of Northwest Akansas, P.O. Box 1795, Harrison, AR 72601.	Berryville, AR	NM		1	20	866,200	50,200
Subsubtotal					4	112	485,500	278,700
Louisiana								
New Orleans	064–EE18/LA48–5931–001, VOA Inc., 3939 N. Causeway Blvd., Metairie, LA 70002.	Welsh, LA	NM		1	20	907,700	57,900
New Orleans	064–EE024/LA48–5931–007, Diocese of Lafayette, 1408 Carmel Avenue, Lafayette, LA 70501.	Jeanerette, LA	NM		1	20	927,300	57,800
New Orleans	064–EE025/LA48–5931–008, Archidocese of New Orleans, 7887 Wolmsley Blvd., New Orleans, LA 70118.	Meraux, LA	M		1	66	211,100	190,800
Subsubtotal					3	106	5,100	306,500
Oklahoma								
Oklahoma City.	117–EE009/OK56–5931–004, Associated Catholic Charities, 425 NW 7th, Oklahoma City, OK 73102.	Oklahoma City, OK	M		1	40	934,200	105,300
Oklahoma City.	118–EE008/OK56–5931–003, Senior Citizens Comm., 201 N. Rowe, Pryor, OK 74361.	Pryor, OK	NM		1	24	1,000	66,900
Subsubtotal					2	64	3,051,200	17,200
Texas								
Forth Worth	112–EE007/TX5931–001, Plano Community Home Sponsor, 1608–1612 Avenue L, Plano, TX 75074.	Plano, TX	M		1	61	3,146,500	176,000
Fort Worth	112–EE009/TX16–5931–006, Lamar Co Human Resources Council, 625 Washington Street, Paris, TX 75460.	Paris, TX	NM		1	50	2,434,000	143,700
Fort Worth	113–EE005/TX16–5931–003, Salvation Army, 1425 Northeast Expressway, Atlanta, GA 30329.	Waco, TX	M		1	76	3,143,300	219,900
Houston	114–EE019/TX24–5931–003, Metro YMCA of Beaumont, 934 Calder Avenue, Beaumont, TX 7704.	Beaumont, TX	M		1	40	1,805,400	115,500
Houston	114–EE020/TX24–5931–004, NCR, 2335 North Bank Drive, Columbus, OH 43220.	Houston, TX	M		1	62	3,218,900	180,500
San Antonio	115–EE021/TX59–5931–004, Amigos Del Valle, Inc., 1116 N. Conway Ave., Mission, TX 78572.	Brownsville, TX	M	4	1	57	* 2,614,500	153,900
San Antonio	115–EE025/TX59–5931–008, Rotary Club of Del Rio, P.O. Box 215, Del Rio, TX 78840.	Del Rio, TX	NM		1	41	1,325,100	100,700
Subsubtotal					7	387	18,358,700	1,101,200
Subtotal					16	669	31,131,500	1,856,600
Kansas City								
Iowa								
Des Moines	074–EE009/IA5931–001, Ahepa National Housing, 10333 N. Meridian Drive, Indianapolis, IN 46290.	Akeny, IA	M		1	53	2,724,200	151,000
Subsubtotal					1	53	2,724,200	151,000

SECTION 202 PROGRAM FOR THE ELDERLY (TO ACCOMPANY HUD 93–99)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Capital advance amount	Rental assistance contract authority
Kansas								
Kansas City ...	102–EE009/KS16–5931–001, Natl Hispanic Council on Aging, 2713 Ontario Road NW, Washington, DC 20009.	Barden City, KS	NM	4	1	40	1,732,400	109,400
Subsubtotal	.....	.....		.....	1	40	1,732,400	1,094,400
Missouri								
Kansas City ...	084–EE008/MO16–5931–001, Lifelink Corporation, 331 South York ROad, Bensenville, IL 60106.	Kansas City, MO	M	.....	1	44	2,425,200	140,100
Kansas City ...	084–EE010/MO16–5931–003, Catholic Charities, 1112 Broadway, Kansas City, MO 64105.	Kansas City, MO	M	.....	1	46	2,535,500	146,500
Kansas City ...	084–EE011/MO16–5931–004, West Central Mo Community Action Agency, P.O. Box 125, Appleton City, MO 64724.	Kansas City, MO	M	.....	1	40	2,107,300	127,400
St. Louis	5–EE018/MO36–5931–003, Lutheran Althenheim Society of MO, 1265 McLaren Avenue, St. Louis, MO 63147.	St. Louis, MO	M	2	1	75	4,514,400	251,600
Subsubtotal	.....	.....		.....	4	205	11,582,400	665,600
Nebraska								
Omaha	103–EE007/NE26–S931–001, Salvation Army, An Illinois Corp., 10 West Algonquin Road, Des Plaines, IL 60016.	Omaha, NE	M	.....	1	48	2,418,500	137,700
Subsubtotal	.....	.....		.....	1	48	2,418,500	137,700
Subtotal	.....	.....		.....	7	346	18,457,500	1,063,700
Denver								
Colorado								
Denver	101–EE006/CO99–S931–003, VOA, 3939 N. Causeway Blvd, Metairie, LA 70002.	Montrose, CO	NM	.....	1	41	2,224,100	124,100
Denver	101–EE008/CO99–S931–005, The Salvation Army, 30840 Hawthorne Blvd, Rancho Palos Verde, CA 90274.	Broomfield, CO	M	.....	1	85	4,541,400	260,500
Subsubtotal	.....	.....		.....	2	126	6,765,500	384,600
Utah								
Denver	105–EE004/UT99–S931–001, Utah NP HSG, 285 West North Temple, Salt Lake City, UT 84103.	Salt Lake City, UT	M	.....	1	65	3,297,000	174,100
Subsubtotal	.....	.....		.....	1	65	3,297,000	174,100
Subtotal	.....	.....		.....	3	191	10,062,500	558,700
San Francisco								
Arizona								
Phoenix	123–EE021/AZ20–S931–005, Chicanos Por La Causa, 1112 East Buckeye Road, Phoenix, AZ 85034.	Tucson, AZ	M	4	1	58	2,755,600	163,500
Phoenix	123–EE024/AZ20–S931–008, Holy Cross Hospital, Inc., 1171 West Target Range Road, Nogales, AZ 85621.	Nogales, AZ	NM	4	1	40	1,797,000	111,900
Subsubtotal	.....	.....		.....	2	98	4,552,600	275,400
California								
San Francisco	121–EE029/CA39–S931–003, Del Norte Senior Center, Inc., 810 H Street, Crescent City, CA 95531.	Crescent City, CA	NM	.....	1	40	2,815,000	156,000

SECTION 202 PROGRAM FOR THE ELDERLY (TO ACCOMPANY HUD 93–99)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Capital advance amount	Rental assistance contract authority
San Francisco	121–EE031/CA39–S931–005, Mission Housing Development Corporation, 474 Valencia Street, Suite 202, San Francisco, CA 94103.	San Francisco, CA	M	4	1	50	3,809,300	200,000
San Francisco	121–EE032/CA39–S931–006, Satellite SR Homes/Pre-School Coord, Council, 360–22nd Street, Suite 700, Oakland, CA 94612.	Pittsburg, CA	M	.....	1	79	5,903,900	312,000
San Francisco	121–EE038/CA39–S931–012, Bridge Housing Corporation, 82 Second Street, Suite 200, San Francisco, CA 94105.	Vallejo, CA	M	.....	1	120	8,496,200	476,000
San Francisco	121–EE040/CA39–S931–014, Mercy Housing, Inc., 1601 Milwaukee Street, 5th Floor, Denver, CO 80206.	San Francisco, CA	M	.....	1	66	5,237,500	260,000
Los Angeles ..	122–EE034/CA16–S931–001, Telacu, 5400 E. Olympic Blvd., Los Angeles, CA 90022.	El Monte, CA	M	4	1	70	5,183,900	220,800
Los Angeles ..	122–EE035/CA16–S931–002, Telacu, 5400 E. Olympic Blvd. Los Angeles, CA 90022.	Pasadena, CA	M	4	1	70	5,183,900	220,800
Los Angeles ..	122–EE037/CA16–S931–004, Cooperative Services, Inc., 25900 Greenfield, Suite 326, Oak Park, MI 48238.	Palm Springs, CA	M	.....	1	60	4,086,400	188,800
Los Angeles ..	122–EE038/CA16–S931–005, Family Services Assn. of W. Riverside County, 3634 Elizabeth Street, Riverside, CA 92506.	Riverside, CA	M	.....	1	54	3,850,000	169,600
Los Angeles ..	122–EE040/CA16–S931–007, First United Methodist Ch of Santa Monica, 1008–11th St, Santa Monica, CA 90403.	Santa Monica, CA	M	.....	1	70	5,199,900	220,800
Los Angeles ..	122–EE041/CA16–S931–008, San Ysidro Urban Council, 1188 Beyer Way, Suite 101, San Diego, CA 92154.	San Diego, CA	M	4	1	70	5,128,700	220,800
Los Angeles ..	122–EE043/CA16–S931–010, Mt. Moriah Baptist Church of Los Angeles, 4269 S. Figueroa, Los Angeles, CA 90037.	Los Angeles, CA	M	2	1	41	3,052,300	128,000
Los Angeles ..	122–EE044/CA16–S931–011, Jewish Federation Council of Greater LA, 6505 Wilshire Blvd., Los Angeles, CA 90048.	Los Angeles, CA	M	.....	1	70	5,199,900	220,800
Los Angeles ..	122–EE045/CA16–S931–012, Jewish Federation Council of Greater LA, 6505 Wilshire Blvd., Los Angeles, CA 90048.	Santa Monica, CA	M	.....	1	66	4,903,700	208,000
Los Angeles ..	122–EE046/CA16–S931–013, Volunteers of America, Inc., 3939 North Causeway Boulevard, Metairie, LA 70002.	Santa Monica, CA	M	.....	1	40	2,978,200	124,800
Los Angeles ..	122–EE050/CA16–S931–017, Broadway Towers, Inc., 1800 Century Blvd. N.E., Suite 1260, Atlanta, GA 30345.	Los Angeles, CA	M	.....	1	70	5,199,900	220,800
Sacramento ...	136–EE007/CA30–S931–002, Volunteers of America, Inc., 3939 N. Causeway Blvd., Suite 400, Metairie, LA 70002.	Roseville, CA	M	.....	1	79	4,991,900	234,000
Subtotal	.....	.....		.....	17	1,115	81,220,600	378,2000

SECTION 202 PROGRAM FOR THE ELDERLY (TO ACCOMPANY HUD 93–99)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Capital advance amount	Rental assistance contract authority
Hawaii								
Honolulu	140–EE005/HI10–S931–001, Kale Mahaolu Elima, 200 Hina Ave., Kahului, HI 96732–9998.	Khului, HI	NM	5	1	40	4,654,200	140,000
Subsubtotal					1	40	4,654,200	140,000
Nevada								
San Francisco	121–EE045/NV39–S931–001, Volunteers of America, Inc., 3939 North Causeway Boulevard, Metairie, LA 70002.	Las Vegas, NV	M		1	75	3,764,300	243,400
Subsubtotal					1	75	3,764,300	243,400
Subtotal					21	1,328	94,191,700	4,440,800
Seattle								
Idaho								
Portland	124–EE005/ID16–S931–001, National Benevolent Assn., 11780 Borman Drive, Suite 200, St. Louis, MO 63146.	Burley, ID	NM		1	40	2,104,300	118,200
Portland	124–EE006/ID16–S931–002, Grand Lodge of Idaho, 920 Grant, Caldwell, ID 83605.	Caldwell, ID	NM		1	40	2,104,300	115,200
Subsubtotal					2	80	4,208,600	233,400
Oregon								
Portland	126–EE011/OR16–S931–001, Union Labor Retire, 1625 SE Lafayette Street, Portland, OR 97202.	Portland, OR	M		1	56	3,078,700	170,100
Portland	126–EE013/OR16–S931–003, Rogue Valley Manor, 1200 Mira Mar, Medford, OR 97504.	Klamath Falls, OR	NM		1	40	2,245,300	121,500
Subtotal					2	96	5,324,000	291,600
Washington								
Seattle	127–EE009/WA19–S931–001, The Salvation Army, 30840 Hawthorne Blvd., Rancho Palos Verde, CA 90274.	Puyallup, WA	M		1	41	2,597,000	132,400
Seattle	171–EE001/WA19–S931–003, Cathedral of St. John the Evangelist, E. 245 13th Avenue, Spokane, WA 99202.	Spokane, WA	M		1	41	2,186,500	129,800
Seattle	171–EE002/WA19–S931–004, Blue Mountain Action Council, 34 Boyer Avenue, Walla Walla, WA 99362.	Walla Walla, WA	NM		1	10	530,000	32,000
Seattle	171–EE007/WA19–S931–009, Catholic Charities, West 1023 Riverside, Spokane, WA 99210.	Clarkston, WA	NM		1	30	1,601,100	95,000
Subsubtotal					4	122	6,914,600	389,200
Subtotal					8	298	16,447,200	914,200
Total					165	9,043	571,821,000	31,104,700

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Boston									
Massachusetts									
Boston	023–HD031/MA06–Q931–001, Minute Man ARC, 747 Main Street, Concord, MA 01742.	Concord, MA	M		1	20	WDD	825,900	91,200

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Boston	023–HD032/MA06–Q931–002, Mental Health Programs, 28 Travis Street, Boston, MA 02134.	Roxbury, MA	M		1	12	WPD	821,200	54,700
Boston	023–HD034/MA06–Q931–004, E. Middlesex ARC, 603 Main Street, Melrose, MA 02176.	Reading, MA	M		1	12	WDD	446,100	54,700
Boston	023–HD035/MA06–Q931–005, ARC, E. Militia Hts., P.O. Box, Needham, MA 02192.	Needham, MA	M		1	10	WDD	680,800	45,600
Boston	023–HD036/MA06–Q931–006, MH & Retardation Svcs, Inc., One Parker Street, Lawrence, MA 01840.	Lawrence, MA	M		1	11	CMI	765,000	45,600
Boston	023–HD039/MA06–Q931–009, S. Shore Housing Development, 169 Summer Street, Kingston, MA 02364.	Taunton, MA	NM		1	6	CMI	436,600	27,400
Boston	023–HD040/MA06–Q931–010, Central Middlesex ARC, 17 Everberg Road, Woburn, MA 01801.	Reading, MA	M		1	3	WDD	298,600	13,700
Boston	023–HD041/MA06–Q931–011, MHA of Springfield, 146 Chestnut Street, Springfield, MA 01103.	Chicopee, MA	M		1	3	WDD	233,800	13,700
Boston	023–HD042/MA06–Q931–012, MHA of Springfield, 146 Chestnut Street, Springfield, MA 01103.	Springfield, MA	M		1	2	CMI	167,600	9,200
Boston	023–HD043/MA06–Q931–013, MHA of Springfield, 146 Chestnut Street, Springfield, MA 01103.	Springfield, MA	M		1	3	CMI	218,100	13,700
Boston	023–HD044/MA06–Q931–014, MHA of Springfield, 146 Chestnut Street, Springfield, MA 01103.	Wilbraham Town, MA.	M		1	4	WDD	296,100	18,300
Boston	023–HD045/MA06–Q931–015, MHA of Greater Lowell, 99 Church Street, Lowell, MA 01856.	Lowell, MA	M		1	11	CMI	862,900	45,600
Subsubtotal.					12	97		6,052,700	433,400
Maine									
Manchester	024–HD004/ME36–Q931–001, Wash Co. ARC, P.O. Box 88, Machias, ME 04654.	Eastport, ME	NM		1	6	WDD	286,600	20,600
Manchester	024–HD005/ME36–Q931–002, Shoreline Comm. MHC, 18 Pleasant Street, Brunswick, ME 04011.	Brunswick Center, ME.	NM		1	6	CMI	369,000	20,500
Manchester	024–HD006/ME36–Q931–003, Tri-County MHC, 106 Campus Avenue, Lewiston, ME 04240.	Lewiston, ME	M		1	15	CMI	891,100	47,900
Manchester	024–HD008/ME36–Q931–004, Crotched Mountain FDN, 1 Verney Drive, Greenfield, NH 03047.	Portland, ME	M		1	16	WPD	976,000	54,700
Subsubtotal.					4	43		2,522,700	143,700

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Rhode island									
Providence .	016–HD002/RI43–Q931–001, UCP, 500 Prospect Street, Pawtucket, RI 02860.	Johnston, RI	M	.....	1	11	WPD	867,000	57,000
Providence .	016–HD003/RI43–Q931–002, Good News Housing, 1043 Broad Street, Providence, RI 02905.	Providence, RI .	M	.....	1	3	CMI	264,200	12,300
Subsubtotal.	.....	.....		.....	2	14		1,131,200	69,300
Vermont									
Manchester .	024–HD007/VT36–Q931–001, Howard Center, 300 Flynn Avenue, Burlington, VT 05401.	Burlington, VT ..	M	.....	1	5	WDD	246,500	16,700
Subsubtotal.	.....	.....		.....	1	5		246,500	16,700
Subtotal ...	.....	.....		.....	19	159		9,953,100	663,100
New York									
New Jersey									
Newark	031–HD015/NJ39–Q931–004, ARC/Morris County Chapter New Jersey Inc., P.O. Box 123, Morris Plains, NJ 07950.	Parsippany-Troyhills, NJ.	M	.....	1	6	WDD	386,300	28,300
Newark	031–HD016/NJ39–Q931–005, Spectrum For Living, 210 Riverdale Road, Riverdale, NJ 07675.	Haworth, NJ	M	.....	1	6	WDD	386,300	28,300
Newark	031D017/NJ39–Q931–006, Spectrum For Living, 210 Riverdale Road, River Vale, NJ 07675.	Maywood, NJ ...	M	.....	1	6	WDD	386,300	28,300
Newark	031D018/NJ39–Q931–007, Collaborative Supp., 30 Broad Street, Freehold, NJ 07728.	Union Beach, NJ.	M	.....	1	3	CMI	313,200	14,200
Newark	031D019/NJ39–Q931–008, Aim For Success, Inc., 1130 McBride Avenue, West Paterson, NJ.	Paterson, NJ	M	.....	1	3	CMI	313,200	14,200
Newark	031–HD020/NJ39–Q931–009, South Brunswick Citizen, P.O. Box 600, Kingston, NJ 08528.	South Brunswick Twp, NJ.	M	.....	1	11	WDD	902,000	47,200
Newark	031–HD022/NJ39–Q931–011, Arcmonmouth Unit, 1158 Wayside Road, Tinton Falls, NJ 07712.	Farmingdale, NJ	M	.....	1	4	WDD	344,500	18,900
Newark	035–HD014/NJ39–Q931–016, Community Options, 5 Third Street, Bordenton, NJ 08550.	West Windsor Twp, NJ.	M	.....	1	4	WDD	325,800	17,100
Newark	035–HD015/NJ39–Q931–017, Collaborative Supp, 30 Broad Street, Freehold, NJ 07728.	Northfield, NJ ...	M	.....	1	3	CMI	284,600	12,900
Newark	035–HD016/NJ39–Q931–018, Mercer Alliance, 404 Market Street, Trenton, NJ 08648.	West Windsor Twp, NJ.	M	.....	1	3	CMI	284,600	12,900
Newark	035–HD017/NJ39–Q931–019, CTR Innovative Fam, 2482 Pennington Road, Trenton, NJ 08638.	Princeton, NJ ...	M	.....	1	4	WDD	312,800	17,100
Subsubtotal.	.....	.....		.....	11	53		4,239,600	239,400

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
New York									
New York	012–HD016/NY36–Q931–001, Crystal Run Village, RD2 Box 98, Middletown, NY 10940.	Bethel, NY	NM	.....	1	8	WDD	403,500	39,100
New York	012–HD017/NY36–Q931–002, New York Society for the Deaf, 817 Broadway, New York, NY 10003.	Bronx, NY	M	.....	1	21	WPD	1,883,600	97,600
New York	012–HD018/NY36–Q931–003, New York Society for the Deaf, 817 Broadway, New York, NY 10003.	Bronx, NY	M	.....	1	25	WPD	2,225,700	117,100
Buffalo	014–HD009/NY06–Q931–001, NYS ARC, INC–GEN, 64 Walnut St, Batavia, NY 14021.	Elba Town, NY .	NM	.....	1	6	WDD	306,800	22,300
Buffalo	014–HD011/NY06–Q931–003, Urban League of RO, 265 N. Clinton Ave, Rochester, NY 14605.	Brighton, NY	M	2	1	24	WDD	775,700	88,800
Buffalo	014–HD012/NY06–Q931–004, UCP of WNY Inc, 7 Community Drive, Buffalo, NY 14225.	Williamsville, NY	M	.....	1	17	WDD	902,700	63,000
Subsubtotal.	.....	.....		.....	6	101		6,498,000	427,900
Subtotal ...	.....	.....		.....	17	154		10,737,600	667,300
Philadelphia									
Delaware									
Philadelphia	032–HD004/DE26–Q931–001, Alliance Mentally, 2500 W. 4th Street, Wilmington, DE 19805.	Wilmington, DE	M	.....	1	18	CMI	1,416,300	65,000
Philadelphia	032–HD005/DE26–Q931–002, The ARC of Delaware, 240 N. James St., Wilmington, DE 19804.	Bridgeville, DE .	M	.....	1	15	WDD	836,400	54,200
Subsubtotal.	.....	.....		.....	2	33		2,252,700	119,200
Maryland									
Washington	000–HD016/MD39–Q931–001, UND Cerebral palsy, 1522 K Street, N.W., Washington, DC 20005.	Silver Spring, MD.	M	.....	1	2	WDD	132,500	7,300
Washington	000–HD017/MD39–Q931–002, Vesta Inc., 2340 University Blvd, EA, Adelphi, MD 20783.	Hillcrest heights, MD.	M	.....	1	21	CMI	1,704,600	76,000
Washington	000–HD020/MD39–Q931–003, Hughes United Meth, 10700 Georgia Ave, Wheaton, Md 20902.	Wheaton, MD ...	M	.....	1	24	WDD	1,590,600	83,300
Baltimore	052–HD006/MD06–Q931–001, Way Station, Inc., P.O. Box 3826, Frederick, MD 20701.	Frederick, MD ..	M	.....	1	12	CMI	914,400	40,800
Baltimore	052–HD007/MD06–Q931–002, Community Living I, 431 Carrollton Drive, Frederick, MD 21701.	Frederick, MD ..	M	.....	1	12	WDD	947,300	40,800
Baltimore	052–HD008/MD06–Q931–003, Baltimore Mental Health, 201 East Baltimore Street Baltimore, MD 21202.	Baltimore, MD ..	M	.....	1	18	CMI	1,098,000	61,200
Subsubtotal.	.....	.....		.....	6	89		6,387,400	309,400

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93-100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Pennsylvania									
Pittsburgh ...	033-HD013/PA28-Q931-001, H.A.N.D.S., 139 East 12th Street, Erie, PA 16501.	Meadville, PA ...	NM	.....	1	14	CMI	796,300	44,300
Pittsburgh ...	033-HD016/PA28-Q931-004, Skills of Cntrl PA, 805 Chestnut, St, Altoona, PA 16601.	Altoona, PA	M	.....	1	9	WDD	558,800	28,500
Pittsburgh ...	033-HD017/PA28-Q931-005, Human Services Ctr, P.O. Box 310, New Castle, PA 16103.	Pulaski Twp, PA	NM	.....	1	8	WDD	295,900	25,400
Pittsburgh ...	033-HD018/PA28-Q931-006, Erie Independence, 2222 Filmore Avenue, Ere, PA 16506.	Erie, PA	M	.....	1	11	WPH	625,700	34,900
Philadelphia	034-HD020/PA26Q931-002, Brian's House, Inc, 1300 South Concord Road, West Chester, PA 19382.	Downingtown, PA.	M	.....	1	3	WDD	263,800	12,800
Philadelphia	034-HD024/PA26-Q931-006, Ken Crest Centers, One Plymouth Meeting, Plymouth Meeting, PA 19462.	Limerick Twp, PA.	M	.....	1	8	WDD	564,600	34,000
Philadelphia	034-HD026/PA26-Q931-008, Resources for HUMA, 4101 Kelly Drive, Philadelphia, PA 19129.	Abington, PA	M	.....	1	3	WDD	263,800	12,800
Subsubtotal.	.....	.....		.....	7	56		3,368,900	192,700
Virginia									
Richmond ...	051-HD011/VA36-Q931-001, Assoc for Retarded, 51 Battle Road, Hampton, VA 23666.	Newport News, VA.	M	.....	1	5	WDD	231,800	15,200
Richmond ...	051-HD012/VA36-Q931-002, Richmond Residenti, 2926 W. Marshall Street, Richmond, VA 23240.	Richmond, VA ..	M	.....	1	5	CMI	220,700	15,200
Richmond ...	051-HD013/VA36-Q931-003, Chesterfield Alter, P.O. Box 281, Chesterfield, VA 23832.	Chesterfield County, VA.	M	.....	1	3	WDD	203,300	9,200
Richmond ...	051-HD014/VA36-Q931-004, Southside Communit, P.O. Box 488 424 Hamilto, South Boston, VA 24592.	South Boston, VA.	NM	.....	1	15	CMI	797,500	45,600
Richmond ...	051-HD015/VA36-Q931-005, Chesterfield Alter, PO Box 281, Chesterfield, VA 23236.	Richmond, VA ..	M	.....	1	4	WDD	217,600	12,200
Richmond ...	051-HD016/VA36-Q931-006, Chesterfield Alter, P.O. Box 281, Chesterfield, VA 23832.	Richmond, VA ..	M	.....	1	4	WDD	217,600	12,200
Subsubtotal.	.....	.....		.....	6	36		1,888,500	109,600
West Virginia									
Charleston ..	045-HD008/WV15-Q931-001, Northwood Health S, 111 Nineteenth Street, Wheeling, WV 26003.	Wheeling, WV ..	M	.....	1	8	CMI	276,000	26,200
Charleston ..	045-HD009/WV15-Q931-002, Western Dist. Guid, 2121 Seventh Street, Parkersburg, WV 26101.	Parkersburg, WV.	M	.....	1	16	CMI	827,400	52,900

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Charleston ..	045–HD010/WV15–Q931–003, Human Resource Dev, 1644 Mileground, Morgantown, WV 26505.	Morgantown, WV.	NM	.....	1	36	WPD	2,020,700	114,500
Charleston ..	045–HD011/WV15–Q931–004, Prester Center For, 3375 Route 60 East, Huntington, WV 25705.	West Hamlin, WV.	NM	.....	1	6	CMI	235,900	19,700
Subsubtotal.	.....	.....		.....	4	66		3,360,000	213,300
Subtotal ...	.....	.....		.....	25	280		17,257,500	944,200
Atlanta									
Alabama									
Birmingham	062–HD021/AL09–Q931–001, Sw Al Fnd for Mental Health/Mental Retard, 328 West Clairborne Stre, Monroeville, AL 36461.	East Brewton, AL.	NM	.....	1	20	CMI	883,600	51,700
Birmingham	062–HD022/AL09–Q931–002, UCP of Greater Birmingham/UCP Assn Inc., 2430 11th Avenue, North, Birmingham, AL 35234.	Homewood, AL	M	.....	1	7	WDD	384,100	19,100
Subsubtotal.	.....	.....		.....	2	27		1,267,700	70,800
Florida									
Jacksonville	066–HD014/FL29–Q931–002, Stein Gerontological Institute, 5200 NE 2nd Ave., Miami, FL 33137.	Miami, FL	M	.....	1	5	WPD	246,500	14,400
Jacksonville	067–HD011/FL29–Q931–003, Harbor Behavioral Health Care, P.O. Box 428, New Port Richey, FL 34656.	New Port Richey, FL.	M	.....	1	3	CMI	165,400	7,600
Jacksonville	067–HD012/FL29–Q931–004, Harbor Behavioral Health Care, P.O. Box 428, New Port Richey, FL 34656.	Port Richey, FL	M	.....	1	16	CMI	805,600	40,600
Jacksonville	067–HD013/FL29–Q931–005, Harbor Behavioral Health Care, PO Box 428, New Port Richey, FL 34656.	New Port Richey, FL.	M	.....	1	4	CMI	203,900	10,200
Jacksonville	067–HD014/FL29–Q931–006, Boley, Inc., 1236 9th St. N., St. Petersburg, FL 33705.	Pinellas County, FL.	M	.....	1	15	CMI	727,200	38,000
Jacksonville	067–HD015/FL29–Q931–007, Boley, Inc., 1236 9th St. N., St. Petersburg, FL 33705.	Pinellas Park, FL.	M	.....	1	24	CMI	1,217,300	60,800
Subsubtotal.	.....	.....		.....	6	67		3,365,900	171,600
Georgia									
Atlanta	061–HD018/GA06–Q931–002, GA Rehab Institute, 1355 Independence Drive, Augusta, GA 30901.	Augusta, GA	M	.....	1	9	WPD	519,200	24,900
Atlanta	061–HD019/GA06–Q931–003, GA Rehab Institute, 1355 Independence Dr, Augusta, GA 30901.	Augusta, GA	M	.....	1	6	WPD	287,000	13,900
Atlanta	061–HD021/GA06–Q931–005, Southwest Ga Easter Seal Society, 1906 Palmyra Road, Albany, GA 31701.	Unadilla, GA	NM	2	1	10	WDD	478,300	22,100

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Atlanta	061–HD022/GA06–Q931–006, Uniontowns Vols for Handicap/Aldersgate HMS, P.O. Box 593, Blairsville, GA 30512.	Blairsville, GA	NM		1	5	WDD	239,100	11,100
Atlanta	061–HD023/GA06–Q931–007, Resources For Retarded Adults Inc., 1200 Old Ellis Road, Roswell, GA 30076.	Union City, GA	M		1	15	WDD	717,500	33,200
Atlanta	061–HD024/GA06–Q931–008, Dekalb MR Auxiliary Inc., 2660 Osborne Road NE, Atlanta, GA 30319.	Stone Mountain, GA.	M		1	4	WDD	191,300	11,100
Subtotal					6	49		2,432,400	116,300
Kentucky									
Louisville	083–HD027/KY36–Q931–001, Pathways Inc., P.O. Box 790 Ashland, KY 41105.	Ashland, KY	M		1	4	WDD	227,200	11,700
Louisville	083–HD028/KY36–Q931–002, Pathways Inc., P.O. Box 790 Ashland, KY 41105.	Morehead, KY	NM		1	4	WDD	227,200	11,700
Louisville	083–HD029/KY36–Q931–003, The Cain Center For The Disabled Inc., 735 East Chestnut Street, Louisville, KY 40202.	Louisville, KY	M		1	24	WPD	1,714,600	70,300
Louisville	083–HD030/KY36–Q931–004, Cedar Lake Lodge Inc., P.O. Box 289, LaGrange, KY 40031.	Louisville, KY	M		1	5	WDD	218,900	11,700
Subtotal					4	37		2,387,900	105,400
North Carolina									
Greensboro	053–HD064/NC19–Q931–001, United Methodist Agency for Retarded/West. NC, 1040 E. Woodlawn Road, Charlotte, NC 28209.	Gastonia, NC	M		1	7	WDD	280,300	17,600
Greensboro	053–HD065/NC19–Q931–002, ARC NC Inc. & ARC/HDS Inc., PO Box 29594, Greensboro, NC 27429.	Madison, NC	M		1	7	WDD	267,900	17,600
Greensboro	053–HD066/NC19–Q931–003, ARC NC Inc. & ARC/HDS Inc., PO Box 29594, Greensboro, NC 27429.	Sanford, NC	NM		1	7	WDD	283,400	17,600
Greensboro	053–HD067/NC19–Q931–004, ARC NC Inc. & ARC/HDS Inc., PO BOX 29594 Greensboro, NC 27429.	Albemarle, NC	NM		1	7	WDD	280,300	17,600
Greensboro	053–HD068/NC19–Q931–005, Mental Health Association In NC Inc., 3820 Bland Road, Raleigh, NC 27609.	Goldsboro, NC	NM		1	7	CMI	253,600	17,600
Greensboro	053–HD069/NC19–Q931–006, Mental Health Association In NC Inc., 3820 Bland Road, Raleigh, NC 27609.	Asheboro, NC	M		1	7	CMI	253,600	17,600
Greensboro	053–HD070/NC19–Q931–007, AIDS Serv AG of Orange Co. & Inter-Faith Coun, PO Box 16574, Chapel Hill, NC 27514.	Carrboro, NC	M		1	7	WPD	283,400	17,600

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Greensboro	053–HD071/NC19–Q931–008, Mental Health Association In NC Inc., 3820 Bland Rd., Raleigh, NC 27609.	Albemarle, NC ..	NM	.....	1	11	CMI	639,900	32,300
Greensboro	053–HD072/NC19–Q931–009, Mental Health Association In NC Inc., 3820 Bland Rd., Raleigh, NC 27609.	Wadesboro, NC	NM	.....	1	7	CMI	265,400	17,600
Greensboro	053–HD073/NC19–Q931–010, Mental Health Association In NC Inc., 3820 Bland Road, Raleigh, NC 27609.	Charlotte, NC ...	M	.....	1	7	CMI	265,400	17,600
Greensboro	053–HD074/NC19–Q931–011, Mental Health Association In NC Inc., 3820 Bland Road, Raleigh, NC 27609.	Fayetteville, NC	M	.....	1	11	CMI	647,000	32,300
Greensboro	053–HD075/NC19–Q931–012, Mental Health Association In NC Inc., 3820 Bland Road, Raleigh, NC 27609.	Gastonia, NC ...	M	.....	1	11	CMI	639,900	32,300
Greensboro	053–HD076/NC19–Q931–013, ARC NC Inc. & ARC/HDS Inc., PO Box 29594, Greensboro, NC 27429.	Eden, NC	NM	.....	1	7	WDD	267,900	17,600
Subtotal ...	.....	.....		.....	13	103		4,628,000	272,900
South Carolina									
Columbia	054–HD038/SC16–Q931–001, Mental Health Association In Aiken Co., Post Office Box 1074, Aiken, SC 29802.	Aiken, SC	M	.....	1	20	CMI	1,001,900	54,400
Columbia	054–HD039/SC16–Q931–002, Pee Dee Housing Development Corporation, Post Office Box 7121, Florence, SC 29502.	Florence County, SC.	M	.....	1	12	CMI	597,200	32,700
Columbia	054–HD040/SC16–Q931–003, Orangeburg Association For Retarded Citizens, Post Office Box 1812, Orangeburg, SC 29115.	Holly Hill, SC	NM	.....	1	12	WDD	820,800	32,700
Columbia	054–HD042/SC16–Q931–005, Laurens Co. Association For Retarded Citizens, Post Office Box 735, Laurens, SC 29360.	Laurens, SC	NM	.....	1	9	WDD	597,200	32,700
Columbia	054–HD043/SC16–Q931–006, Sumter Co. Mental Retardation Board Inc., Post Office Box 2847, Sumter, SC 29151.	Sumter, SC	NM	.....	1	9	WDD	615,600	24,500
Columbia	054–HD044/SC16–Q931–007, Greenville Assoc for the Retarded, Post Office Box 17007, Greenville, SC 29606.	Greenville County, SC.	M	.....	1	9	WDD	619,500	24,500
Columbia	054–HD045/SC16–Q931–008, Tri-development Center of Aiken County Inc, Post Office Box 698, Aiken, SC 29802.	Aiken County, SC.	M	.....	1	4	WDD	206,500	8,200

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Columbia	054–HD046/SC16–Q931–009, Friendship Center, 1135 Carter Street, Columbia, SC 29204.	Cayce, SC	M	.....	1	20	CMI	995,400	54,400
Columbia	054–HD047/SC16–Q931–010, Friendship Center, 1135 Carter Street, Columbia, SC 29204.	Richland County, SC.	M	.....	1	16	CMI	796,300	43,600
Columbia	054–HD048/SC16–Q931–011, Berkeley Citizens Inc, Post Office Drawer 429, Moncks Corner, SC 29461.	Moncks Corner, SC.	M	.....	1	8	WDD	425,100	16,400
Columbia	054–HD050/SC16–Q931–013, Hope Services Inc, Post Office Box 31729, Charleston, SC 29417.	Charleston County, SC.	M	.....	1	4	WPD	209,000	8,200
Columbia	054–HD052/SC16–Q931–015, The Junior Welfare League Inc, Post Office Box 10820, Rock Hill, SC 29731.	York County, SC.	M	.....	1	12	WDD	605,000	32,700
Columbia	054–HD053/SC16–Q931–016, The Charles Lea Center for Rehab & Spec Educ, 195 Burdette Street, Spartanburg, SC 29307.	Spartanburg County, SC.	M	.....	1	4	WPD	206,500	8,200
Columbia	054–HD054/SC16–Q931–017, The Charles Lea Center for Rehab & Spec Educ, 195 Burdette Street, Spartanburg, SC 29307.	Spartanburg, SC	M	.....	1	12	WDD	619,500	24,500
Subtotal ...	.....	.....		.....	14	154		8,315,500	397,700
Tennessee									
Nashville	081–HD010/TN40–Q931–001, Northwest Counseling, P.O. Box 530, Martin, TN 38237.	Dyersburg, TN ..	NM	.....	1	21	CMI	997,700	55,300
Nashville	086–HD002/TN43–Q931–002, Cumberland Mental Health Service Inc, PO Box 657–1404 Winter D, Lebanon, TN 37087.	Lebanon, TN	M	.....	1	2	CMI	102,600	5,200
Knoxville	087–HD011/TN37–Q931–001, Emory Valley Center Inc, 715 Emory Valley Rd, Oak Ridge, TN 37830.	Oak Ridge, TN .	M	.....	1	7	WDD	237,700	16,200
Knoxville	087–HD012/TN37–Q931–002, Overlook Ctr Inc, 3001 Lake Brook Blvd, Knoxville, TN 37909.	Knoxville, TN	M	.....	1	8	CMI	377,500	21,600
Knoxville	087–HD013/TN37–Q931–003, Overlook Ctr Inc, 3001 Lake Brook Blvd, Knoxville, TN 37909.	Maryville, TN	M	.....	1	6	CMI	283,100	16,200
Knoxville	087–HD014/TN37–Q931–004, The Aim Center Inc, 1903 McCallie Ave, Chattanooga, TN 37404.	Chattanooga, TN.	M	.....	1	8	CMI	385,200	21,600
Knoxville	087–HD015/TN37–Q931–005, Orange Grove Ctr Inc, PO Box 3249, Chattanooga, TN 37404.	Chattanooga, TN.	M	.....	1	18	WDD	509,100	43,200
Knoxville	087–HD016/TN37–Q931–006, Orange Grove Ctr Inc, PO Box 3249, Chattanooga, TN 37404.	Chattanooga, TN.	M	.....	1	10	WDD	437,300	21,600

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Subsubtotal.	.....	.....		.....	8	80		3,330,200	200,900
Subtotal ...	.....	.....		.....	53	517		25,727,600	1,335,600
Chicago									
Illinois									
Chicago	071–HD032/IL06–Q931–008, Franciscan Ministries, P.O. Box 667, Wheaton, IL 60189.	Wheaton, IL	M	.....	1	12	WPD	841,400	40,200
Chicago	072–HD027/IL06–Q931–003, Brown County Mental Health Center, 111 West Washington St., Mount Sterling, IL 62353.	Mount Sterling, IL.	NM	.....	1	16	CMI	894,600	53,600
Chicago	072–HD028/IL06–Q931–004, Futures Unlimited, 210 E. Torrance Ave., Pontiac, IL 61764.	Pontiac, IL	NM	.....	1	18	CMI	1,018,100	53,600
Chicago	072–HD030/IL06–Q931–006, Brown County Mental Health Center, 111 West Washington St., Mount Sterling, IL 62353.	Mount Sterling, IL.	NM	.....	1	16	CMI	894,600	53,600
Subtotal ...	.....	.....		.....	4	62		3,648,700	201,000
Indiana									
Indianapolis	073–HD022/IN36–Q931–007, Quinco Consulting, 2075 Lincoln Park Drive, Columbus, IN 47201.	Seymour, IN	NM	.....	1	21	CMI	950,200	62,400
Indianapolis	073–HD023/IN36–Q931–008, Otis R Bowen Center, 850 North Harrison, Warsaw, IN 46580.	Warsaw, IN	NM	.....	1	21	CMI	950,200	62,400
Indianapolis	073–HD025/IN36–Q931–010, Quinco Consulting, 2075 Lincoln Park Drive, Columbus, IN 47201.	Columbus, IN ...	NM	.....	1	9	CMI	160,900	24,900
Indianapolis	073–HD026/IN36–0931–011, Tri-City Mental Health, 3903 Indianapolis Blvd, East Chicago, IN 46312.	East Chicago, IN.	M	.....	1	6	CMI	336,500	18,700
Indianapolis	073–HD027/IN36–Q931–012, Quinco Consulting, 2075 Lincoln Park Drive, Columbus, IN 47201.	North Vernon, IN.	NM	.....	1	9	CMI	160,900	24,900
Subsubtotal.	.....	.....	M	.....	5	66		2,558,700	193,300
Michigan									
Detroit	044–HD005/MI28–Q931–001, Springhill Housing, 4200 Charms Court, Milford, MI 48042.	Washington TWP, MI.	M	.....	1	6	WDD	290,000	21,100
Subsubtotal.	.....	.....	M	.....	1	6		290,000	21,100
Minnesota									
Minn/St Paul	092–HD013/MN46–Q931–002, Accessible Space, 2550 University Avenue W, St Paul, MN 55114.	Stillwater, MN ...	M	.....	1	24	WPD	1,583,600	81,600
Minn/St Paul	092–HD016/MN46–Q930–005, National Handicap, 4556 Lake Drive, Robbinsdale, MN 55422.	New Brighton, MN.	M	.....	1	25	WPD	1,703,300	81,600
Minn/St Paul	092–HD017/MN46–Q931–006, Comm. Involvement, 1845 Stingson Blvd NE, Minneapolis, MN 55418.	Minneapolis, MN	M	.....	1	22	CMI	1,681,800	74,800

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Minn/St Paul	092–HD019/MN46–Q931–008, Zumbro Valley, 2116 Campus Drive SE, Rochester, MN 55904.	Rochester, MN .	M	.....	1	12	CMI	690,400	40,800
Subsubtotal.	.....	.....	M	.....	4	83		5,659,100	278,800
Ohio									
Cleveland ...	042–HD020/OH12–Q931–001, Mansfield-Richland, 452 Annadale Avenue, Mansfield, OH 44905.	Madison, OH	M	2	1	24	WPD	1,272,100	84,100
Cleveland ...	042–HD021/OH12–931–002, Stark County Comm Mental Health, 500 Cleveland Avenue, Canton, OH 44702.	Alliance, OH	M	.....	1	16	CMI	904,900	52,600
Cleveland ...	042–HD022/OH12–Q931–003, Society Handicapped, 4283 Paradise Road, Seville, OH 44273.	Medina, OH	M	.....	1	4	WDD	241,000	14,100
Cleveland ...	042–HD023/OH12–Q931–004, Jewish Community, 1750 Euclid Avenue, Cleveland, OH 44115.	Cleveland Heights, OH.	M	.....	1	6	CMI	272,700	21,100
Cleveland ...	042–HD024/OH12–Q931–005, Jewish Community, 1750 Euclid Avenue, Cleveland, OH 44115.	Shaker Heights, OH.	M	.....	1	6	CMI	272,700	21,100
Cleveland ...	042–HD026/OH12–Q931–007, Mahoning Co, 527 N. Meridan Road, Youngstown, OH 44509.	Youngstown OH	M	.....	1	16	CMI	879,100	52,600
Cleveland ...	042–HD027/OH12–Q931–008, Mahoning Co Chemical Dependency, 527 N. Meridan Road, Youngstown, OH 44509.	Youngstown, OH.	M	.....	1	13	WPD	796,600	63,100
Cleveland ...	042–HD029/OH12–Q931–010, Burdman Group Inc, 278 Broadway, Youngstown, OH 44504.	Warren, OH	M	.....	1	19	CMI	1,043,900	63,100
Cleveland ...	042–HD030/OH12–Q931–011, Claymont Jaycees, Inc., 1000 Claymont Drive, Uhrichsville, OH 44683.	Uhrichsville, OH	NM	.....	1	24	WPD	1,272,100	80,600
Cincinnati	046–HD011/OH10–Q931–001, Wilmington Mthly Mtg., 66 North Mullberry Street, Wilmington, OH 45177.	Wilmington, OH	NM	.....	1	22	CMI	1,187,400	69,200
Subsubtotal.	.....	.....		.....	10	50		8,142,500	521,600
Wisconsin									
Milwaukee ..	075–HD018/WI39–Q931–002, Goodwill Industries, 6055 North 91 Street, Milwaukee, WI 53225.	Milwaukee, WI ..	M	.....	1	12	WDD	774,300	38,300
Milwaukee ..	075–HD019/WI39–Q931–003, Eternal Life Church of God in Christ, 200 W Concordia Ave, Milwaukee, WI 53212.	Milwaukee, WI ..	M	2	1	20	WPD	1,218,200	63,700
Milwaukee ..	075–HD020/WI39–Q931–004, Goodwill Industries, 6055 North 91 Street, Milwaukee, WI 53225	Saukville, WI	M	.....	1	12	WPD	730,000	38,300

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Milwaukee ..	075–HD021/WI39–Q931–005, AIDS Resource Ctr of NW Side Comm. Devel., 315 West Court Street, Milwaukee, WI 53212.	Milwaukee, WI ..	M	.....	1	6	WPD	541,800	19,200
Milwaukee ..	075–HD022/WI39–Q931–006, ARC Housing, Inc., 1126 South 70 Street, West Allis, WI 53214.	Milwaukee, WI ..	M	.....	1	8	WDD	516,200	25,500
Subsubtotal.	.....	.....		.....	5	58		3,780,500	185,000
Fort Worth									
Arkansas									
Little Rock ..	082–HD013/AR37–Q931–001, Garland Co Assn for Retarded Children, P.O. Box 2440, Hot Springs, AR 71914.	Hot Springs, AR	NM	.....	1	20	WPD	866,200	50,200
Little Rock ..	082–HD014/AR37–Q931–002, Texarkana Resources for the Disabled, P.O. Box 19, Texarkana, AR 75504.	Texarkana, AR .	M	.....	1	6	WDD	313,900	15,100
Little Rock ..	082–HD016/AR37–Q931–004, Pathfinder Schools, P.O. Box 647, Jacksonville, AR 72076.	Jacksonville, AR	M	.....	1	17	WDD	745,100	40,200
Little Rock ..	082–HD017/AR37–Q931–005, Birch Tree Communities, P.O. Box 1589, Benton, AR 72015.	Malvern, AR	NM	.....	1	20	CMI	866,200	50,200
Subsubtotal.	.....	.....		.....	4	63		2,791,400	155,700
Louisiana									
New Orleans	064–HD021/LA48–Q931–001, Diocese of Lafayette, 1401 Carmel Ave., Lafayette, LA 70501.	Lafayette, LA	M	.....	1	20	WPD	917,900	57,800
New Orleans	064–HD022/LA48–Q931–002, Natl Baptist Hsg Board, 383 Washington Street, Newark, OH 43055.	New Orleans, LA.	M	.....	1	24	WPD	1,124,700	69,400
Subsubtotal.	.....	.....		.....	2	44		2,042,600	127,200
New Mexico									
Fort Worth ..	116–HD003/NM16–Q931–001, SW New Mex. Svcs to Hndcap Children & Adults, 907 Pope St., Silver City, NM 88061.	Silver City, NM .	NM	.....	1	5	WPH	256,900	11,500
Subsubtotal.	.....	.....		.....	1	5		256,900	11,500
Oklahoma									
Oklahoma City.	117–HD005/OK56–Q931–002, Carter Cty Assn for Retarded Persons, 1103 Lake Murray Drive, Ardmore, OK 73401.	Ardmore, OK	NM	.....	1	12	WDD	554,600	32,400
Oklahoma City.	117–HD006/OK56–Q931–003, Caddo Cnty Shelter, 102 E. Broadway, Anadarko, OK 73005.	Anadarko, OK ..	NM	.....	1	4	WDD	184,800	10,800
Oklahoma City.	118–HD003/OK56–Q931–001, Alliance for Mentally Ill of Wash. Co., P.O. Box 3614, Bartlesville, OK 74006.	Bartlesville, OK .	NM	.....	1	20	CMI	930,800	52,900
Subsubtotal.	.....	.....		.....	3	36		1,670,200	96,100

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Texas									
Fort Worth ..	112–HD004/TX16–Q931–001, Sabine Valley Center, P.O. Box 21, Longview, TX 75606.	Longview, TX ...	M	.....	1	7	CMI	221,100	17,600
San Antonio	115–HD008/TX59–Q931–001, Mission Rd. Development Center, 8706 Mission Road, San Antonio, TX 78216.	San Antonio, TX	M	.....	1	16	WDD	700,000	43,200
San Antonio	115–HD009/TS59–Q931–002, Accessible Space, Inc., 2550 University Avenue, St. Paul, MN 55114.	Austin, TX	M	.....	1	24	WPD	1,161,600	64,800
San Antonio	115–HD010/TX59–Q931–003, Community Agency for Self Help, 223 West Zavala, Crystal City, TX 78839.	Crystal City, TX	NM	4	1	24	CMI	1,151,900	64,800
San Antonio	115–HD011/TX59–Q931–004, Guadalupe County Mhmr, 1104 Jefferson Ave., Seguin, TX 78155.	Seguin, TX	M	.....	1	24	CMI	1,242,000	64,800
San Antonio	115–HD012/TX59–Q931–005, Inman Christian Center, 1214 Colima, San Antonio, TX 78207.	San Antonio, TX	M	.....	1	24	WPD	1,132,500	64,800
Subsubtotal.	.....	.....		.....	6	119		5,609,100	320,000
Subtotal ...	.....	.....		.....	16	267		12,370,200	710,500
Kansas City									
Iowa									
Des Moines	074–HD008/IA05–Q931–002, Metro Area Housing, 93 9th Ave, SE., Cedar Rapids, IA 52401.	Cedar Rapids, IA.	M	.....	1	16	CMI	43,500	22,800
Des Moines	074–HD010/IA05–Q931–004, Muscatine Welfare Association, 415 E. 4th Street, Muscatine, IA 52761.	Muscatine, IA ...	NM	.....	1	10	WDD	472,500	28,500
Subsubtotal.	.....	.....		.....	2	26		908,000	51,300
Kansas									
Kansas City	102–HD014/KS16–Q931–001, Area Mental Health, 1111 E. Spruce, Garden City, KS 67846.	Dodge City, KS	NM	.....	1	10	CMI	450,900	28,100
Subsubtotal.	.....	.....		.....	1	10		450,900	28,100
Missouri									
Kansas City	084–HD012/MO16–Q931–001, Lafayette County Enterprises, 109 West 19th St., Higginsville, MO 64037.	Higginsville, MO	NM	.....	1	16	WDD	760,100	51,000
Kansas City	084–HD013/MO16–Q931–002, Chariton Co. Sheltered Workshop, Inc., Route 1, Keytesville, MO 65281.	Keytesville, MO	NM	.....	1	12	WDD	601,100	38,300
Kansas City	084–HD014/MO16–Q931–003, Save Inc., P.O. Box 45301, Kansas City, MO 64111.	Kansas City, MO.	M	.....	1	28	WPD	1,501,400	85,900
St. Louis	085–HD005/MO36–Q931–002, Catholic Charities, 4532 Lindell Blvd., St. Louis, MO 63108.	St. Louis, MO ...	M	.....	1	8	CMI	275,600	26,900

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Subsubtotal.	.....	.....		.....	4	64		3,138,200	202,100
Nebraska									
Omaha	103–HD004/NE26–Q931–001, Bethphage Mission, 11128 John Galt Blvd., Omaha, NE 68137.	Papillion, NE	M	.....	1	16	WDD	910,500	45,900
Omaha	103–HD005/NE26–Q931–002, Community Alliance, 3860 Leavenworth Street, Omaha, NE 68105.	Omaha, NE	M	.....	1	16	CMI	470,000	45,900
Omaha	103–HD006/NE26–Q931–003, Improved Living, Inc. P.O. Box 116, Norfolk, NE 68701.	Columbus, NE ..	NM	.....	1	8	CMI	464,600	23,000
Omaha	103–HD008/NE26–Q931–005, Liberty Center Services, Inc., 112 South Birch, Norfolk, NE 68701.	Norfolk, NE	NM	.....	1	16	CMI	790,300	45,900
Subsubtotal.	.....	.....		.....	4	56		2,635,400	160,700
Subtotal ...	.....	.....		.....	11	156		7,132,500	442,200
Denver									
Colorado									
Denver	101–HD006/CO99–Q931–002, Las Animas County Rehabilitation, 1205 Congress Drive, Trinidan, CO 81082.	Walsenburg, CO	NM	.....	1	4	WDD	222,600	12,500
Subsubtotal.	.....	.....		.....	1	4		222,600	12,500
Montana									
Denver	093–HD004/MT99–Q931–001, Accessible Space, Inc., 2550 University Avenue, St. Paul, MN 55114.	Great Falls, MT	M	.....	1	24	WPD	1,201,400	68,900
Subsubtotal.	.....	.....		.....	1	24		1,201,400	68,900
Utah									
Denver	105–HD002/UT99–Q931–002, Valley Mental Health, 5965 So. 9th East, Salt Lake City, UT 84121.	Salt Lake City, UT.	M	.....	1	20	CMI	979,600	51,700
Subsubtotal.	.....	.....		.....	1	20		979,600	51,700
Wyoming									
Denver	109–HD003/WY99–Q931–001, Magic City, P.O. Box 925, Cheyenne, WY 82003.	Cheyenne, WY .	M	.....	1	5	WDD	201,600	15,600
Subsubtotal.	.....	.....		.....	1	5		201,600	15,600
Subtotal ...	.....	.....		.....	4	53		2,605,200	148,700
San Francisco									
Arizona									
Phoenix	123–HD008/AZ20–Q931–001, Pact for Life, 801 West Congress Street, Tucson, AZ 85745.	Tucson, AZ	M	.....	1	25	WPD	1,268,800	68,900
Phoenix	123–HD009/AZ20–Q931–002, Mercy Housing, Inc., 550 W. Thomas Rd., #C224, Phoenix, AZ 85013.	Phoenix, AZ	M	.....	1	25	CMI	1,422,000	71,700
Subsubtotal.	.....	.....		.....	2	50		2,690,800	140,600

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
California									
San Francisco.	121–HD013/CA39–Q931–001, Housing for Independent People, 25 East Hedding Street, San Jose, CA 95112.	Fremont, CA	M	.....	1	20	CMI	1,597,300	76,000
San Francisco.	121–HD015/CA39–Q931–003, Tenants and Owners Development Corporation, 230 Fourth Street, San Francisco, CA 94103.	San Francisco, CA.	M	2	1	24	WPD	2,368,500	97,700
San Francisco.	121–HD016/CA39–Q931–003, Resources for Community Development, 2131 University Avenue, Suite 422, Berkeley, CA 94702.	Oakland, CA	M	.....	1	13	WPD	1,050,200	48,000
San Francisco.	121–HD017/CA39–Q931–005, Therapon/Ecumenical Assoc. for Housing, 7 Mt. Lassen, Suite D110, San Rafael, CA 94903.	San Rafael, CA	M	.....	1	13	WDD	628,300	24,500
Los Angeles	122–HD031/CA16–Q931–002, House of Triumph/ASI, 1381 S. Highland Ave. Fullerton, CA 92632.	Fullerton, CA	M	.....	1	25	WPD	1,915,400	76,800
Los Angeles	122–HD034/CA16–Q931–005, Downstown, Inc., P.O. Box 128, San Marcos, CA 92079.	Vista, CA	M	.....	1	8	WDD	682,800	32,400
Los Angeles	122–HD035/CA16–Q931–006, Project Headway, 17037 Ventura Blvd., Encino, CA 91316.	Northridge, CA .	M	.....	1	6	WPH	351,100	16,200
Los Angeles	122–HD036/CA16–Q931–007, Downstown, Inc., 910 San Marcos Blvd., San Marcos, Ca 92069.	San Marcos, CA	M	.....	1	8	WDD	682,800	32,400
Los Angeles	123–HD037/CA16–Q931–008, TLC for the Blind, 7937 Lindley Avenue, Reseda, CA 91335.	Los Angeles, CA.	M	.....	1	12	WDD	702,200	32,400
Los Angeles	122–HD038/CA16–Q931–009, Valley Village, 17317 Roscoe Blvd., Northridge, CA 91325.	Los Angeles, CA.	M	.....	1	12	WDD	692,200	32,100
Los Angeles	122–HD040/CA16–Q931–011, Home/Coastal Development Services, 5901 Green Valley Circle, Culver City, CA 90230.	Culver City, CA	M	.....	1	8	WDD	341,400	12,800
Los Angeles	122–HD041/CA16–Q931–012, TLC For The Blind, 7937 Lindley Avenue, Reseda, CA 91335.	Los Angeles, CA.	M	.....	1	12	WDD	702,200	32,400
Los Angeles	122–HD044/CA16–Q931–015, ED. Resource and Svcs Center, Inc., 10101 Jefferson Blvd., Culver City, CA 90232.	Culver City, CA	M	.....	1	6	WDD	351,100	16,200
Los Angeles	122–HD045/CA16–Q931–016, Little Tokyo, 112 N. San Pedro, #109, Los Angeles, CA 90012.	Monterey Park, CA.	M	5	1	8	WDD	378,100	21,600

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Los Angeles	122–HD046/CA16–Q931–017, Project New Hope/Episcopal Church of LA, 1220 West 4th Street, Los Angeles, CA 90017.	Santa Monica, CA.	M	.....	1	25	WPD	1,969,300	76,800
Los Angeles	122–HD047/CA16–Q931–018, Project New Hope/Episcopal Church of LA, 1220 West 4th Street, Los Angeles, CA 90017.	Los Angeles, CA.	M	.....	1	15	WPD	1,212,700	76,800
Sacramento	136–HD004/CA30–Q931–001, N. Valley Catholic Soc. Svcs., 1733 Oregon Street, Redding, CA 96001.	Redding, CA	M	.....	1	17	WDD	1,093,300	58,400
Subsubtotal.	.....	.....		.....	17	232		16,718,900	763,500
Hawaii									
Honolulu	140–HD002/HI10–Q931–001, The House, 4510 Sierra Drive, Honolulu, HI 96816–2408.	Kaimuki, HI	NM	.....	1	7	CMI	552,800	24,500
Honolulu	140–HD003/HI10–Q931–002, The House, 4510 Sierra Drive, Honolulu HI 96816–2408.	Hilo, HI	NM	.....	1	8	CMI	567,800	28,000
Honolulu	140–HD005/HI10–Q931–004, Steadfast Housing Development Corporation, 677 Ala Moana Blvd., Suite 507, Honolulu, HI 96813–5413.	South Kona, HI	NM	5	1	5	CMI	502,900	17,500
Honolulu	140–HD007/HI10–Q931–006, Steadfast Housing Development Corporation, 677 Ala Moana Blvd., Suite 507, Honolulu, HI 96813–5413.	Honolulu, HI	M	5	1	5	CMI	502,900	17,500
Subsubtotal.	.....	.....		.....	4	25		2,126,400	87,500
Nevada									
San Francisco.	121–HD019/NV39–Q931–001, Accessible Space, Inc., 2550 University Avenue West, St. Paul, MN 55114.	Carson City, NV	NM	.....	1	24	WPD	1,250,200	79,000
Subsubtotal.	.....	.....		.....	1	24		1,250,200	79,000
Subtotal ...	.....	.....		.....	24	331		22,786,300	1,700,600
Seattle									
Alaska									
Anchorage ..	176–HD004/AK06–Q931–001, Asets, Inc., 2330 Mikols St, Anchorage, AK 99508.	Anchorage, AK .		.....	1	9	WPD	1,071,100	46,500
Subsubtotal.	.....	.....		.....	1	9		1,071,100	46,500
Idaho									
Portland	124–HD001/ID16–Q931–001, Accessible Space, Inc., 2550 University Avenue W, St. Paul, MN 55114.	Boise, ID	M	.....	1	24	WPD	1,131,800	70,900
Subsubtotal.	.....	.....		.....	1	24		1,131,800	70,900

SECTION 811 PROGRAM FOR PERSONS WITH DISABILITIES (TO ACCOMPANY HUD 93–100)—Continued

[Fiscal Year 1993 Selections]

Office	FHA and project rental assistance contract (PRAC) numbers, sponsor name and address	Location	Metro or non-metro	Minority code	Number of projects	Units	Tenant type	Capital advance amount	Rental assistance contract authority
Oregon									
Portland	126–HD006/OR16–Q931–001, Options for Southern Oregon, Inc., 1215 SW 'G' Street, Grants Pass, OR 97526.	Grants Pass, OR.	NM		1	12	CMI	548,400	33,400
Portland	126–HD007/OR16–Q931–002, Mental Health Services, 710 SW Second Avenue, Portland, OR 97204.	Portland, OR	M		1	24	CMI	1,359,300	69,900
Portland	126–HD008/OR16–Q931–003, ARC of Lane County, 45 West Broadway, Eugene, OR 97401.	Eugene, OR	M		1	10	WDD	662,700	30,400
Portland	126–HD009/OR16–Q931–004, Ecumenical Ministries, 0245 SW Bancroft Street, Portland, OR 97201.	Portland, OR	M		1	12	CMI	722,100	33,400
Portland	126–HD010/OR16–Q931–005, Specialized Housing, Inc, 5319 SW Westgate Drive, Portland, OR 97221.	Coos Bay, OR	NM		1	22	CMI	1,000,000	63,800
Subsubtotal.					5	80		4,292,500	230,900
Washington									
Seattle	127–HD006/WA19–Q931–001, Central WA, Comprehensive Mental Health Svcs, 321 E Yakima Ave, Yakima, WA 98901.	Sunnyside, WA	M		1	12	CMI	698,100	38,000
Seattle	127–HD007/WA19–Q931–002, Counterpoint Community Mental Health Svcs, 7416 212th St SW, Edmonds, WA 98026.	Lynnwood, WA	M		1	11	CMI	706,200	35,600
Seattle	127–HD008/WA19–Q931–003, UCP Assn of King/Snohomish Counties, 4409 Interlake Ave N, Seattle, WA 98103.	Bellevue, Redmond, WA.	M		1	9	WDD	554,700	29,100
Seattle	171–HD003/WA19–Q931–004, Inland Empire Residential Resources, 111 Cataldo, Spokane, WA 99201.	Spokane, WA	M		1	6	WDD	493,900	19,000
Subsubtotal.					4	38		2,452,900	121,700
Subtotal					11	151		8,948,300	470,000
Total					209	2493		141,597,800	7,853,000

[FR Doc. 93–31652 Filed 12–29–93; 8:45 am]

BILLING CODE 4210–27–M

Office of the Assistant Secretary for Community Planning and Development

[Docket No. N–93–1917; FR–3350–N–64]

Federal Property Suitable as Facilities to Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

ADDRESSES: For further information, contact Mark Johnston, room 7262, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–4300; TDD number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 56 FR 23789 (May 24, 1991) and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real

property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD:

(1) Its intention to make the property available for use to assist the homeless,

(2) Its intention to declare the property excess to the agency's needs; or

(3) A statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Judy Breitman, Division of Health Facilities Planning, U.S. Public Health Service, HHS, room 17A–10, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 56 FR 23789 (May 24, 1991).

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Mark Johnston at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: U.S. Air Force: John Carr, Realty Specialist, HQ–AFBDA/BDR, Pentagon, Washington, DC 20330–5130; (703) 696–5569; Dept. of Transportation: Ronald D. Keefer, Director, Administrative Services & Property Management, DOT, 400 Seventh St. SW., room 10319, Washington, DC 20590; (202) 366–4246; (These are not toll-free numbers).

Dated: December 23, 1993.

Jacquie M. Lawing,

Deputy Assistant Secretary for Economic Development.

Title V, Federal Surplus Property Program Federal Register Report for 12/30/93

Suitable/Available Properties

Buildings (by State)

Florida

9 Industrial Storage Bldgs.
Homestead Air Force Base
Miami Co: Dade FL 33218–0001
Landholding Agency: Air Force-BC
Property Number: 199340003
Status: Excess
Base closure
Number of Units: 9
Comment: 792 to 23415 sq. ft., 1 story, needs rehab, scheduled to be vacant 3/31/94

17 Administrative Bldgs.
Homestead Air Force Base
Miami Co: Dade FL 33218–0001
Landholding Agency: Air Force-BC
Property Number: 199340004
Status: Excess
Base closure
Number of Units: 17
Comment: 960 to 25653 sq. ft., 1–3 story, needs rehab, scheduled to be vacant 3/31/94

13 Dormitories
Homestead Air Force Base
Miami Co: Dade FL 33218–0001
Landholding Agency: Air Force-BC
Property Number: 199340005
Status: Excess
Base closure
Number of Units: 13
Comment: 13426 to 26034 sq. ft., 2–3 story, needs rehab, scheduled to be vacant 3/31/94

9 Miscellaneous Bldgs.
Homestead Air Force Base
Miami Co: Dade FL 33218–0001
Landholding Agency: Air Force-BC
Property Number: 199340006
Status: Excess
Base closure
Number of Units: 9
Comment: 1344 to 93202 sq. ft., 1–2 story, needs rehab, scheduled to be vacant 3/31/94, includes dining hall, stores, child care center, dental clinic, classroom.

8 Recreational Facilities
Homestead Air Force Base
Miami Co: Dade FL 33218–0001
Landholding Agency: Air Force-BC
Property Number: 199340007
Status: Excess
Base closure
Number of Units: 8
Comment: 384 to 27953 sq. ft., 1–2 story, needs rehab, scheduled to be vacant 3/31/94, includes bathhouse, gymnasium, bowling center, officers club, golf club house.

6 Warehouses
Homestead Air Force Base
Miami Co: Dade FL 33218–0001
Landholding Agency: Air Force-BC
Property Number: 199340008
Status: Excess
Base closure
Number of Units: 6
Comment: 3600 to 90683 sq. ft., 1 story, needs rehab, scheduled to be vacant 3/31/94

New Jersey

Sandy Hook Light
Middletown Co: Monmouth NJ 07732–
Location: Adjacent to Gateway National Recreation Area
Landholding Agency: DOT
Property Number: 879340001
Status: Unutilized
Comment: Brick 29' base diameter lighthouse, historic structure, needs major rehab

Land (by State)

Florida

Land
Homestead Air Force Base
Miami Co: Dade FL 33218–0001
Landholding Agency: Air Force-BC
Property Number: 199340001
Status: Excess
Base Closure
Number of Units: 1
Comment: 843 acres, scheduled to be vacant 3/31/94

Unsuitable Properties

Buildings (by State)

Florida

1600 Family Housing Units
Homestead Air Force Base

Miami Co: Dade FL 33218–0001
Landholding Agency: Air Force-BC
Property Number: 199340002
Status: Excess
Base closure
Number of Units: 1600
Reason: Other
Comment: Extensive Deterioration

[FR Doc. 93–31837 Filed 12–29–93; 8:45 am]
BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–260–4210–01 24 1a]

Publication of Initial List of Base Land Parcels Relinquished to the United States Pursuant to the Act of June 4, 1897

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: In compliance with the Act of July 2, 1993, Public Law 103–48, this notice publishes the initial list of base land parcels that were relinquished, or were purported to be relinquished, to the United States of America pursuant to the Act of June 4, 1897 (as amended), and for which selection or other rights under that Act or supplemental legislation were not realized or exercised. This has resulted in situations where the ownership of the land is uncertain.

Public Law 103–48 sets forth the procedures by which these situations can be resolved. This notice is the first step in the procedure. It sets forth an initial list of base lands, located on public lands, for which the Bureau of Land Management has determined selection or other rights have not been realized or exercised. Persons asserting an interest in any base lands omitted from this initial list are invited to suggest addition of omitted parcels to the list in order to be considered for relief pursuant to this Act.

DATES: Request to add parcels to this list or other comments must be received by June 28, 1994.

ADDRESSES: Requests for addition of parcels or other comments must be addressed to the Director (260), Bureau of Land Management, United States Department of the Interior, 1849 C Street, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Brenda Zenan in the BLM Washington Office (260), (202) 452–7787, Bill Bliesner, BLM Oregon State Office, (503) 280–7157, John Beck, BLM California State Office, (916) 978–4820, or Bill Ireland, BLM Idaho State Office, (208) 384–3162.

SUPPLEMENTARY INFORMATION: The request, to have lands added to the final list, must include the name of the person or entity granting the lands to the United States, the legal description of the lands, State and county where recorded, and the volume and page of the deed recordation book.

The Initial List has been prepared based on information in the actual possession of the Bureau of Land Management as of July 2, 1993, including information submitted to Congress pursuant to the directive contained in Senate Report No. 98–578, issued for the Fiscal Year 1985 Interior and Related Agencies Appropriation Act.

The list presents the information grouped by State, by meridian, and by county. The first column identifies the parcel of base land by an agency identifier. The second column lists the names of the individual or entity that relinquished base lands to the United States under the 1897 Act. The third column shows the legal description of the base lands by Township (T), Range (R), section (sec.), and the legal subdivisions of the section.

INITIAL LIST

Parcel No.	Grantor name	Legal description
	Bonner County, Idaho (Boise Meridian)	
1	Conrad Kohrs	T. 58 N., R. 3 W., Sec. 13, NE¼NE¼.
2	Conrad Kohrs	T. 58 N., R. 3 W., Sec. 15, NE¼NW¼.
3	N. Pacific R.R. Co	T. 59 N., R. 4 W., Sec. 1, Lots 1 & 2, NW¼, NE¼SE¼ and S½SE¼.
4	N. Pacific R.R. Co	T. 59 N., R. 4 W., Sec. 15, NE¼NE¼, W½NW¼ and SE¼NW¼.
9	N. Pacific R.R. Co	T. 63 N., R. 4 W., Sec. 11, NW¼NE¼.
10	W.J. Carney	T. 63 N., R. 4 W., Sec. 27, SW¼NW¼.
	Boundary County, Idaho (Boise Meridian)	
5	N. Pacific R.R. Co	T. 62 N., R. 3 W., Sec. 13, S½NW¼.
6	N. Pacific R.R. Co	T. 63 N., R. 3 W., Sec. 17, N½.
7	N. Pacific R.R. Co	T. 63 N., R. 3 W., Sec. 19, W½NW¼ and SE¼.
8	N. Pacific R.R. Co	T. 63 N., R. 3 W., Sec. 31, NW¼.
	El Paso County, Colorado (6th. Principal Meridian)	
11	W.E. Moses	T. 11 S., R. 67 W., Sec. 5, N. ¾ of NW¼NW¼.
	Douglas County, Colorado (6th. Principal Meridian)	
11A	Donald McIntosh	T. 9 S., R. 68 W., Sec. 2, SW¼SW¼; Sec. 3, E½SE¼; Sec. 10, NE¼NE¼.
	Custer County, South Dakota (Black Hills Meridian)	
15	Lewis Benedict	T. 3 S., R. 6 E., Sec. 31, SE¼NW¼.
16	V. Vallenthine	T. 3 S., R. 6 E., Sec. 32, NW¼NE¼.
	Lincoln County, New Mexico (New Mexico Principal Meridian)	
17	W.E. Moses LS&R Co	T. 8 S., R. 15 E., Sec. 27, NW¼SW¼.
18	Jefferson D. Thomas	T. 7 S., R. 14 E., Sec. 17, E½SW¼.

INITIAL LIST—Continued

Parcel No.	Grantor name	Legal description
18A	Jesse H. Sherman	T. 10 S., R. 10 E., Sec. 29, S½NE¼.
	Catron County, New Mexico (New Mexico Principal Meridian)	
18B	Henry N. Porter	T. 9 S., R. 13 W., Sec. 26, SW¼SE¼.
	Coconino County, Arizona (Gila and Salt River Meridian)	
18C	Aztec Land & Cattle	T. 18 N., R. 11 E., Sec. 11, N½SW¼.
	Fresno County, California (Mt. Diablo Meridian)	
19	Walter N. Bush	T. 11 S., R. 30 E., Sec. 16, SW¼SE¼; Sec. 36, NW¼SW¼.
	Tulare County, California (Mt. Diablo Meridian)	
20	F.A. Hyde	T. 14 S., R. 32 E., Sec. 36, NW¼NE¼.
21	Jacob H. Cook	T. 22 S., R. 30 E., Sec. 31, Lot 4 (Tr. 37).
22	E.O. Miller	T. 23 S., R. 30 E., Sec. 16, SW¼NW¼.
	Kern County, California (Mt. Diablo Meridian)	
23	Frank S. Fugitt	T. 26 S., R. 33 E., Sec. 11, N½S½SW¼.
24	Hiram M. Hamilton	T. 26 S., R. 33 E., Sec. 29, Part of E½NW¼.
26	C.E. Glover	T. 27 S., R. 37 E., Sec. 36, SW¼ and W½SE¼.
28	Marcus Hart	T. 28 S., R. 35 E., Sec. 16, S½SW¼.
	Mono County, California (Mt. Diablo Meridian)	
29	J.C. Irwin	T. 5 S., R. 30 E., Sec. 25, NW¼SE¼.
	Inyo County, California (Mt. Diablo Meridian)	
30	A.W. Foster	T. 21 S., R. 37 E., Sec. 16, S½NE¼.
	Santa Barbara County, California (San Bernardino Meridian)	
31	John D. Ackerman	T. 11 N., R. 28 W., Sec. 31, Lots 1 and 2.
	Los Angeles County, California (San Bernardino Meridian)	
32	J.D. Stoddard	T. 8 N., R. 18 W., Sec. 20, SE¼.
33	E.M. Durant	T. 7 N., R. 14 W., Sec. 5, W½ of Lot 2 and SW¼NE¼.
34	E.M. Durant	T. 7 N., R. 15 W., Sec. 5, SW¼NW¼.
35	E.M. Durant	T. 7 N., R. 15 W., Sec. 3, S½NW¼.
36	H.A. Cowen	T. 7 N., R. 15 W., Sec. 5, NE¼NE¼.
37	Alfred A. Vickery	T. 5 N., R. 10 W., Sec. 36, All.
38	William G. Goslin	T. 5 N., R. 12 W., Sec. 30, Lot 1 and S½ of Lot 2.
39	C.A. Johnson	T. 5 N., R. 13 W., Sec. 20, N½SW¼.
40	Cora Graybill	T. 5 N., R. 13 W., Sec. 22, NE¼SE¼.
41	John Woods	T. 5 N., R. 13 W., Sec. 22, SE¼SE¼.
42	Isaac Liebes	T. 5 N., R. 15 W., Sec. 36, SW¼.
43	Gabino Comichio	T. 4 N., R. 13 W., Sec. 7, N½SE¼SE¼ and NE¼SW¼SE¼.
44	W.C. Burgstrom	T. 4 N., R. 15 W., Sec. 30, Lots 1 and 2.
45	E.M. Durant	T. 4 N., R. 16 W., Sec. 11, Lots 1, 2, and 3.
46	Charles Overlook	T. 4 N., R. 16 W., Sec. 12, NE¼NE¼ and NW¼SW¼.
47	E.M. Durant	T. 4 N., R. 16 W., Sec. 25, Lots, 1, 2, 3, and 4.
48	Alice M. Hall	T. 4 N., R. 17 W., Sec. 16, NW¼.
49	Big Blackfoot Milling	T. 4 N., R. 10 W., Sec. 2, Lot 2 of NW¼.
50	L.A. Grimminger	T. 4 N., R. 15 W., Sec. 6, NW¼SE¼ and SW¼SW¼.
51	J. Furniwell	T. 4 N., R. 15 W., Sec. 19, Lot 1.
52	John F. Campbell	T. 4 N., R. 15 W., Sec. 19, W½SE¼NE¼, N½SW¼NE¼ and N½NE¼.
53	Wm. Erwin	T. 4 N., R. 15 W., Sec. 20, N½S½SE¼.
54	Lewis A. Black	T. 4 N., R. 15 W., Sec. 31, SE¼NW¼.
	San Diego County, California (San Bernardino Meridian)	
57	Lewis A. Black	T. 9 S., R. 2 E., Sec. 15, Lot 3.

INITIAL LIST—Continued

Parcel No.	Grantor name	Legal description
	Snohomish County, Washington (Willamette Meridian)	
60	Gary Peavey	T. 32 N., R. 8 E., Sec. 2, E½SW¼.
61	Stephen A. Thayer	T. 32 N., R. 9 E., Sec. 9, N½SE¼.
62	Stephen A. Thayer	T. 32 N., R. 9 E., Sec. 10, N½SW¼.
63	A.J. Hazeltine	T. 32 N., R. 9 E., Sec. 8, SE¼SE¼.
64	A.J. Hazeltine	T. 32 N., R. 9 E., Sec. 9, SW¼SW¼, NE¼SW¼ and SE¼SW¼.
65	Stephen A. Thayer	T. 30 N., R. 8 E., Sec. 7, W½NE¼.
	Lewis County, Washington (Willamette Meridian)	
66	Marion Edwards	T. 12 N., R. 7 E., Sec. 15, Lot 6.
67	N. Pacific R.R. Co	T. 12 N., R. 7 E., Sec. 13, Lot 2.
68	N. Pacific R.R. Co	T. 12 N., R. 7 E., Sec. 7, SE¼SE¼, Sec. 19, Lot 1.
69	N. Pacific R.R. Co	T. 12 N., R. 8 E., Sec. 1, Lot 1.
70	N. Pacific R.R. Co	T. 12 N., R. 8 E., Sec. 11, Lot 5.
71	N. Pacific R.R. Co	T. 12 N., R. 8 E., Sec. 17, Lot 12.
	Mason County, Washington (Willamette Meridian)	
72	Jacob Lockbaum	T. 21 N., R. 5 W., Sec. 34, E½SW¼.
73	Charles Borgeson	T. 21 N., R. 5 W., Sec. 34, SE¼.
74	Harold Waltz	T. 21 N., R. 6 W., Sec. 33, S½SW¼.
75	F. Stabenfeldt	T. 21 N., R. 5 W., Sec. 32, SE¼SW¼.
	Clallam County, Washington (Willamette Meridian)	
76	James Kerr	T. 28 N., R. 13 W., Sec. 7, Lot 7.
77	Gideon McDonald	T. 28 N., R. 13 W., Sec. 17, SE¼NE¼.
78	Mary Coffin	T. 28 N., R. 14 W., Sec. 24, Lot 1.
79	W.J. Williams	T. 28 N., R. 14 W., Sec. 8, SE¼SE¼.
80	Virgil E. Rice	T. 28 N., R. 14 W., Sec. 34, E½NE¼.
81	Fred Pape	T. 28 N., R. 14 W., Sec. 15, Lots 4 & 5.
82	Carl E. Clemens	T. 28 N., R. 14 W., Sec. 15, Lot 3.
83	Carl E. Clemens	T. 28 N., R. 14 W., Sec. 10, Lot 6.
84	Carl E. Clemens	T. 28 N., R. 14 W., Sec. 10, Lot 4, NW¼SW¼ and SW¼SE¼.
85	Herbert Upper	T. 28 N., R. 14 W., Sec. 30, NW¼SE¼.
86	Charles Cobb	T. 28 N., R. 14 W., Sec. 20, SE¼NE¼; Sec. 21, SW¼NW¼.
87	Carl Clemens	T. 28 N., R. 14 W., Sec. 10, Lot 5.
88	W.A. Clark	T. 28 N., R. 15 W., Sec. 13, S½SW¼.
89	W.A. Clark	T. 28 N., R. 15 W., Sec. 14, W½NE¼ and S½SW¼.
90	W.A. Clark	T. 28 N., R. 15 W., Sec. 24, N½NE¼, SE¼NE¼ and NE¼SE¼.
91	W.A. Clark	T. 29 N., R. 4 W., Sec. 12, SW¼SE¼ and SE¼SW¼; Sec. 13, NW¼NE¼ and NE¼NW¼.
92	Herbert Upper	T. 29 N., R. 3 W., Sec. 7, W½SE¼ and SE¼SE¼.
93	Jacob Kintz	T. 30 N., R. 12 W., Sec. 22, NW¼NW¼.
94	Jacob Kintz	T. 30 N., R. 12 W., Sec. 21, E½NE¼.
95	Jeramiah Collins	T. 30 N., R. 13 W., Sec. 25, Lot 4.
96	Jeramiah Collins	T. 30 N., R. 13 W., Sec. 26, SE¼NE¼.
97	Virgil Rice	T. 30 N., R. 14 W., Sec. 5, SE¼SE¼; Sec. 8, E½NE¼.
98	Virgil Rice	T. 30 N., R. 14 W., Sec. 9, Lot 4.
99	William Caldwell	T. 31 N., R. 15 W., Sec. 35, SW¼NE¼.
99A	Gideon McDonald	T. 28 N., R. 15 E., Sec. 14, NW¼SE¼.
	Yakima County, Washington (Willamette Meridian)	
100	N. Pacific R.R. Co	T. 12 N., R. 14 E., Sec. 5, All.

The procedures the Bureau of Land Management will observe in carrying out the provisions of Public Law 103–48 are as follows:

1. *Compile, publish, and distribute an initial list of all affected base lands.* This list was compiled from the agency's own records. Persons claiming an interest in the base lands will have 180 days from the date of publication to suggest base lands to add to the initial list. In addition to publication in the **Federal Register**, Bureau of Land Management field offices will send the initial list to all persons or entities, such as the Forest Lieu Selection Committee, that have indicated a title interest in the base lands, to appropriate Forest Service Offices, and to appropriate State and county offices.

2. *Consider suggested additions and revise the initial list.* The agency will add parcels suggested by interested parties which it determines meet the conditions set forth in the Act—those for which selection or other rights under the 1897 Act, as amended and supplemented, were not realized or exercised. Parcels that do not meet those conditions or which for other reasons are no longer affected by these conditions will not be included or will be removed from the initial list.

3. *Identify, compile, publish, and distribute a list of nationally significant lands and other lands to be deleted from the initial list.* Following preparation of the initial list, the agency will identify nationally significant lands which the agency determines should be retained as public lands. This list will be published in the **Federal Register** before or concurrently with the final list of lands described under step 4 below. The list will be distributed to those parties submitting information on the initial list and to those who received the initial list. Upon publication, all right, title, and interest in these nationally significant lands, subject to valid existing rights, will be vested and confirmed in the United States. The list will be recorded in appropriate county and Bureau of Land Management records.

Anyone claiming that the identification of nationally significant lands under the Act was a "taking" of property will be allowed a one-year opportunity to file a petition in the United States Claims Court for monetary compensation. Identification of nationally significant lands does not of itself entitle any party to compensation. The burden is on the claimant to prove a compensable claim.

4. *Compile, publish and distribute a final list of lands to be relinquished by the United States.* The final list will be published in the **Federal Register** within 24 months after publication of this notice and will be the result of revisions made to the initial list by additions under step 2, and by deletions of nationally significant lands under step 3.

5. *Issue instruments of disclaimer of interest confirming the statutory quitclaim of lands included in the final list.* Within six months of publication of the final list in the **Federal Register**, the agency will issue documents of disclaimer confirming the quitclaiming of all right, title, and interest in and to these base lands, subject to valid existing rights, to the listed grantors, their heirs, devisees, successors, and assigns. The document of disclaimer of interest, confirming the statutory quitclaim of the lands included on the final list, will be recorded in appropriate county and Bureau of Land Management records.

The acceptance of benefits under Public Law 103–48 or the failure to seek the benefits provided under this Act within the time allotted with respect to any base or other lands will be considered a waiver of any claims against the United States with respect to those and or to any revenues therefrom.

Dated: December 14, 1993.

Michael J. Penfold

Assistant Director for Lands and Renewable Resources.

[FR Doc. 93–31140 Filed 12–29–93; 8:45 am]

BILLING CODE 4310–84–P

[CA–065–04–4350–08]

Restrictions on Collecting Reptiles and Amphibians Within the Desert Tortoise Natural Area, Kern County, California

AGENCY: Bureau of Land Management, Interior.

ACTION: Restrictions on collecting reptiles and amphibians within the Desert Tortoise Natural Area, Kern County, California.

SUMMARY: Notice is hereby given that the Bureau of Land Management is placing restrictions on the collection of reptiles and amphibians within the boundaries of the Desert Tortoise Natural Area (DTNA), Kern County, California. The authorities for this action area 43 CFR 8200.0–1, 8223.0–1, 8223.0–5, 8223.0–6, 8223.1, part 8364, and part 8365, the Federal Land Policy and Management Act of 1976, the National Environmental Policy Act of 1969, the Sikes Act of 1974, and 43 CFR Public Land Order 5694. The area affected by these actions is the DTNA. The DTNA Management Plan was developed following the guidelines established for the area in the California Desert Conservation Area Plan of 1980.

EFFECTIVE DATE: March 1, 1994.

ADDRESSES: Send inquiries to Area Manager, Ridgecrest Resource Area, 300 S. Richmond Rd., Ridgecrest, California, 93555. The DTNA Management Plan with public comments will be available at the above address from 7:30 a.m. to 4 p.m. on regular working days.

FOR FURTHER INFORMATION CONTACT: Robert Parker, Bureau of Land Management, Ridgecrest Resource Area, 300 S. Richmond Rd., Ridgecrest, California, 93555, 619–375–7125.

SUPPLEMENTARY INFORMATION: Individuals will not be allowed to collect reptiles or amphibians within the boundaries of the DTNA. The boundaries of the DTNA are easily identified by the woven wire fence and signs. The Management Plan, signed by BLM and California Department of Fish and Game (CDGF) states that the collection of these animals is prohibited. The plan allows for collection of reptiles and amphibians as part of approved, permitted research.

Any person who violates or fails to comply with these regulations as governed by 43 CFR parts 8364 and 8365, may be subject to prosecution pursuant to appropriate laws and regulations. Such punishment may be a fine of not more than $1,000 or imprisonment for not longer than 12 months, or both.

Dated: December 21, 1993.

Henri Bisson,

District Manager.

[FR Doc. 93–31970 Filed 12–29–93: 8:45 am

BILLING CODE 4310–40–M

Book Cliffs Resource Area, UT; Environmental Assessment

AGENCY: Bureau of Land Management, DOI.

ACTION: Notice of Intent to Prepare an Environmental Assessment.

SUMMARY: This notice is intended to inform the public of an intent to prepare an amendment to the Book Cliffs Resource Area Management Plan. An Environmental Assessment (EA) will be prepared that addresses future management of lands to be acquired by the Bureau of Land Management within the Book Cliffs area of the Vernal District and to invite public participation in this process. Public comment will be solicited throughout the EA development process.

SUPPLEMENTARY INFORMATION: An Environmental Assessment (EA) will be prepared that addresses future management of lands to be acquired by the Bureau of Land Management within the Book Cliffs area of the Vernal District for the purpose of amending the Book Cliffs Resource Management Plan (RMP). The planned acquisitions would be consistent with and would implement existing RMP decisions. The land acquisition was made possible through a cooperatively developed program known as the Book Cliffs Conservation Initiative (Initiative). The Initiative involves a partnership between the Utah Division of Wildlife Resources (UDWR), The Nature Conservancy (TNC), the Rocky Mountain Elk Foundation (RMEF), and the Bureau of Land Management (BLM). The Initiative's objective is to create a balanced approach to the management of the unique natural resources within the upper portion of the East Tavaputs Plateau, hereinafter referred to as the Book Cliffs, in southeastern Uintah County, Utah. The portion of the Book Cliffs within the area covered by the Initiative lies between the Uintah-Ouray Indian Reservation trust lands to the west and the Utah-Colorado state line to the east. Within this area, there are several private ranches that have been

acquired by TNC or RMEF with the intent of vesting the title to either the State of Utah or the United States. These previously privately held ranch properties are completely surrounded by land in public ownership. This Environmental Assessment (EA) will be developed by the BLM in concert with the UDWR, other State and Federal agencies, Uintah County, local government entities, and the general public.

General planning issues to be addressed are: management of the lands to be acquired by BLM, the type of public access to those lands, and the allocation of forage on associated public land grazing allotments.

This EA will be prepared under 43 CFR part 1610 to meet the requirements of section 202 of the Federal Land Policy and Management Act and section 102 of the National Environmental Policy Act. This revision is necessary to update and expand the decisions in the existing land use plan. Decisions generated during this planning process will supersede affected land use planning decisions presented in the 1985 Book Cliffs Resource Management Plan.

Public participation is being sought at this time to ensure the EA addresses all issues, problems, and concerns from those interested in the management of lands within the Initiative area. The development of the EA is a public process and the public is invited to assist in the identification of issues and the scope of the EA. Public meetings will be held to discuss planning issues. The date, time, and location of these scoping meetings will be announced at a later date in local newspapers. Additional public participation will be encouraged throughout this process.

Formal public participation will again be requested for review of the draft EA in 1994. Notice of availability of this document will be published at the appropriate time.

The EA will be prepared by an interdisciplinary team which includes specialists in range vegetation (including threatened and endangered plants), recreation, and wildlife/fisheries (including threatened and endangered animals). Other disciplines may be represented as necessary.

FOR FURTHER INFORMATION CONTACT: Paul Andrews, Book Cliffs Resource Area Manager, Vernal District, 170 South 500 East, Vernal, Utah 84078. Vernal District office hours are from 7:45 a.m. to 4:30 p.m. Monday through Friday, except holidays, telephone (801) 789–1362 or 781–4400.

Dated: December 20, 1993.

David E. Little,

District Manager.

[FR Doc. 93–31971 Filed 12–29–93; 8:45 am]

BILLING CODE 4310–DQ–M

[ID–943–04–4210–04; IDI–28152]

Exchange and Order Providing for Opening of Public Land; Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of exchange and opening order.

SUMMARY: The United States has issued an exchange conveyance document to Envirosafe Services of Idaho, Inc., of Boise, Idaho, under section 206 of the Federal Land Policy and Management Act. In addition to providing official public notice of the exchange, this document contains an order which opens land received by the United States to the public land, mining, and mineral leasing laws.

EFFECTIVE DATE: January 31, 1994.

FOR FURTHER INFORMATION CONTACT: Sally Carpenter, BLM, Idaho State Office, 3380 Americana Terrace, Boise, Idaho, (208) 384–3163.

1. In an exchange made under the provisions of section 206 of the Act of October 21, 1976, 90 Stat. 2756, 43 U.S.C. 1716, the following described land has been conveyed from the United States:

Boise Meridian

T. 4 S., R. 2 E.,
Sec. 19, lots 1 to 4, inclusive, E½NE¼, W½E½NW¼, E½SW¼, and SE¼.
Comprising 502.68 acres of public lands.

2. In exchange for this land, the following described land was conveyed to the United States:

Boise Meridian

T. 5 S., R. 3 E.,
Sec. 14, lot 8;
Sec. 15, lots 8 and 9;
Sec. 22, lot 3;
Sec. 23, lot 2.
Comprising 118.16 acres of private land.

The purpose of the exchange was to acquire non-Federal land which has high public values for big game, upland bird, waterfowl, and other non-game and riparian habitat and recreation. The public interest was well served through completion of the exchange. The values of the Federal and private lands involved in the exchange were $100,000 and $189,000, respectively. Envirosafe Services waived any equalization payment to compensate for the difference in land values.

3. At 9 a.m. on January 31, 1994, the reconveyed private land described in paragraph 2 will be opened to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. All valid applications received at or prior to 9 a.m. on January 31, 1994, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

4. At 9 a.m. on January 31, 1994, the reconveyed private land described in paragraph 2 will be opened to location and entry under the United States mining laws and to the operation of the mineral leasing laws, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. Appropriation of any of the land described in paragraph 2 under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (1988), shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Dated: December 20, 1993.

William E. Ireland,

Chief, Realty Operations Section.

[FR Doc. 93–31894 Filed 12–29–93; 8:45 am]

BILLING CODE 4310–GG–M

[AZ–020–04–5410–11–A114; AZA–28310]

Receipt of Conveyance of Mineral Interest Application

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of minerals segregation.

SUMMARY: The private lands described in this notice aggregating approximately 800 acres, are segregated and made unavailable for filings under the general mining laws and the mineral leasing laws to determine their suitability for conveyance of the reserved mineral interest pursuant to section 209 of the Federal Land Policy and Management Act on October 21, 1976.

The mineral interest will be conveyed in whole or in part upon favorable mineral examination.

The purpose is to allow consolidation of surface and subsurface of minerals ownership where there are no known mineral values or in those instances where the reservation interferes with or precludes appropriate nonmineral development and such development is a more beneficial use of the land than the mineral development.

FOR FURTHER INFORMATION CONTACT: Vivian Reid, Land Law Examiner, Phoenix District Office, 2015 West Deer Valley Road, Phoenix, Arizona 85027 (602) 780–8090. Serial Number AZA–28310.

Gila and Salt River Base and Meridian, Maricopa County, Arizona

T. 12 N., R. 5 W.,
Sec. 33, NE¼;
Sec. 34, All.

Minerals Reservation—All Minerals

Upon publication of this Notice of Segregation in the **Federal Register** as provided in 43 CFR 2720.1–1(b), the mineral interests owned by the United States in the private lands covered by the application shall be segregated to the extent that they will not be subject to appropriation under the mining and mineral leasing laws. The segregative effect of the application shall terminate upon: issuance of a patent or deed of such mineral interest; upon final rejection of the application; or two years from the date of application, September 16, 1993, whichever occurs first.

Dated: December 23, 1993.

David J. Miller,

Acting District Manager.

[FR Doc. 93–31972 Filed 12–29–93; 8:45 am]

BILLING CODE 4310–32–M

[CO–942–04–4730–02]

Colorado: Filing of Plats of Survey

December 15, 1993.

The plats of survey of the following described land will be officially filed in the Colorado State Office, Bureau of Land Management, Lakewood, Colorado effective 10 a.m., December 15, 1993.

The plat (in two sheets), representing the dependent resurvey of the south half of the line between sections 16 and 17, certain tract lines, and Mineral Survey No. 6304, Fisherman Lode, and the metes-and-bounds surveys in sections 16 and 21, T. 8 S., R. 86 W., Sixth Principal Meridian, Colorado, Group No. 989, was accepted November 24, 1993.

The supplemental plat creating new lot 1 in the NE¼ section 28, T. 16 S., R. 69 W., Sixth Principal Meridian, Colorado, was accepted October 8, 1993.

These surveys were executed to meet certain administrative needs of this Bureau.

All inquiries about this land should be sent to the Colorado State Office, Bureau of Land Management, 2850 Youngfield Street, Lakewood, Colorado 80215.

Darryl A. Wilson,

Acting Chief, Cadastral Surveyor for Colorado.

[FR Doc. 93–31884 Filed 12–29–93; 8:45 am]

BILLING CODE 4310–JB–M

[NV–930–4210–06; N–57186]

Partial Cancellation of Withdrawal Application; Nevada

December 20, 1993.

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management, has canceled in part its withdrawal application for a National Wild Horse and Burro Center. The land being eliminated from the application will be opened to the public land laws, including the mining laws.

EFFECTIVE DATE: The land being eliminated from the application will be open to entry at 10 a.m. on January 31, 1994.

FOR FURTHER INFORMATION CONTACT: Mike Phillips, Bureau of Land Management, Carson City District, 702–885–6115.

SUPPLEMENTARY INFORMATION: The Notice of Proposed Withdrawal was published in the **Federal Register** (58 FR 40154) on July 27, 1993, which segregated the 8,344.22 acres in the application from settlement, sale, location or entry under the general land laws, including the mining laws, subject to valid existing rights. The Bureau of Land Management has determined that only the following described 640 acres will be needed for the National Wild Horse and Burro Center facilities:

Mount Diablo Meridian

T. 21 N., R. 19 E.,
Sec. 1, S½;
Sec. 12, N½.

The application is hereby canceled as to the following land:

Mount Diablo Meridian

T. 21 N., R. 19 E.,
Sec. 1, lots 1–4, S½N½;
Sec. 2, lots 1–4, S½, S½N½;
Sec. 12, S½;
Sec. 13.
T. 22 N., R. 19 E.,
Sec. 36.
T. 21 N., R. 20 E.,
Sec. 5, lots 1–4, S½, S½N½;
Sec. 6, lots 1–7, S½NE¼, SE¼NW¼, E½SW¼, SE¼;
Sec. 7, lots 1–4, E½, E½W½;
Secs. 8 and 17;
Sec. 18, lots 1–4, E½, E½W½.
T. 22 N., R. 20 E.,
Sec. 31, lots 1–4, E½, E½W½;
Sec. 32.

At 10 a.m. on January 31, 1994, the land eliminated from the proposed withdrawal will become open to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on January 31, 1994, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

At 10 a.m. on January 31, 1994, the land eliminated from the proposed withdrawal will also be open to location under the United States mining laws. Appropriation of lands under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. Sec. 38, shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Billy R. Templeton,

State Director, Nevada.

[FR Doc. 93–31888 Filed 12–29–93; 8:45 am]

BILLING CODE 4310–HC–M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 32400]

The Garden City, Gulf and Northern Railroad Co. and The Atchison, Topeka And Santa Fe Railway Co.—Corporate Family Exemption

The Garden City, Gulf and Northern Railroad Company (GCGN) and The Atchison, Topeka and Santa Fe Railway Company (ATSF) have filed a notice of exemption under 49 CFR 1180.2(d)(3) with respect to a proposed change in the corporate family. GCGN, a wholly owned subsidiary of ATSF, is inactive and does not conduct rail operations. It will be dissolved under Section 17–6804 of Chapter 17 of the Kansas Statutes Annotated, and the

approximately 3,488 feet of active rail line that it owns, between milepost 156.48 and milepost 157.14 in Garden City, KS, will be transferred to ATSF for continued operation. The transaction is to be consummated on or after December 22, 1993.[1]

This is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1180.2(d)(3). It will not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family. The purpose of the transaction is to eliminate unnecessary corporate structure and reduce barriers to business activities. ATSF will continue to operate the track after GCGN is dissolved.

To ensure that all employees who may be affected by the transaction are given the protection afforded under 49 U.S.C. 10505(g)(2) and 49 U.S.C. 11347, the labor conditions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979), are imposed.

Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the exemption's effectiveness. Pleadings must be filed with the Commission and served on: Jeffrey T. Williams, The Atchison, Topeka and Santa Fe Railway Company, 1700 East Golf Road, Schaumburg, IL 60173–5860.

Decided: December 22, 1993.

By the Commission, Richard B. Felder, Acting Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary.

[FR Doc. 93–31933 Filed 12–29–93; 8:45 am]

BILLING CODE 7035–01–P

[Docket No. AB–167 (Sub-No. 1132X)]

Consolidated Rail Corp.—Abandonment Exemption—in Washington County, PA and Brooke County, WV

Consolidated Rail Corporation (Conrail) has filed a notice of exemption under 49 CFR part 1152 subpart F—Exempt Abandonments to abandon 9± miles of railroad of its Weirton Secondary rail line from approximately milepost 26.7± near Burgettstown, PA, to approximately milepost 35.7± near Colliers, WV.

Conrail has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) any overhead traffic has been rerouted over other lines; and (3) no formal complaint filed by a user of rail service on the line (or by a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period; and (4) that the requirements at 49 CFR 1105.7 (service of environmental report on agencies); 49 CFR 1105.8 (service of historic report on State Historic Preservation Officer); 49 CFR 1105.11 (transmittal letter); 49 CFR 1105.12 (newspaper publication); and 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee affected by the abandonment shall be protected under Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on January 29, 1994, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29[3] must be filed by January 10, 1994. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 19, 1994, with: Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423.

A copy of any pleading filed with the Commission should be sent to applicant's representative: Robert S. Natalini, Associate General Counsel, Consolidated Rail Corporation, Two Commerce Square, 2001 Market Street, P.O. Box 41416, Philadelphia, PA 19101–1416.

If the notice of exemption contains false or misleading information, the exemption is void *ab initio*.

Conrail has filed an environmental report which addresses the abandonment's effects, if any, on the environmental and historic resources. The Section of Energy and Environment (SEE) will issue an environmental assessment (EA) by January 4, 1994. Interested persons may obtain a copy of the EA by writing to SEE (room 3219, Interstate Commerce Commission, Washington, DC 20423) or by calling Elaine Kaiser, Chief of SEE, at (202) 927–6248. Comments on environmental and historic preservation matters must be filed within 15 days after the EA is available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: December 23, 1993.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.,

Secretary

[FR Doc. 93–31932 Filed 12–29–93; 8:45 am]

BILLING CODE 7035–01–P

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[1] The exemption effective date is recomputed from December 15, 1993, the date that supplemental information completing the notice filing requirements was received.

[1] A stay will be issued routinely by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Commission's Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. See Exemption of Out-of-Service Rail Lines, 5 I.C.C.2d 377 (1989). Any entity seeking a stay on environmental concerns is encouraged to file its request as soon as possible in order to permit this Commission to review and act on the request before the effective date of this exemption.

The Brooke-Hancock-Jefferson Metropolitan Planning Commission (BHJ) filed comments opposing "any quick decision" authorizing the abandonment without consideration of "some major consequences." We do not normally consider comments prior to the publication of the notice. Here, BHJ can file a petition to stay and/or a petition to reopen or revoke on or before the dates specified in this notice. BHJ should clearly set out the relief it seeks and any supporting arguments for such relief.

[2] See Exempt. of Rail Abandonment—Offers of Finan. Assist., 4 I.C.C.2d 164 (1987).

[3] The Commission will accept a late-filed trail use request as long as it retains jurisdiction to do so.

DEPARTMENT OF JUSTICE

Lodging of Consent Decree Pursuant to the Clean Air Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on December 20, 1993, a proposed Second Consent Decree in *United States* v. *Martech USA, Inc.*, Civil Action No. A91–290 (D. Alaska), was lodged with the United States District Court for the District of Alaska. This Consent Decree resolves the United States' allegations in this action against Martech USA, Inc. ("Martech") regarding violations of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, and the Environmental Protection Agency's National Emission Standard for Asbestos ("the Asbestos NESHAP"), 40 CFR part 61, subpart M. The Decree requires, inter alia, that Martech:

(1) Pay a civil penalty to the United States in the amount of $85,000 plus the interest accruing thereon from September 15, 1993;

(2) Provide to Region 10 of the Environmental Protection Agency, in addition to that Region ordinarily required to be notified under 40 CFR part 61, subpart M, a notice of its intent to conduct renovation and/or demolition operations involving asbestos;

(3) Provide to EPA, within forty-five days of the conclusion of each such operation, post-project certification that the operation was conducted in accordance with the Asbestos NESHAP and that all asbestos-containing waste materials therefrom have been disposed of properly; and

(4) Dismiss with prejudice its remaining counterclaim against the United States.

The Department of Justice will receive comments relating to the proposed Consent Decrees for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Martech USA, Inc.*, D.J. No. 90-5-2-1-1550.

The proposed Consent Decree may be examined at the Office of the United States Attorney for the District of Alaska, room 253, Federal Building and U.S. Courthouse, 222 West Seventh Avenue, Anchorage, Alaska 99513-7567; the Region 10 Office of the Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington 98101; and at the Consent Decree Library, 1120 G Street, NW., 4th Floor, Washington, DC 20005 (Tel: 202-624-0892). A copy of the proposed Consent Decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW., 4th Floor, Washington, DC 20005. In requesting a copy, please enclose a check in the amount of $4.00 (25 cents per page reproduction cost) payable to Consent Decree Library.

John C. Cruden,

Chief, Environmental Enforcement Section, Environment & Natural Resources Division.

[FR Doc. 93-31892 Filed 12-29-93; 8:45 am]

BILLING CODE 4410-01-M

Lodging of Consent Decree

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in *United States* v. *Tempcon Corp. et al*, Civil Action No. 91-Civ. 3531, was lodged on December 16, 1993 with the United States District Court for the Southern District of New York. Under the terms of the proposed consent decree, Defendants Tempcon Corp., Hillburg Par Corp., Edward Cimmino, and John Wright will reimburse the United States $125,000 to resolve the United States' claims under the CERCLA, 42 U.S.C. 9601 et seq., for response costs incurred in responding to the release of hazardous substances at the Village of Suffern Well Field Site in Ramapo, New York.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Tempcon Corp. et al*, DOJ Ref. #90-11-2-316.

The proposed consent decree may be examined at the Office of the United States Attorney for the Southern District of New York, 100 Church Street, New York, New York; the Region II Office of the Environmental Protection Agency, 26 Federal Plaza, New York, New York; and at the Consent Decree Library, 1120 G Street, NW., 4th Floor, Washington, DC 20005, (202) 624-0892. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW., 4th Floor, Washington, DC 20005. In requesting a copy, please refer to the referenced case and enclose a check in the amount of $5.25 (25 cents per page reproduction costs), payable to the Consent Decree Library.

John C. Cruden,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 93-31893 Filed 12-29-93; 8:45 am]

BILLING CODE 4410-01-M

Antitrust Division

Notice Pursuant To The National Cooperative Research and Production Act of 1993—Semiconductor Research Corporation

Notice is hereby given that, on November 19, 1993, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Semiconductor Research Corporation ("SRC") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Matrix Integrated Systems, Inc., Richmond, CA has become an affiliate member. The following company has been deleted from SRC membership: Los Alamos National Laboratories.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and SRC intends to file additional written notification disclosing all changes in membership.

On January 7, 1985, SRC filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the Federal Register pursuant to section 6(b) of the Act on January 30, 1985 (52 FR 4281).

The last notification was filed with the Department on June 24, 1993. A notice was published in the Federal Register pursuant to section 6(b) of the Act on July 28, 1993 (58 FR 40448).

Joseph H. Widmar,

Director of Operations Antitrust Division.

[FR Doc. 93-31891 Filed 12-29-93; 8:45 am]

BILLING CODE 4410-01-M

Notice Pursuant to the National Cooperative Research and Production Act of 1993 Gas-Fueled Railway Research Program Feasibility and Infrastructure Study

Notice is hereby given that, on October 28, 1993, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Southwest Research Institute ("SwRI") filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Burlington Northern Railroad, Fort Worth, TX; Institute of Gas Technology, Chicago, IL; Southern California Regional Rail Authority, Los Angeles, CA; and Southern Pacific Transportation Company, Monterey Park, CA have become members of the group research project.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and the members intend to file additional written notification disclosing all changes in membership.

On January 4, 1993 SwRI filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on January 25, 1993, 58 FR 6015.

Joseph H. Widmar,

Director of Operations Antitrust Division.

[FR Doc. 93-31890 Filed 12-29-93; 8:45 am]

BILLING CODE 4410-01-M

DEPARTMENT OF LABOR

Office of the Secretary

Bureau of International Labor Affairs; North American Agreement on Labor Cooperation; Establishment of National Administrative Office

AGENCY: Office of the Secretary, Labor.

ACTION: Notice of establishment and request for comments.

SUMMARY: The Secretary of Labor announces the establishment, within the Bureau of International Labor Affairs (ILAB), of the National Administrative Office (NAO) required to satisfy the terms of the North American Agreement on Labor Cooperation (NAALC) signed by the governments of the United States of America, Canada, and the United Mexican States. The NAALC specifies that a NAO be established by each Party. The address for the U.S. NAO will be: Department of Labor, 200 Constitution Avenue, NW., room C-4322, Washington, DC 20210. The effective date for the establishment of the U.S. NAO is January 1, 1994.

The U.S. NAO will have the following responsibilities: on labor law matters in the United States, to consult with Canada and Mexico (and specified trinational bodies) and assist them in collecting information on U.S. compliance with the obligations under the NAALC to effectively enforce domestic labor law; and on labor law matters in Canada and Mexico, to conduct reviews on whether Canada and Mexico are enforcing their labor law, and to consult with the Canadian and Mexican NAOs on such issues. The U.S. NAO will develop further procedural guidelines by April 1, 1994. Written suggestions and comments are requested.

DATES: Written comments and suggestions on procedural guidelines should be submitted to the U.S. NAO by February 15, 1994.

ADDRESSES: Send comments to the Secretary of the National Administrative Office, Bureau of International Labor Affairs, Department of Labor, 200 Constitution Avenue, NW., room C-4322, Washington, DC 20210. Telephone: (202) 501-6653, Fax (202) 501-6615.

FOR FURTHER INFORMATION CONTACT: Andrew Samet, Associate Deputy Under Secretary, Bureau of International Labor Affairs, Department of Labor, 200 Constitution Avenue, NW., room S-2235, Washington, DC 20210. Telephone: (202) 219-6043 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background and Overview

The North American Agreement on Labor Cooperation (NAALC) was signed by the Presidents of the United States of America and of the United Mexican States, and the Prime Minister of Canada at Mexico City, Washington, and Ottawa on September 8, 9, 12, and 14, 1993. Section 101(b)(2) of Public Law 103-182, the North American Free Trade Agreement Implementation Act, states that the North American Free Trade Agreement (NAFTA) does not enter into force with respect to Canada or Mexico until "the Government of such country exchanges notes with the United States providing for the entry into force of the * * * North American Agreement on Labor Cooperation for that country and the United States." Article 15.1 of the NAALC requires that each Party "shall establish a National Administrative Office (NAO) at the federal government level and notify * * * the other Parties of its location."

Article 16 of the NAALC requires the U.S. NAO to perform several functions: to serve as a U.S. point of contact with respect to the NAALC for other U.S. government agencies, for the NAOs of Canada and Mexico, and for the Secretariat of the Commission for Labor Cooperation established by the NAALC; to provide publicly available information about U.S. labor law matters upon request from the trinational Secretariat of the Commission for Labor Cooperation established by Articles 12-14 of the NAALC, the Canadian or Mexican NAO, or an ad hoc, trinational Evaluation Committee of Experts (ECE) formed under Articles 23-26 of the NAALC to analyze labor law matters; and to provide for the submission and receipt, and periodically publish a list, of public communications on labor law matters in Canada and Mexico and the review of such matters by the United States.

Article 21 of the NAALC outlines procedures for NAOs to consult with one another about labor law in the NAFTA countries, its administration, or labor market conditions. In such consultations, the NAOs must promptly provide to other NAOs publicly available data or information, including:

(a) Descriptions of laws, regulations, procedures, policies or practices;

(b) Proposed changes to such procedures, policies or practices; and

(c) Such clarifications and explanations related to such matters, as may assist the consulting NAOs to better understand and respond to the issues raised.

The attached notice establishes an open and transparent process for providing oversight of Canadian and Mexican compliance with the obligations of the NAALC. It provides for public submissions to the U.S. NAO on labor law matters in Canada or Mexico. Within 60 days of receipt of a submission, the NAO will initiate a review of the matter or advise the submitting party that a review is not appropriate. The NAO may also initiate a review on its own initiative on labor law matters.

At the conclusion of each review, the NAO will publish a report. The NAO will also publish an annual list of public submissions.

The Notice of Establishment is set forth below.

Signed at Washington, DC., on December 22, 1993.

Robert B. Reich,

Secretary of Labor.

(a) Establishment.—

(1) There is established, within the Bureau of International Labor Affairs (ILAB) of the Department of Labor, a U.S. National Administrative Office (NAO) as required by the North American Agreement on Labor Cooperation between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States.

(2) The U.S. NAO shall be established effective January 1, 1994.

(3) The Secretary of Labor shall designate the Secretary of the NAO.

(b) Definitions.—For the purposes of this notice:

(1) The term "Agreement" means the North American Agreement on Labor Cooperation between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States signed at Mexico City, Washington, and Ottawa on September 8, 9, 12, and 14, 1993.

(2) The term "Office" means the National Administrative Office of the United States as established by this notice.

(3) The term "Secretariat" means the Secretariat of the Commission for Labor

Cooperation established by Article 12 of the Agreement.

(4) The term "Council" means the Council of the Commission for Labor Cooperation established by Article 9 of the Agreement.

(5) The term "Evaluation Committee of Experts" means an Evaluation Committee of Experts established under Article 23 of the Agreement.

(6) The term "Party" means a Party to the Agreement.

(7) The phrase "publicly available information" means information as defined in Article 49 of the Agreement.

(c) Functions of the National Administrative Office.—

(1) The Office shall serve as a point of contact with and otherwise provide assistance to agencies of the United States Government, the NAOs of the other Parties, the Secretariat, and the Council.

(2) On matters within the scope of the Agreement, the Office shall promptly provide publicly available information requested by the Secretariat for reports and studies under Article 14 (1) and (2) of the Agreement, by NAOs of the other Parties, or by an Evaluation Committee of Experts.

(3) The Office shall accept public submissions on labor law matters arising in the territories of the other Parties. The Office shall develop procedures for and administer the submissions process.

(4) The Office may, at the discretion of the NAO Secretary, initiate a review of any matter covered by the Agreement.

(5) The Office shall publish periodic and special reports, as provided in section (g) of this notice.

(6) The Office may request consultations with the NAO of another Party in relation to that Party's labor law, its administration of the law, or labor market conditions in its territory, under Article 21 of the Agreement, shall respond to requests for consultations made under Article 21, and may participate in consultations of other NAOs under Article 21.

(7) The Office may consult periodically with appropriate agencies of the U.S. government.

(8) The Office shall provide assistance to the Secretary of Labor on all matters concerning the Agreement.

(d) Public Submissions.—

(1) The Office shall provide for the receipt of public submissions on labor law matters arising in the territories of Canada or Mexico.

(2) The submission should clearly identify the person or organization making the submission, state with specificity the matters that the person or organization requests the Office to address, and include information reasonably available to the person or organization supporting the request.

(3) The Office shall determine whether it should initiate a review of the matters raised by the submission. Within 60 days of receipt of a submission, the office shall advise the person or organization in writing that it has begun a review or that review is not appropriate.

(e) Reviews.—

(1) In deciding whether a submission warrants initiation of a review by the Office, the Office may consider such factors as it deems appropriate.

(2) When it initiates a review, the Office shall publish a notice to that effect in the **Federal Register**.

(3) When conducting a review, the Office shall make all reasonable efforts to obtain appropriate information concerning the labor law matters of another Party, and shall provide means for the public to provide appropriate information including, where appropriate, public hearings.

(4) At the conclusion of a review, the Office shall issue a public report.

(5) If, after consultations under Article 21 of the Agreement, the NAO Secretary determines that a Party has failed to comply with its obligations under Part Two of the Agreement, the NAO Secretary shall recommend that the Secretary of Labor request consultations at the ministerial level under Article 22 of the Agreement.

(6) If, following ministerial consultations under Article 22 of the Agreement, the NAO Secretary determines that the matter has not been satisfactorily resolved and is within the scope of Article 23 of the Agreement, the office shall recommend that the Secretary of Labor request that an Evaluation Committee of Experts be established under Article 23.

(7) Following presentation of a final Evaluation Committee of Experts report under Article 26(1) of the Agreement, the NAO Secretary shall provide recommendations to the Secretary of Labor regarding pursuit of dispute resolution under Part Five of the Agreement.

(f) Consideration of NAO Recommendations.—

(1) In deciding whether to request consultations at the ministerial level under Article 22 of the Agreement, the establishment of an Evaluation Committee of Experts under Article 23 of the Agreement, or the establishment of a dispute settlement panel under Part Five of the Agreement, the Secretary of Labor shall give due consideration to the recommendations of the NAO Secretary.

(2) In deciding which cooperative activities should be promoted by the Council under Article 11 of the Agreement, the Secretary of Labor shall give due consideration to the recommendations of the NAO Secretary.

(g) Periodic and Special Reports.—

(1) The Office shall publish, periodically, a list of public submissions on labor law matters, including a summary of the disposition of those submissions.

(2) The Office shall obtain the lists of submissions and public communications on labor law matters published by the NAOs of the other Parties, and make those lists available in the United States.

(3) The Office may publish special reports on any topic under its purview on its own initiate, or upon request from the Secretary of Labor.

(h) Development of Procedural Guidelines.—

(1) The Office shall develop procedural guidelines for submission and processing of requests for review by April 1, 1994.

[FR Doc. 93-31627 Filed 12-29-93; 8:45 am]
BILLING CODE 4510-28-M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 93-97]

NASA Advisory Council (NAC), Space Science Advisory Committee, Solar System Exploration Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92-463, as amended, the National Aeronautics and Space Administration announces a forthcoming meeting of the NAC, Space Science Advisory Committee, Solar System Exploration Subcommittee.

DATES: January 11-12, 1994, 8:30 a.m. to 5:30 p.m., January 13, 1994, 8 a.m. to 5:30 p.m., and January 14, 1994, 8 a.m. to noon.

ADDRESSES: Capitol Park Suites, Conference Center, 300 Fourth Street, SW., Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Dr. John Appleby, Code SLB, National Aeronautics and Space Administration, Washington, DC 20546, 202/358-0788.

SUPPLEMENTARY INFORMATION: The meeting will be closed to the public on Friday, January 14, 1994, from 8 a.m. to 9 a.m. in accordance with 5 U.S.C.

552(c)(6), to allow for discussion on qualifications of individuals being considered for membership to the Subcommittee. The remainder of the meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows:

—Strategic Planning
—Workshop Approach and Subgroup Process
—Science Working Group Status Reports
—Technology Issues for Strategic Planning
—Strategic Planning Working Group Report

It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. Visitors will be requested to sign a visitor's register.

Dated: December 23, 1993.

Danalee Green,

Chief, Management Controls Office, National Aeronautics and Space Administration.

[FR Doc. 93-31912 Filed 12-29-93; 8:45 am]

BILLING CODE 7510-01-M

NATIONAL SCIENCE FOUNDATION

Permit Issued Under the Antarctic Conservation Act of 1978

December 27, 1993.

AGENCY: National Science Foundation.

ACTION: Notice of permits issued under the Antarctic Conservation Act of 1978, Public Law 95-541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permits issued under the Antarctic Conservation Act of 1978. This is the required notice.

FOR FURTHER INFORMATION CONTACT: Thomas F. Forhan, Permit Office, Office of Polar Programs, National Science Foundation, Washington, DC 20550.

SUPPLEMENTARY INFORMATION: On August 30, 1993 a notice in the **Federal Register** of permit applications received. Permit for taking, import into USA-Port of entry, was issued to David G. Ainley on December 22, 1993.

Thomas F. Forhan,

Permit Officer, Office of Polar Programs.

[FR Doc. 93-31924 Filed 12-29-93; 8:45 am]

BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. STN 50-454, STN 50-455, STN 50-456, STN 50-457, 50-373, 50-374, 50-295, and 50-304]

Commonwealth Edison Co., Byron Station, Unit Nos. 1 and 2, et al.; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. NPF-37 and NPF-66, NPF-72 and NPF-77, NPF-11 and NPF-18, and DPR-39 and DPR-48, issued to the Commonwealth Edison Company (the licensee), for operation of Byron Station, Units 1 and 2, Braidwood Station, Units 1 and 2, LaSalle County Station, Units 1 and 2, and Zion Station, Units 1 and 2, respectively.

Environmental Assessment

Identification of Proposed Action

The proposed amendment would revise the limitations on radioactive materials released in liquid and gaseous effluents and revise 10 CFR part 20 references to recognize the new section numbers. Specifically, the changes would revise the limitations on concentrations of radioactive material released in liquid effluents, revise the limitations on the dose rate resulting from radioactive material released in gaseous effluents, and would reflect the relocation of the prior 10 CFR 20.106 requirements to the new 10 CFR 20.1302. These changes are in response to the licensee's application for amendments dated November 10, 1993.

The Need for the Proposed Action

The proposed action is needed in order to retain operational flexibility consistent with 10 CFR part 50, appendix I, concurrent with the implementation of the revised 10 CFR part 20.

Environmental Impacts of the Proposed Action

The proposed revision, in regards to the actual release rates as referenced in the Technical Specifications (TS) as a dose rate to the maximally exposed member of the public, will not increase the types or amounts of effluents that may be released offsite, nor increase individual or cumulative occupational radiation exposures. Therefore, the Commission concludes that there are no significant radiological environmental impacts associated with the proposed amendments.

With regard to potential nonradiological impacts, the proposed changes do not affect nonradiological effluents and have no other environmental impact. Therefore, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed amendments.

Alternatives to the Proposed Action

Since the Commission concluded that there are no significant environmental impacts associated with the proposed amendments to the TS, any alternative to the amendments will have either no significantly different environmental impact or will have greater environmental impact. The principal alternative would be to deny the requested amendments. This would not reduce environmental impacts as a result of plant operation.

Alternative Use of Resources

This action does not involve the use of resources not previously considered in the Final Environmental Statement related to the operation of the Byron Station, Units 1 and 2, dated April 1982, Braidwood Station, Units 1 and 2, dated June 1984, LaSalle County Station, Units 1 and 2, dated November 1978, and Zion Station, Units 1 and 2, dated December 1972.

Agencies and Persons Consulted

The Commission's staff reviewed the licensee's request and did not consult other agencies or persons.

Finding of No Significant Impact

The Commission has determined not to prepare an environmental impact statement for the proposed license amendments.

Based upon the foregoing environmental assessment, we conclude that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the application for amendments dated November 10, 1993, which is available for public inspection at the Commission's Public Document Room, 2120 L Street, NW., Washington, DC and, for Byron, at the Byron Public Library, 109 N. Franklin, P.O. Box 434, Byron, Illinois 61010; for Braidwood, the Wilmington Township Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481; for LaSalle, the Public Library of Illinois Valley Community College, Rural Route No. 1, Oglesby, Illinois 61348; for Zion, the Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085.

Dated at Rockville, Maryland, this 23rd day of December 1993.

For the Nuclear Regulatory Commission.

James E. Dyer,

Director, Project Directorate III-2, Division of Reactor Projects—III/IV/V, Office of Nuclear Reactor Regulation.

[FR Doc. 93-31904 Filed 12-29-93; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-302]

Florida Power Corp.; Issuance of Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. 149 to Facility Operating License No. DPR-72 issued to Florida Power Corporation (the licensee), which revised the Technical Specifications for operation of Crystal River, Unit No. 3, located in Citrus County, Florida. The amendment is effective as of the date of issuance.

The amendment, requested by the licensee by letter of August 25, 1989, replaces the current Technical Specifications (TS) with a set of TS based on the new Babcock & Wilcox Standard Technical Specifications (STS), NUREG-1430. The adoption of the STS is part of an industry-wide initiative to standardize and improve TS.

The application for amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment and Opportunity for Hearing in connection with this action was published in the **Federal Register** on November 8, 1989 (54 FR 46998). No request for hearing or petition for leave to intervene was filed following this notice.

The Commission has prepared an Environmental Assessment related to the action and has determined not to prepare an environmental impact statement. Based upon the environmental assessment, the Commission has concluded that the issuance of this amendment will not have a significant effect on the quality of the human environment (58 FR 64987).

For further details with respect to the action see (1) the application for amendment dated August 25, 1989, (2) Amendment No. 149 to License No. DPR-72, (3) the Commission's related Safety Evaluation, and (4) the Commission's Environmental Assessment. All of these items are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555, and at the local public document room located at the Coastal Region Library, 8619 W. Crystal Street, Crystal River, Florida 32629.

Dated at Rockville, Maryland this 22nd day of December 1993.

For the Nuclear Regulatory Commission.

Herbert N. Berkow,

Director, Project Directorate II-2, Division of Reactor Projects—I/II.

[FR Doc. 93-31905 Filed 12-29-93; 8:45 am]

BILLING CODE 7590-01-M

RAILROAD RETIREMENT BOARD

Determination of Quarterly Rate of Excise Tax for Railroad Retirement Supplemental Annuity Program

In accordance with directions in section 3221(c) of the Railroad Retirement Tax Act (26 U.S.C., 3221(c)), the Railroad Retirement Board has determined that the excise tax imposed by such section 3221(c) on every employer, with respect to having individuals in his employ, for each work-hour for which compensation is paid by such employer for services rendered to him during the quarter beginning January 1, 1994, shall be at the rate of 30 cents.

In accordance with directions in section 15(a) of the Railroad Retirement Act of 1974, the Railroad Retirement Board has determined that for the quarter beginning January 1, 1994, 33.7 percent of the taxes collected under sections 3211(b) and 3221(c) of the Railroad Retirement Tax Act shall be credited to the Railroad Retirement Account and 66.3 percent of the taxes collected under such sections 3211(b) and 3221(c) plus 100 percent of the taxes collected under section 3221(d) of the Railroad Retirement Tax Act shall be credited to the Railroad Retirement Supplemental Account.

Dated: December 20, 1993.

By Authority of the Board.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. 93-31889 Filed 12-29-93; 8:45 am]

BILLING CODE 7905-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-33383; File No. SR-BSE-93-23]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing and Order Granting Accelerated Approval to Proposed Rule Change Relating to Net Capital and Equity Requirements

December 23, 1993.

I. Introduction

On December 2, 1993, the Boston Stock Exchange, Inc. ("BSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to amend the Exchange's Net Capital Requirements. On December 9, 1993, the BSE submitted to the Commission Amendment No. 1 to the proposed rule change.[3] On December 13, 1993, the BSE submitted to the Commission Amendment No. 2 to the proposed rule change.[4]

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The BSE's proposed rule change permanently amends chapter XXII, section 2 of the BSE Rules of the Board of Governors to increase the specialist net capital requirements, which the Commission previously approved on a six-month pilot basis,[5] and to create an Early Warning Alert Notification Program for BSE specialist firms that will expire on April 1, 1994.[6]

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b-4 (1992).

[3] See letter from Karen A. Aluise, Assistant Vice President, BSE, to Sandra Sciole, Special Counsel, Commission, dated December 3, 1993. Amendment No. 1 requested permanent approval of the capital portion of File No. SR-BSE-93-7, which was approved by the Commission on a six-month temporary basis. *See* Securities Exchange Act Release No. 32569 (July 1, 1993), 58 FR 36716 (July 8, 1993). On December 23, 1993, the BSE submitted a letter clarifying that the request in Amendment No. 1 to permanently approve the BSE's net capital requirements should be considered part of the instant filing (BSE-93-23).

[4] See letter from Karen A. Aluise, Assistant Vice President, BSE, to Sandra Sciole, Special Counsel, Commission, dated December 10, 1993. Amendment No. 2 clarified delivery time periods in Section 2(c)(3).

[5] See Securities Exchange Act Release No. 32569, *supra* note 3.

[6] Currently, all of the specialists at the BSE are exempt from the Commission's net capital rule, as codified in Section 15c3-1 under the Act. As a result, the Commission's early warning notification procedures, as codified in Section 17a-11 under the

Continued

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The self-regulatory organization has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) *Purpose.* The purpose of the proposed rule change is to amend the capital provision of the net capital and equity requirements in chapter XXII, section 2(c) of the BSE Rules to adopt an early warning alert program for specialist firms that are assigned to the Exchange as their Examining Authority.[7] The proposed rule change establishes a notification procedure when, among other things, net capital reaches 120% of minimum net capital. This alert mechanism will be used by the Exchange to determine a member's net capital in comparison to the minimum capital required. While it is the member's responsibility to report to the Exchange whenever it fails to maintain the capital levels or financial responsibility requirements set forth by the Exchange, procedurally, the Exchange will notify the specialist firm and, the specialist must immediately deliver written notice to the Exchange verifying its capital position in writing, and stating what it is doing to alleviate the alert status.[8] In this regard, Chapter XXII, Section 2(c)(3) would be adopted as follows:

Early Warning Alert Notification

Section 2(c)(3) All specialists assigned to the Exchange as their Examining Authority shall be required to compute net capital and must immediately deliver written notice to the Exchange, identifying what action is being taken to alleviate the alert status, whenever one of the following occurs:

(i) Net capital falls below required minimum levels;

(ii) Net capital falls below 120% of its minimum requirement; or

(iii) Specialist fails to comply with the following financial responsibility requirements:

(A) Fails to make and keep current books and records;

(B) Discovers or is notified by an independent accountant of the existence of any material inadequacy; or

(C) When the Exchange learns that the specialist has failed to file a notice under this section.

Note: Where a specialist is assigned to another Examining Authority, that specialist shall be required to comply with the provisions as set forth by its assigned Examining Authority of SEC Rule 15c3–1 and the reporting requirements set forth under SEC Rule 17a–11. Whenever the Exchange provides a specialist with an early warning alert notice, such specialist must respond by verifying the alert in writing. If a specialist fails to respond to the early warning alert sent by the Exchange, it shall be considered a valid alert and the specialist shall be notified by the Exchange that it must comply with the provisions of this rule as set forth above.

The BSE also proposes to permanently adopt the amendments temporarily approved in the net capital section of File No. SR–BSE–93–7.[9] The BSE proposal permanently amends chapter XXII, section 2(c) of the BSE Rules of the Board of Governors to increase the specialist net capital requirement from $35,000 to $100,000. The BSE also proposes to amend section 2(c)(2) to increase the haircut for net capital purposes to 15% on both long and short security positions.[10] In this regard, chapter XXII, section 2(c) would be permanently amended to provide:

Section 2(c) A member or member organization registered as a specialist doing business on the floor of the Exchange, whose business may include floor brokerage for other professionals and who does not carry any customer accounts, shall at all times maintain a minimum net capital, as defined by SEC Rule 15c3–1, equal to the greater of (a) $100,000 or (b) the value of 200 shares of each security in which such specialist is the dealer, marked-to-market at not less than the minimum margin of 25% of the market value.

Section 2(c)(2) All remaining securities haircuts for Net Capital purposes shall be as follows: (i) Specialists who do not have any public customers and who do not have an active trading account, (as defined by the SEC), shall be haircut 15% on both long and short security positions prior to the required computation.

(b) *Statutory Basis.* The statutory basis for the proposed rule change is section 6(b)(5) of the Act, in that the capital and equity requirements of the Exchange are designed to protect investors and the public interest by ensuring that Exchange members doing business on the floor have adequate funds to cover losses that they might incur in the everyday transaction of business.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Copies of the filing will also be available for inspection and copying at the principal office of the BSE. All submissions should refer to File No. SR–BSE–93–23 and should be submitted by January 20, 1994.

Act, generally are not applicable to them. Effective April 1, 1994, all Exchange specialists will become subject to the Commission's net capital rule. See Securities Exchange Act Release No. 32737 (August 11, 1993), 58 FR 43555 (August 17, 1993). As a result, such specialists will be required to comply generally with the provisions of the Commission's early warning notification procedures. The BSE's early warning alert program is intended as an interim program that will remain effective until April 1, 1994, at which time BSE specialists must fully comply with the Commission's early warning notification procedures. Telephone Conversation between Kenneth J. Meeden, Assistant Vice President, Market Surveillance and Compliance, BSE, and Louis A. Randazzo, Attorney, Commission, on December 9, 1993.

[7] The early warning alert program is codified in chapter XXII, section 2(c)(3).

[8] As noted above, on April 1, 1994, all Exchange specialists must fully comply with the Commission's early warning notification provisions as codified in 17 CFR 240.17a–11. See *supra* note 7. Those BSE specialists currently subject to the Commission's net capital requirements must continue to comply with the Commission's early warning notification provisions.

[9] See Securities Exchange Act Release No. 32569, *supra* note 1.

[10] A "haircut" is a reduction when computing net capital.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The BSE, through these amendments to its net capital and equity rules, is increasing the financial responsibility of its specialists by:

(1) Increasing minimum net capital requirements and increasing the haircuts in the net capital computation; and

(2) Adopting an early warning notification procedure when net capital reaches, among other things, 120% of minimum net capital.[11]

The Commission finds that the BSE's amendments to its net capital and equity requirements for specialists are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with the requirements of sections 6(b)(5) and 11(b) of the Act.[12] The Commission believes that the BSE's proposal is consistent with the section 6(b)(5) requirement that the rules of an exchange be designed to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission also believes that the proposal is consistent with section 11(b) of the Act, and Rule 11b–1 thereunder,[13] which allow securities exchanges to promulgate rules relating to specialists in order to maintain fair and orderly markets. The proposal is consistent with the Rule 11b–1(a)(2)(i) requirement that the rules of a national securities exchange which permit a member to register as a specialist and to act as a dealer include, among other things, adequate minimum capital requirements in view of the markets for securities on such exchange.

The rules of the BSE, in addition to the rules set forth under the Act, impose certain obligations upon specialists, including, but not limited to, the maintenance of fair and orderly markets.[14] Specialists play a crucial role in providing stability, liquidity, and continuity to the trading of stocks on the Exchange. Generally, specialists are under an affirmative obligation to trade for their own accounts to minimize order imbalances and contribute to continuity and depth in their specialty stocks.[15] Conversely, pursuant to their negative obligations, specialists are precluded from trading for their own accounts unless such dealing is necessary for the maintenance of a fair and orderly market. To ensure that specialists fulfill these obligations, it is important that they maintain an adequate amount of capital and equity.

The importance of specialists' net capital and equity as it relates to the quality of Exchange markets was highlighted during the October 1987 Market Break. In the Division of Market Regulation's ("Division") report on the 1987 Market Break, the Division reviewed, among other things, specialists' ability to maintain fair and orderly markets and minimum capital requirements imposed by the exchanges. In this respect, the Division stated its concern that the minimum capital requirements imposed by the exchanges on specialists did not reflect the actual capital needed to ensure the maintenance of fair and orderly markets in different types of securities.[16] Accordingly, Division staff recommended a number of changes to the exchanges' capital rules.

The Division believes that the BSE amendment is a positive step toward procuring stronger capital foundations for specialists on its floor. Specifically, the Commission believes that permanently increasing specialist net capital requirements to $100,000 should help to ensure that BSE specialists have greater access to the capital necessary for the maintenance of fair and orderly markets in their registered securities. By assuring that specialists have capital sufficient to perform their market making responsibilities, the proposal should provide additional protection for the Exchange, member organizations, and public investors.

The Commission believes that the BSE's early warning provision is consistent with section 6(b)(5) of the Act, which requires that the rules of an exchange be designed to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. Specifically, the immediate notice requirement gives the Exchange adequate early warning of potential financial problems. Furthermore, after receiving notice of a potential net capital deficiency, the Exchange will be able to increase its surveillance of a specialist experiencing difficulty and to obtain any additional information necessary to assess and monitor the specialist's financial condition.

The Commission finds good cause for accelerated approval of the proposed rule change prior to the thirtieth day after publication of notice of filing thereof. This will permit the increased net capital requirements to continue uninterrupted on a permanent basis. Furthermore, the Commission finds that accelerated approval of proposal is necessary in order for the BSE to be able to effectuate its new net capital and equity requirements in a timely manner upon approval. Moreover, the BSE's proposed increase in specialist net capital requirements are identical to amendments that were published in the **Federal Register** for the full comment period and no comments were received.[17]

It is therefore ordered, Pursuant to section 19(b)(2) and Rule 19d–1(c)(2) under the Act,[18] the above-mentioned proposed rule change (SR–BSE–93–23) is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–31938 Filed 12–29–93; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–33381; File No. SR–CHX–93–34]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Stock Exchange, Inc. To Waive Exchange Transaction Fees on Trades in the Chicago Stock Basket

December 23, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on December 21, 1993, the Chicago Stock Exchange, Inc. ("CHX" of "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit

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[11] As noted above, pursuant to the early warning procedures, specialists are required to compute net capital and immediately deliver written notice to the Exchange in certain enumerated circumstances. See section 2(c)(3) of the BSE Rules of the Board. In addition, the Commission notes that effective April 1, 1994, Exchange specialists must comply with the Commission's early warning notification provisions as codified in Section 17a–11 under the Act. See *supra* note 6.

[12] 15 U.S.C. 78f(b)(5) and 78k(b) (1988).

[13] 17 CFR 240.11b–1 (1992).

[14] See generally chapter XV of the BSE Rules of the Board of Governors. See also Rule 11b–1 under the Act.

[15] See *supra* note 14.

[16] See Division of Market Regulation, The October 1987 Market Break, February 1988, at 4–66 to 4–67. See also Market Analysis of October 13 and 16, 1989, A Report by the Division of Market Regulation, U.S. Securities and Exchange Commission, December 1990, at 4, 16 and 33.

[17] See Securities Exchange Act Release No. 32333 (May 19, 1993), 58 FR 30079 (May 25, 1993).

[18] 15 U.S.C. 78s(b)(2) (1988) and 17 CFR 240.19d–1(c)(2) (1991).

[19] 17 CFR 200.30–3(a)(12) (1991).

comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CHX proposes to waive, through March 31, 1994, Exchange transaction fees for the Chicago Stock Basket ("CXM"). This would extend a waiver currently in effect through December 31, 1993.[1] The text of the proposed rule change is underlined:

(c) Transaction Fee Schedule Round Lots/Mixed Lots
45 cents per 100 shares
$100 maximum per trade
Odd Lots
35 cents per trade
$400 maximum monthly fee

The above fees shall not apply to transactions in the Chicago Basket ("CXM") through (December 31, 1993) *March 31, 1994.*

II. Self-Regulatory Organization's Statement of the Purpose of and Statutory Basis for, the Proposed Rule Change

It its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed change is to extend the waiver of certain Exchange fees for trades in the CXM, through March 31, 1994.

2. Statutory Basis

The proposed rule change is consistent with section 6(b)(4) of the Act in that it provides for the equitable allocation of reasonable fees and other charges among members using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance on the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule change Received From Members, Participants or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange and therefore has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b–4 thereunder. At any time within 60 days of the filing of such rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the CHX. All submissions should refer to File No. SR–CHX–93–34 and should be submitted by January 20, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–31936 Filed 12–29–93; 8:45am]

BILLING CODE 8010–01–M

[1] See, Securities Exchange Act Release No. 33056 (October 15, 1993), 58 FR 54387 (October 21, 1993) (File No. SR–CHX–93–24).

[Release No. 34–33380; File No. SR–CHX–93–32]

Self Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Chicago Stock Exchange, Inc. to Give Registered Market Makers a Credit Against Their Dues for Trading the Chicago Stock Basket

December 23, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on December 8, 1993, the Chicago Stock Exchange, Inc. ("CHX" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to give registered Market Makers in the Chicago Stock Basket ("CXM") a credit against their dues for trading the CXM through January 31, 1994.[1] The text of the proposed rule change is italicized:

Membership Dues and Fees

Member Dues (all members)—$3,200 per annum, payable monthly in equal installments.

Through January 31, 1994, registered Market Makers in the CXM will be given a credit towards their monthly installment of their dues at the rate of $1 for each contract of CXM that they trade. The maximum credit given to any registered Market Maker in the CXM pursuant to the preceding sentence shall be $15 per day up to a maximum of $266 per month.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of

[1] According to the CHX, the credit will apply only to CXM trades for a registered Market Maker's proprietary market making account. Telephone conversation between David T. Rusoff, Foley & Lardner, and Beth Stekler, Attorney, Division of Market Regulation, SEC, on December 14, 1993.

For further discussion of the market structure for trading the CXM and, in particular, of the role of registered Market Makers, see Securities Exchange Act Release No. 33053 (October 15, 1993), 58 FR 54610 (October 22, 1993) (File No. SR–CHX–93–18).

and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis For, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to encourage more trading and participation in the CXM product by registered Market Makers.

2. Statutory Basis

The proposed rule change is consistent with section 6(b)(4) of the Act in that it provides for the equitable allocation of reasonable fees and other charges among members using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange and therefore has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b-4 thereunder. At any time within 60 days of the filing of such rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the CHX. All submissions should refer to File No. SR-CHX-93-32 and should be submitted by January 20, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-31937 Filed 12-29-93; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-33370; File No. SR-CBOE-93-57]

Self-Regulatory Organizations; Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to Listing and Trading Options on the Global Telecommunications Index

December 22, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on December 14, 1993, the Chicago Board Options Exchange ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

As provided in Exchange Rule 24.2, "Designation of the Index," [1] the CBOE proposes to list for trading options on the Global Telecommunications Index ("Index"). The text of the proposed rule change is available at the Office of the Secretary, CBOE, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The CBOE has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to permit the Exchange to list and trade cash-settled, European-style [2] index options on the Global Telecommunications Index. According to the Exchange, the Index represents a segment of the U.S. equity market that is not currently represented in the U.S. derivative markets. Therefore, the Exchange believes, options on the Index will provide investors with a low-cost means to achieve diversification or to tilt a portfolio toward or away from the global telecommunications industry. The Exchange believes that the Index will provide retail and institutional investors with a means to benefit from their forecasts of that industry's market performance. The Exchange further believes that options on the Index also can be utilized by portfolio managers and investors to provide a performance measure and evaluation guide for passively or actively managed global telecommunications industry funds, as well as a means of hedging the risks of investing in the global telecommunications industry.

Index Design

The Index is based on twenty U.S. and foreign companies that are representative of the global telecommunications industry,[3] all of

[1] Exchange Rule 24.2 provides, in part, that the Commission must approve a particular index upon which options are traded.

[2] European-style options can only be exercised during a specified period before the options expire.

[3] The component securities of the Index are: Alcatel Alsthom Compangie Generale d'Electricite (ADR); Atlantic Tele-Network, Inc.; BCE, Inc.; Bell Atlantic Corp.; BellSouth Corp.; British Telecommunications PLC (ADR); Comsat Corp.; Compania De Telefonos De Chile (ADR); Cable and Wireless PLC (ADR); DSC Communications Corp.; ECI Telecom Ltd.; L.M. Ericsson Telephone Co.

Continued

which trade domestically as either stocks or American Depositary Receipts ("ADRs").[4] Fourteen of the component securities currently trade on the New York Stock Exchange, Inc., one currently trades on the American Stock Exchange, Inc., and five are National Market System securities traded through the facilities of the National Association of Securities Dealers, Inc. Automated Quotation System.

As of November 24, 1993, the securities comprising the Index ranged in market capitalization from a low of $144.21 million (Atlantic Tele-Network, Inc.) to a high of $73.61 billion (AT&T). The median capitalization as of that date was $8.1 billion. The component accounting for the largest percentage of the total weighting of the Index on that date was Compania De Telefonos De Chile (9.08%), while the smallest was Atlantic Tele-Network, Inc. (1.27%).

Calculation

The Index is price-weighted and reflects changes in the prices of the component stocks relative to the base date of January 2, 1992. The Index value is calculated by summing the prices of the component securities and then dividing by a divisor that yielded an index value of 100.00 as of that date.

The Index will be calculated on a real-time basis using last-sale prices by CBOE or its designee and will be disseminated every 15 seconds by the Exchange. If a component stock is not currently being traded, the most recent price at which the stock traded will be used in the Index calculation.

Maintenance

The Index will be maintained by the Exchange. To maintain continuity in the Index following an adjustment to a component security, the divisor will be adjusted. Changes which may result in divisor changes include, but are not limited to, spin-offs, certain rights issuances, and mergers and acquisitions.

The Exchange states that the Index will be reviewed on approximately a monthly basis by the CBOE staff. The Exchange may change the composition of the Index at any time or from time to time to reflect the changes in the global telecommunications industry. If a company in the Index is no longer representative of the global telecommunications industry, the Exchange represents that the component security will be removed from the Index. If it otherwise becomes necessary to remove a stock from the Index (generally due to a takeover or merger), every effort will be made to add a component security that is representative of the global telecommunications industry. In such circumstances, CBOE will take into account the capitalization, liquidity, volatility, and name recognition of the proposed replacement stock.

The Exchange will most likely maintain twenty stocks in the Index at all times. Absent prior approval by the Commission, the Exchange will not increase to more than 26 or fewer than 14 the number of component securities in the Index.

Long-Term Index Options

In addition to Index options on the full-value of the Index, the Exchange also proposes to list long-term Index option series ("LEAPS") as provided in CBOE Rule 24.9, and reduced-value Index LEAPS for which the underlying value would be computed at one-tenth (1/10th) of the value of the Index. The current and closing index value of any such reduced-value Index LEAPS will, after such initial computation, be rounded to the nearest one-hundredth. Other than the reduced value, all other specifications and calculations for the reduced-value Index LEAPS will remain the same.

Exercise and Settlement

Index options will have European-style exercise and will be "A.M.-settled index options" within the meaning of the rules in Chapter XXIV of the Exchange's rules.[5] The CBOE proposes to amend Rule 24.9 to refer specifically to Global Telecommunications Index options. The Exchange states that the proposed Index options would expire on the Saturday following the third Friday of the expiration month. Thus, the last day for trading in an expiring series will be the second business day (ordinarily a Thursday) preceding the expiration date.

Exchange Rules Applicable

Except as modified in the proposed amendment, the Rules in Chapter XXIV of the Exchange's Rules will be applicable to Index options. Index option contracts based on the Global Telecommunications Index will be subject to the position limit requirements of Rule 24.4. For purposes of position and exercise limits Index LEAPS will be aggregated with Index options on a one for one basis. Under the proposal, ten reduced-value Index LEAPS contracts will equal one full-value Index option or Index LEAPS for purposes of aggregating positions. The Exchange represents that it has the necessary systems capacity to support Index options.

The Exchange believes that the proposed rule change is consistent with section 6 of the Act, in general, and furthers the objectives of section 6(b)(5) of the Act, in particular, in that it is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade, and thereby will provide investors with the ability to invest in options based on an additional index.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any inappropriate burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent

(ADR); Hong Kong Telecommunications, Ltd. (ADR); International CableTel, Inc.; Telecom Corp. of New Zealand Ltd. (ADR); Philippine Long Distance Telephone Co.; American Telephone and Telegraph Co.; Telefonica De Espana S.A. (ADR); Telefonos De Mexico S.A. De C.V. (ADR); and Vodafone Group PLC (ADR).

[4] An American Depositary Receipt is a negotiable receipt which is issued by a depositary, generally a bank, representing shares of a foreign issuer that have been deposited and are held, on behalf of holders of the ADRs, at a custodian bank in the foreign issuer's home country.

[5] Under CBOE Rule 24.9, A.M.-settled index options are settled based on an index value derived from opening prices on the last day of trading prior to expiration.

amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR-CBOE-93-57 and should be submitted by January 20, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-31882 Filed 12-29-93; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-33377; File No. SR-NASD-93-16]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Partially Approving Proposed Rule Change Relating to the Small Order Execution System on Pilot Basis

December 23, 1993.

I. Introduction

On March 23, 1993, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder.[2] The proposal[3] would amend the rules of the NASD's Small Order Execution System ("SOES") to provide for the following modifications: (1) A reduction in the maximum size order eligible for SOES execution from 1,000 shares to 500 shares; (2) a reduction in the minimum exposure limit for "unpreferenced" SOES orders from five times the maximum order size to two times the maximum order size, and the elimination of exposure limits for "preferenced" orders;[4] (3) an automated function for updating market maker quotations when the market maker's exposure limit has been exhausted (market makers using this update function may establish an exposure limit equal to the maximum order size for that security); and (4) the prohibition of short sale transactions through SOES.

Notice of the proposed rule change appeared in the **Federal Register** on April 21, 1993.[5] The Commission received 649 letters commenting on the proposal, 137 in support and 512 in opposition.[6] On May 13, 1993, the NASD submitted the results of an NASD study on the extent and effect of active SOES trading on the market quality of the NASD's Automated Quotation System ("Nasdaq"). The Commission published the NASD's study for comment in the **Federal Register** on May 21, 1993.[7] The Commission received 7 comments on the NASD's study. The NASD responded to the comments on July 12, 1993.[8] For the reasons discussed below, the Commission is approving the proposal, as amended,[9] until January 6, 1995.

II. Summary

The instant rule is only the most recent chapter in the debate that has erupted over the last several years over the appropriate usage of SOES. Often this debate has been characterized as a feud between the market-making firms that in many ways form the backbone of the NASD and the active SOES traders who have taken advantage of opportunities to exploit what were perceived as relatively minor, but potentially profitable, imperfections in market structure. Although the Commission's authority and responsibility to review proposed changes in the rules of self regulatory organizations rests on broader principles, all of which are discussed *infra*, the fundamental question at issue here is whether, having adopted a mandatory automated trading system in order to facilitate the prompt efficient execution of relatively small transactions for retail market participants, the NASD may permissibly modify that system in an effort to limit its use to those types of trading strategies it was initially designed to facilitate. The contrary position is that, having mandated such a system in the first place, the NASD must make it available without regard to the manner in which the system is being used.

The NASD's initial attempts to restrict access to the system revolved around denying access to those with the status

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[6] 17 CFR 200.30-3(a)(12) (1993).

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b-4 (1993).

[3] The NASD has filed four amendments to the proposed rule change with the Commission. Amendment No. 1, filed on April 8, 1993, supplements the statement of statutory basis for the rule change. Amendment No. 2, filed on April 13, 1993, clarifies the market makers electing to use the proposed auto-update function may establish an exposure limit equal to the maximum order size for that security. Amendment No. 3, filed on May 13, 1993, provides the results of a study by the NASD's Department of Economic Research. Amendment No. 4, filed on November 29, 1993, requests that the Commission approve the rule change for a pilot period of one year.

[4] SOES orders are executed in rotation against those market makers at the inside bid or ask. In addition, orders may be entered in SOES and routed to a particular market maker with which the order entry firm has an order routing arrangement. This type of order entry is referred to as "preferencing." Preferenced orders are executed with the designated market maker at the inside bid or ask even if the market maker's quotation is not at the inside market.

[5] Securities Exchange Act Release No. 32143 (April 14, 1993), 58 FR 21484.

[6] A Summary of Comments is contained in appendix A. The Appendix is available for inspection in the Commission's Public Reference Room. A list of comment letters received in connection with publication of the rule change is also available for inspection in the Public Reference Room. In addition, the Commission has receive 409 comment letters in an unrelated filing that also raise objections to the instant rule change. See Securities Exchange Act Release No. 33307 (December 9, 1993), 58 FR 65746 (December 16, 1993) (approving File No. SR-NASD-93-59). The Commission has considered these comments as part of the record.

[7] Securities Exchange Act Release No. 32313 (May 17, 1993), 58 FR 29647 (publication of Amendment No. 3).

[8] See letter from Richard Ketchum, Executive Vice President and Chief Operating Officer, NASD, to Selwyn Notelovitz, Branch Chief, Over-the-Counter Regulation, SEC (July 12, 1993) ("NASD letter"). The Commission received two letters asserting that the NASD's letter responding to comments contains additional issues and information not included in the original rule filing, and therefore, should be published to provide public notice and an opportunity for public comment. See letters to Jonathan G. Katz, Secretary, SEC, from Harvey L. Pitt, Fried, Frank, Harris, Shriver & Jacobson, Counsel for Dina Securities (July 21, 1993); Mark D. Shefts, President, All-Tech Investment Group, Inc. (July 30, 1993); Harvey L. Pitt, Fried, Frank, Harris, Shriver & Jacobson, Counsel for Dina Securities (December 20, 1993). The Commission does not believe it is necessary to publish the NASD's letter for notice and comment. The instructions to Form 19b-4 under the Exchange Act expressly contemplate correspondence prepared by the Self-Regulatory Organization ("SRO") concerning a proposed rule change after the rule change is filed but before the Commission takes final action on it. 17 CFR 249.819. Although such letters are filed with the Commission and retained for public inspection, the filing of such letters does not trigger a publication requirement pursuant to Section 19(b)(1) and Rule 19b-4 thereunder, except in those circumstances in which the letter amounts to an amendment of the rule change. The Commission has concluded that the NASD's letter responds to issues raised by commenters, and therefore does not constitute an amendment of the proposed rule change. In any event, the Commission has considered these two letters as part of the record.

[9] Initially, the NASD had proposed adoption of a 15-second delay between SOES executions for locked and crossed markets. Subsequently, however, the NASD requested that the Commission defer consideration of that element of the proposal pending the completion of necessary system modifications. See letter from Robert E. Aber, Vice President and General Counsel, NASD, to Selwyn Notelovitz, Branch Chief, SEC (July 27, 1993). Consequently, this order does not address the proposed delay for locked and crossed markets.

of "professional traders." Although those efforts were approved by the Commission, and the United States Court of Appeals for the District of Columbia in *Timpinaro, et al.* v. *SEC*,[10] determined that those rules were based on a "sound theory of market behavior," the court remanded the rules for reconsideration in light of the views expressed by the court in that decision. At that time, apparently in significant measure because the rules did not prove effective in limiting the use of SOES, the NASD chose to withdraw those rules and to proceed with the rules presently under review. While the previous rules attempted to define a kind of trading account that could not utilize SOES, the new rules attempt instead to limit the categories of transactions that may be affected through SOES, thereby effectively limiting the usage of SOES by those who use it in a manner seen by the NASD as inconsistent with the intended use of SOES.[11]

Ultimately, the question whether the proposed rule change is permissible may be seen to depend upon the resolution of two subsidiary issues. First, whether certain types of SOES utilization which are claimed to be abusive, do indeed threaten the efficient functioning of the Nasdaq market. Second, if such a threat is fairly perceived, whether the response to that threat reflected in the proposed rules is a rational and measured response. Judge Ginsburg questioned in *Timpinaro* whether it would be possible to determine those issues in a case of this sort through the utilization of significant empirical data and analyses. The Commission is satisfied, however, after reviewing proposed analyses of that nature, and after considering the views of its own economic staff, as reflected in this order, that such statistical or economic reviews as have been made are inconclusive and that there is no reasonable likelihood that additional studies would prove beneficial. In short, the difficulty is that there is no meaningful way to separate cause (or causes) from effect. Increased volatility and wider spreads between market makers' bid and asked prices, which are necessarily less efficient than more narrow spreads, do coincide with greater trading activity through SOES. It cannot be determined, however, whether increased volatility and wider spreads are in response to more active SOES trading, whether SOES trading is attracted by increased volatility and wider spreads, or whether both are caused by outside forces.

In these circumstances, while the Commission's analysis, discussed *infra*, includes all the elements that the courts have determined to be appropriate in proceedings of this nature, the Commission is ultimately required to rely on its own experience and expertise in according weights to the arguments made by the proponents and opponents of the proposed rules, all of whom have expressed their views to the Commission at great length. Having undertaken that analysis, the Commission concludes that the proposed rules meet the standards imposed by the Act, and is therefore approving the proposed rule changes for the one year pilot program requested by the NASD.

III. Background

The NASD designed and implemented SOES in 1984 to provide an efficient facility for order entry firms to execute retail customer orders of limited size in Nasdaq securities.[12] SOES offers an alternative for these firms to the traditional telephone contact and negotiation with market makers by providing automatic execution of customer orders against Nasdaq market makers at the best available market price. SOES confirms the trade to the market maker and the order entry firm and then automatically reports the trade data to the clearing corporation on their behalf for post-trade clearance and settlement. SOES reduces paperwork for both firms and limits and need for telephone contact, which is especially useful in active markets.

During the October 1987 market break, however, the Nasdaq market experienced significant operational problems, in part because of the failure of SOES to process the increased order flow.[13] During the market break, sharp downward volatility and record volume resulted in delayed transaction reports and a large number of locked and crossed markets. The unusual market conditions created a situation in which it was not possible for market makers to ensure that their quotes, against which trades were continuing to be executed in SOES, accurately reflected the rapidly changing market. Because participation in SOES at that time was voluntary, a majority of market makers responded by withdrawing from SOES.[14] Trades that normally would have been handled through SOES then had to be executed by contacting market makers by telephone. This necessarily increased the already extraordinary workload of market makers, and contributed to a large number of unfilled orders, as well as complaints that market makers were not accessible.

In response to those problems, the NASD adopted a number of rules to facilitate the execution of retail customer orders in SOES and to ensure market maker participation in the system ("1988 modifications").[15] The NASD made participation in SOES mandatory for all market makers in Nasdaq National Market System ("Nasdaq NMS") securities, increased the penalty imposed on market makers withdrawing from Nasdaq—and consequently from SOES—from 2 to 20 days, and established a SOES minimum exposure limit[16] for market makers of five times the maximum order size.[17] By raising the cost to market makers of withdrawing from SOES, and increasing the minimum level of market maker participation in SOES, these changes were intended, among other things, to ensure that order entry firms could obtain executions for their customers in volatile markets.

The 1988 modifications, however, changed the dynamic and economics of trading in Nasdaq, particularly by facilitating intra-day trading activity through SOES. The 1988 modifications

[10] 2 F.3d 453 (DC Cir. 1993).

[11] Because of the information advantage industry professionals enjoy over public customers, SOES has always excluded non-public customers, a term that refers to NASD members and other industry professionals who have direct access to SOES. See NASD Manual, SOES Rules, Secs. (a)(12), (c)(3)(C)–(D), (CCH ¶¶ 2451, 2460; NASD NTM 88–61 (included in File No. SR-NASD–88–37).

[12] See Securities Exchange Act Release No. 21433 (October 29, 1984), 49 FR 44042 (November 1, 1984).

[13] See division of Market Regulation, The October 1987 Market Break 9–3 to 9–15 (February 1988) ("1987 Market Break Report").

[14] As described more fully in the Division's October 1987 Report, the number of market making positions declined more than 83 percent between October 19 and October 22, 1987. *Id.* at 9–14.

[15] See Securities Exchange Act Release No. 25791 (June 9, 1988), 53 FR 22594 (June 16, 1988).

[16] The exposure limit is the number of shares a market maker is willing to buy or sell in SOES. Market makers establish exposure limits for each security in which they make a market. The minimum exposure limit is the minimum number of shares a market maker must buy or sell in SOES. Once a market maker's exposure limit is exhausted, the market maker is suspended from SOES and provided a 5-minute grace period within which to update its market and reestablish its exposure limit. Incoming orders are executed against the remaining market makers in the SOES rotation. Market makers that fail to update their quotations within the grace period are withdrawn from the issue on an unexcused basis and must wait 20 days before reentering the issue. NASD Manual, SOES Rules, Sec. (c)(2)(F) (CCH) ¶ 2460.

[17] See Securities Exchange Act Release No. 25791. The SOES maximum order size for Nasdaq NMS securities is 200, 500, or 1,000 shares, depending upon trading characteristics of the particular security. NASD Manual, Sched. D to the By-Laws, Part VI, Sec. (2)(a)(CCH) ¶ 1819. All Nasdaq Small-Cap securities are subject to a SOES maximum order size of 500 shares.

made it possible for customers in direct contact with a registered representative at a SOES order entry firm [18] to use the automatic execution capability of SOES for trading based on the direction of intra-day price movements. As a result of the 1988 modifications, market makers are required to accept multiple trades at the same price and cannot respond to the trading activity of these customers by withdrawing from SOES.

This activity places increased pressure on market makers. For example, in reacting to an earnings report, as a practical matter, all market makers in a security cannot update their quotations simultaneously. Customers monitoring market quotations closely at SOES order entry firms can use SOES to obtain instantaneous executions from market makers that have not yet been able to update their quotations. Absent SOES, following the first such execution, a market maker would have a reasonable opportunity to update its quotations and, consistent with its Firm Quote Rule obligations,[19] could decline to trade at its displayed quotations while in the process of updating. With SOES, however, market makers may be subject to multiple executions before they are able to update their markets and even if they are already in the process of updating.

Subsequently in 1988, the NASD filed a series of rule changes in response to concerns that intra-day trading activity through SOES increases the cost of market making, and thereby jeopardizes liquidity in Nasdaq securities.[20] In approving each of these rule filings, the Commission recognized that the system was not intended to serve as a facility for active intra-day trading, and that to preserve the benefits of SOES for public investors, it is necessary to limit use of the system by active traders. These changes included attempts to prohibit, so-called "professional trading accounts" from using SOES ("1988 Rules").[21] The 1988 Rules, however, proved ineffective. Therefore, in 1991, the NASD proposed and the Commission approved additional rules intended to restrict professional trading account access to SOES ("1991 Rules").[22] Following Commission approval, the 1991 Rules were challenged in the United States Court of Appeals for the District of Columbia Circuit, and were subsequently remanded for further consideration.[23]

Although the 1991 Rules remained in effect while the litigation was pending, active intra-day trading through SOES has increased [24] as customers at a growing number of order entry firms are engaging in intra-day trading strategies through SOES. The activities of these customers have resulted in a pattern of trading in which concentrated numbers of orders are generated in a short period of time after price movements or market maker quotation updates in a security.

According to the NASD, until recently, the trading activity of these makers that had not yet been able to update their quotations in response to price moves. As their numbers have increased, however, these customers also are attempting to catch what they perceive to be emerging price trends, executing concentrated numbers of orders through SOES against the majority of market makers at the inside quote in a particular security after as little as one quote update.

By way of example, customers monitoring the market in a particular security may notice that one by one, the market makers at the inside offer are raising their quotations. Hoping to take advantage of what appears to be a developing price trend,[25] these customers use SOES to execute buy orders instantaneously against those market makers who have not yet raised their quotations. Nonetheless, in response to successive 1,000-share executions from multiple customers, the remaining market makers raise their quotations as well. Minutes later, as the price trend stalls or reverses, these customers liquidate their positions by selling the securities at the new, higher market price.

In addition, these customers are positioning themselves between market makers and customers with larger orders, which may result in inferior prices for the larger orders. For example, the broker for a customer with a 10,000-share sell order telephones the first of five market makers at the inside bid, who executes 2,000 shares of that order, reports the trade, and updates his or her quotation. Public customers monitoring the market, and speculating that this trade is part of a larger order, react to the quotation update and trade report, executing SOES transactions against the remaining four market makers at the inside bid. The four market makers then update their quotations in response to these SOES executions. By the time the customer's broker has reached one of the market makers to execute the remaining 8,000 shares, the inside quotation has changed and the customer receives an inferior execution for the balance of its order.[26]

As discussed below, the NASD believes, and the Commission is persuaded, that the ability of such intra-day traders to place trades through SOES imposes increased risks and costs on market makers and jeopardizes market quality. Furthermore, the Commission is persuaded that these costs outweigh any marginal increases in liquidity and pricing efficiency attributable to such trading. In light of these costs, and in light of the ineffectiveness of previous

[18] An NASD member registered as a SOES Order Entry Firm may enter orders of limited size for execution against SOES market makers. NASD Manual, SOES Rules, Sec. (a)(6) (CCH) ¶2451.

[19] 17 CFR 240.11Ac1-1(c)(2).

[20] See Securities Exchange Act Release No. 26045 (August 31, 1988), 53 FR 34856 (September 8, 1988) (notice of filing and immediate effectiveness of rule change prohibiting member firms from breaking up larger orders for execution in SOES); Securities Exchange Act Release No. 26173 (October 12, 1988), 53 FR 40809 (October 18, 1988) (accelerated approval of six-month system change permitting market makers to lower their SOES minimum exposure limit for a security from five times the maximum order size to the maximum order size).

[21] Professional trading accounts were defined to include any account in which five or more "day trades"—that is, offsetting SOES trades in the same security for generally the same size during the trading day—have been executed through SOESI during any trading day or where a professional trading pattern in SOES is exhibited. "Professional trading pattern" was defined as (1) the existence of a pattern or practice of executing day trades; (2) the execution of a high volume of day trades in relation to the total transactions in the account; or (3) the execution of a high volume of day trades in relation to the amount and value of securities held in the account. Securities Exchange Act Release No. 26361 (December 15, 1988), 53 FR 51605 (December 22, 1988).

[22] See Securities Exchange Act Release No. 29809 (October 10, 1991), 56 FR 52092 (October 17, 1991); Securities Exchange Act Release No. 29810 (October 10, 1991), 56 FR 52098 (October 17, 1991). In these rules, the NASD expanded its definition of "professional trading account" to include four additional factors that demonstrate a pattern of professional trading: (1) Excessive frequency of intra-day trading; (2) excessive frequency of shortselling; (3) existence of discretion; and (4) direct or physical access to SOES execution capability or data services such as Nasdaq Level II or National Quotation Data Service ("NQDS") that provide a real-time display of all market maker quotes in Nasdaq. The NASD also expanded the definition of "day trade" to situations in which only one side of the offsetting trades is executed through SOES; established a 15-second update period between unpreferenced SOES executions; and permitted market makers to specify the firms from which they would consent to receive preferenced orders. See *supra* note 4.

[23] *Timpinaro, et al.* v. *SEC*, 2 F.3d 453 (D.C. Cir. 1993).

[24] See Securities Exchange Act Release No. 32143 at 14.

[25] The availability of 1,000-share guaranteed executions facilitates intra-day trading because even the smallest price move can be profitable—that is, offsetting 1,000-share trades capturing an 1/8th per share nets $125, less commissions.

[26] Intra-day traders who reacted to the initial transaction report and quote update continue to monitor the market, and liquidate their positions when the price trend stalls or reverses. Of course, if the intra-day traders have guessed incorrectly that the 2,000-share trade was part of a larger order, the market will have reacted in response to incorrect trading estimates.

modifications to SOES, the Commission agrees that responsive measures are appropriate.

The Commission has considered the proposed rule against the framework of the *Timpinaro* decision. In sanctioning the differential treatment of preferenced and unpreferenced orders and by leaving in place that part of the 1991 Rules restricting professional trading accounts from using SOES ("professional trading account rules"), the Court of Appeals implicitly affirmed the NASD's right to distinguish among investors and limit access to its systems for certain trading practices if such distinctions and limitations are consistent with the Act. Indeed, Section 15A itself contemplates the imposition of such limitations as long as the limitations are procedurally fair and are otherwise consistent with the Act.

Nevertheless, the court remanded, without vacating, the professional trading account rules, largely because of the lack of empirical data in the administrative record buttressing the Commission's views.[27] The court's opinion, however, did not seek to displace the Commission's discretion to determine—in light of its organizational considerations, and consistent with its statutory mandate—what procedures will insure the sufficiency of the information underlying its findings.[28] In the context of the *Timpinaro* decision, as construed above, we have examined the current rule proposal on its record.[29]

[27] See *Timpinaro*, 2 F.3d at 457–59.

[28] *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Bradford Nat'l Clearing Corp.* v. *SEC*, 590 F.2d 1085, 1103 (DC Cir. 1978) (the deference accorded agency decisions "increases and becomes less qualified when . . . the agency's decision partakes of 'prediction[s] based upon pure legislative judgment.'" (citations omitted)); *Clement v. SEC*, 674 F.2d 641, 647 (7th Cir. 1982). *Cf. NASD v. SEC*, 801 F.2d 1415, 1422 (DC Cir. 1986) (Commission need not "cite record evidence for the self-evidence proposition" that the emergence of competition to the NASD's query function meant that market makers did not need to rely solely on the NASD's query function). We do not read the court's decision as requiring the Commission to employ specified additional procedures in reviewing rule proposals from self-regulatory organizations. Rather, the court directed the Commission on remand to "explain or cure its failure to produce data." *Timpinaro*, 2 F.3d at 460.

[29] We do not read the court's opinion in *Timpinaro* to imply that there was a significant failure in the evidence on which the Commission's approval of the 1991 Rules were based. The court suggested that regression analyses may provide one means of curing the insufficiency, but, as the DC Circuit noted in *Occidental Petroleum Corp. v. SEC*, "it is the result reached not the method employed which is controlling." 873 F.2d 325, 347 (DC Cir. 1989), citing *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). The court's decision to remand the professional trading account rules without vacating therefore indicates that the court viewed the record supporting the 1991 Orders as not seriously deficient and viewed the professional trading account rules as "altogether sound at the core." *ICORE, Inc.* v. *FCC*, 985 F.2d 1075, 1081 (DC Cir. 1993).

IV. Description of the Proposed Rule Change

The proposal effects four changes to SOES:

(1) SOES Maximum Order Size

The rule change reduces the maximum size order eligible for SOES execution from 1,000 shares to 500 shares for the highest tier of Nasdaq NMS securities. Market makers must continue to display a size of 1,000 shares in their quotations for these securities, and to be firm for a minimum of 1,000 shares at their published quotations, for any negotiated transaction through SelectNet[30] or over the telephone.[31] Thus, the rule change will not affect a market maker's displayed size and firm quotation obligations.

(2) SOES Minimum Exposure Limit

The rule change reduces a market maker's SOES minimum exposure limit from five times the maximum order size to two times the maximum order size. In addition, the rule change restricts a market maker's exposure limit to unpreferenced orders so that preferenced orders will no longer count toward depletion of the minimum exposure limit.

(3) Automated Quotation Updates

The rule change authorizes the NASD to provide an automated quotation update function for market makers using SOES, at their election, on an issue-by-issue basis. Currently, when a market maker depletes its exposure limit in SOES, the market maker's quotation is closed to SOES executions until the market maker updates its quote and reestablishes its exposure limit. The proposed automated update function would update a market maker's quotation in any Nasdaq security when its exposure limit has been exhausted, and would reestablish the original quotation size and exposure limit, thereby preventing closed quotations. Under the rule change, market makers can set the fractional interval of the quotation update for each security. Market makers electing to use the automated update feature will be able to set their exposure limit at the maximum order size for that security—that is, 500 shares for the highest tier of Nasdaq NMS securities.[32]

(4) Short Sales Through SOES

The rule change prohibits the execution of short sales through SOES. Order entry firm customers seeking to execute short sales can do so only through SelectNet or over the telephone.

V. Discussion

Under Section 19(b) of the Act, the Commission must approve a proposed NASD rule change if it finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder that govern the NASD.[33] No other finding is required.[34] In evaluating a given proposal, the Commission must examine the record before it and all relevant factors and necessary information.[35]

Section 15A of the Act addresses with some specificity the requirements applicable to NASD rules, and those are the standards against which the Commission must measure the NASD proposal.[36] As discussed below, the Commission has evaluated the costs and benefits of the proposed modifications in light of the objectives of Section 15A.

[30] SelectNet is an electronic subsystem of Nasdaq that allows order entry firms and market makers to communicate orders and negotiate transactions through their Nasdaq terminals without having to use the telephone. Securities Exchange Act Release No. 28636 (November 21, 1990), 55 FR 48732 (November 30, 1990).

[31] See NASD Manual, Sched. D to the By-Laws, Part VI, Section 2(a)–(b) (CCH ¶1819). Currently, market makers must display minimum size in their quotations equivalent to the SOES maximum order size, which is 1,000 shares for the highest tier of Nasdaq NMS issues. In light of the reduction in the SOES maximum order size, the rule change amends Schedule D to provide that the minimum display size for the highest tier of Nasdaq NMS issues will be 1,000 shares.

[32] The NASD will monitor the number of market makers using the automated update function on a real-time basis. In addition, the NASD has stated that it will add a feature in 1994 that provides the ability to shut down the automated update function if market conditions warrant. Letter from Beth E. Weimer, Associate General Counsel, NASD, to Selwyn Notelovitz, Branch Chief, SEC (August 11, 1993) ("NASD Automated Update Letter").

[33] 15 U.S.C. 78s(b).

[34] The Commission's statutory role is limited to evaluating the rules as proposed against the statutory standards, and does not require the SRO to prove its proposal is the less burdensome solution to a problem.

[35] In the Securities Acts Amendments of 1975 ("1975 Amendments"), Congress directed the Commission to use its authority under the Act, including its authority to approve SRO rule changes, to foster the establishment of a national market system and promote the goals of economically efficient securities transactions, fair competition, and best execution. Congress granted the Commission "broad, discretionary powers" and "maximum flexibility" to develop a national market system and to carry out these objectives. Furthermore, Congress gave the Commission "the power to classify markets, firms, and securities in any manner it deems necessary or appropriate in the public interest or for the protection of investors and to facilitate the development of subsystems within the national market system." S. Rep. No. 75, 94th Cong., 1st. Sess., at 7 (1975).

[36] See 15 U.S.C. 78o–3.

Because the benefits for market quality of restricting SOES usage outweigh any potential decrease in pricing efficiency, the Commission concludes that the net effect of the proposal is to remove impediments to the mechanism of a free and open market and a national market system, and to protect investors and the public interest, and that the proposed rule changes are designed to produce accurate quotations, consistent with Sections 15A(b)(6)[37] and 15A(b)(11)[38] of the Act. In addition, the Commission concludes that the benefits of the proposal in terms of preserving market quality and preserving the operational efficiencies of SOES for the processing of small size retail orders outweigh any potential burden on competition or costs to customers or broker-dealers affected adversely by the proposal. Thus, the Commission concludes that the proposal is consistent with Section 15A(b)(9) of the Act in that it does not impose a burden on competition which is not necessary or appropriate in furtherance of the purposes of the Act.[39]

The proposal also is consistent with the injunction in Section 15A(b)(6) that NASD rules not be designed to permit unfair discrimination between customers, brokers, or dealers. In fact, the proposal considered today would not draw distinctions between customers based on their status as traders—in contrast to the professional trading account rules—and generally provides that customers will have equal access to SOES. The proposal continues to treat preferenced orders differently, recognizing the freedom of market makers and order-entry firms to vary rights and obligations, on an arm's-length basis, in ways that do not unfairly disadvantage other customers.

[37] Section 15A(b)(6) authorizes the NASD to adopt rules designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Furthermore, the rules of the NASD must not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

[38] Section 15A(b)(11) authorizes the NASD to adopt rules relating to quotations. Such rules must be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.

[39] S.Rep. at 13–14. In weighing the competitive effects of an SRO rule filing, the Commission must balance any perceived anti-competitive effects against other statutory objectives. The statute does not require the NASD to achieve its objective by selecting the least anti-competitive alternative. See *infra* notes 86–87 and accompanying text.

The Commission also concludes that the proposal advances the objectives of Section 11A of the Act.[40] Section 11a provides that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure economically efficient execution of securities transactions, fair competition among market participants, and the practicality of brokers executing orders in the best market. The Commission concludes that the proposal furthers these objectives by preserving the operational efficiencies of SOES for the processing of small orders from retail investors.

A. The Analytical Framework

Reports from market participants about the manner in which SOES is being used for active intra-day trading strategies are largely undisputed. Market makers, order entry firms, and customers commenting on the proposal all relate that public customers engaged in active intra-day trading strategies are using SOES to execute one or both sides of offsetting trades. These customers monitor trade prices and quotations on computer screens, and cumulatively generate successive 1,000-share SOES executions in response to price movements or quotation updates.[41]

These executions follow the trend of price movements, and typically are reversed shortly thereafter through SOES or SelectNet. The NASD states, and commenters do not dispute, that this pattern of trading can result in virtually simultaneous executions against multiple market makers at the inside quote, and can occur repeatedly throughout the trading day in hundreds of Nasdaq securities.[42] These customers can account for virtually all trading in certain securities occurring through SOES for short periods of time and even for the whole trading day.

[40] See 15 U.S.C. 78k–1.

[41] Various data provided by the NASD demonstrate the extent to which customers at a growing number of SOES order entry firms—classified by the NASD as SOES active trading firms ("SAT firms")—are using SOES for intra-day trading strategies, generating concentrated numbers of 1,000-share orders over short periods of time. By way of example: During February 1993, aggregate SAT firm SOES volume accounted for over 80% of total SOES share volume; of the 50 Nasdaq share volume leaders for February 1993, 27 experienced SAT firm SOES volume exceeding 70% of total SOES volume; average SAT firm customer trade size on SOES: 995 shares; and average non-SAT firm customer trade size on SOES: 366 shares. Securities Exchange Act Release No. 32313 at 1–2. See also Securities Exchange Act Release No. 32143 at 9–11 for examples of concentrated numbers of SOES executions within short time periods.

[42] See Securities Exchange Act Release No. 32143 at 8, 11.

The NASD and commenters supporting the proposed modifications to SOES argue that active trading through SOES subjects market makers to increased risks and costs, and is having a detrimental effect on the Nasdaq market. Specifically, they argue that concentrated activity in SOES that follows the trend of price movements exacerbates volatility in quotations and transactions prices. They believe that this activity makes it difficult for market makers to execute larger orders and maintain orderly markets. Further, they argue that the use of SOES for active intra-day trading strategies is inconsistent with the design of the system as an execution facility for small retail orders. As a result, active intra-day trading through SOES imposes additional costs on market makers, which are reflected in wider spreads and a loss of liquidity for individual and institutional investor orders.

In contrast, the customers who use SOES to effect these intra-day trading strategies maintain that they are merely reacting to publicly available information, buying undervalued securities and selling overvalued securities, which causes prices to reflect all available information and adjust more rapidly to new information. These customers argue that their trading activity forces market makers to monitor the market more closely and update their quotations more quickly, which further contributes to pricing efficiency. These customers also contend that their trading activity contributes to market liquidity and depth.

Given these arguments, the threshold issue before the Commission is the effect of concentrated intra-day SOES activity on the market. Accordingly, in evaluating the rule change, the Commission must evaluate the asserted costs and benefits to market quality associated with active trading through SOES.

In evaluating the effects of active trading through SOES, the Commission would prefer, as Judge Ginsburg urged in *Timpinaro*, to have been able to rely upon appropriate empirical analyses prepared by the NASD, other proponents of the rule changes, opponents of the rule changes, or the Commission's staff. Unfortunately, that preference has not been, and apparently under the circumstances cannot fairly be, satisfied. The NASD submitted a study prepared by its Department of Economic Research regarding the effect of trading by SAT firm customers on Nasdaq market quality.[43] Through

[43] See Securities Exchange Act Release No. 32313.

regression analyses, the NASD demonstrates a significant correlation between concentrated SAT firm activity and wider spreads, as well as significant increases in bid price and execution price volatility. In response, several commenters challenged the NASD's interpretation of its results, and asserted that the NASD's study does not establish that SAT firm trading causes a deterioration in market quality.

One commenter submitted an alternative methodology for determining the market effect of SOES activity by active customers.[44] The commenter proposed a cross-sectional regression that estimates the determinants of spreads in Nasdaq stocks, including the amount and type of trading by customers other than active SOES customers. The proposed methodology would also include an examination of spreads before and after the 1988 modifications to SOES that required market maker participation in SOES for all Nasdaq NMS securities.

The Commission concludes, however, that the analyses in the NASD study do not establish that SAT firm trading produces wider spreads, greater volatility, or diminished liquidity. The study finds a positive correlation between SAT firm volume and increased spreads and volatility. The Commission recognizes, however, that a positive correlation does not necessarily imply causation. It is not possible to determine whether increased volatility leads to SAT firm trading or SAT firm trading results in additional volatility. As a statistical matter, and particularly after considering the analysis of its staff economists, as reflected in this Order, the Commission does not believe that it is possible to differentiate between the effects on spreads and volatility attributable to active SOES trading and the effects attributable to other factors, such as stock-specific news or volatility. Therefore, the Commission is unable to make a clear statistical inference as to the effects of SAT firm customers on spreads.

The proposed alternative methodology contains the same basic flaw inherent in the NASD's analyses—namely, that the direction of causality is unclear. Unrelated increases in stock-specific, industry-specific, or market-wide volatility may produce wider spreads, and these changes in volatility may coincide with more active trading by customers engaging in intra-day trading strategies, possibly accompanied by reduction in trading volume by other retail customers and risk-averse individuals. Active SOES customers watch the market on Nasdaq Level II terminals, trying to identify price trends. Therefore, one would expect to see an increase in SAT firm activity in connection with significant price movement in the market.

Accordingly, the Commission is unable to conclude that either the NASD's study or the proposed alternative methodology provides a basis for discerning the effects of active intra-day SOES trading on spreads, volatility, or liquidity. The Commission is of the view that additional study of the existing data at best can determine only the overall effect of SOES on spreads, volatility and liquidity, and that the effects attributable to active intra-day trading through SOES cannot be disentangled independently.[45] In any event, the Commission is of the opinion that it has a sufficient basis for approving the rules despite the absence of statistically dispositive results.

In view of the lack of conclusive statistical analysis,[46] the Commission is mindful of its mandate from Congress in adopting the 1975 Amendments. In adopting the 1975 Amendments, Congress contemplated that "in the exercise of its quasi-legislative functions, the Commission's action may be based upon policy considerations and administrative expertise which cannot be reduced to specific evidentiary facts."[47] Thus, the Commission has reviewed the evidence provided by the NASD and commenters, and has exercised its administrative expertise in evaluating the economic theory and logical consequences of such trading activity in an automated environment. The Commission also has considered the comments of the NASD and market participants including SOES order entry firms and their customers, Nasdaq market makers, and trade associations representing broker-dealers, securities traders, and institutional investors. Moreover, the Commission is approving the proposal for a limited time, and will monitor its effects with a view to assessing whether the modifications produce the expected effects.

B. Costs and Benefits of Active Intra-day Trading through SOES

SOES originally was designed to process efficiently the trades of retail investors—trades that, because of their small size and the relatively low information they convey—should not have a significant effect on market prices. Market makers' quotations reflect information they glean from the volume and composition of trading activity. Market makers were willing to provide automatic execution of low-volume retail orders because of the low risks and costs[48] associated with these orders. In contrast, successive executions from intra-day traders which follow the trend of price movements can impose significant costs on market makers; because of the automatic execution capability of SOES, market makers do not have sufficient opportunity to react to market moves and the concentrated bursts of trading activity of intra-day traders and adjust their prices accordingly.

Unlike an automated transaction system such as SelectNet, SOES does not allow market makers to interact with orders. When an order is received over the telephone or through SelectNet, the market maker affirmatively accepts that offer, and then has an opportunity to update its quotations. On SOES, market makers automatically receive multiple executions every 15 seconds. As a result, market makers do not have the same opportunity to react, and are subject to increased risks and costs.

The Commission believes that it is appropriate to restrict trading practices through SOES that impose excessive risks and costs on market makers and jeopardize market quality, and which do not provide significant contributions to liquidity or pricing efficiency. Although SOES accounts for a fraction of total Nasdaq share volume, SOES handles a proportionally larger percentage of orders.[49] By reducing paperwork and eliminating the need for telephone contact for these orders, SOES allowed market makers to devote more time to professional trading in the negotiated market. Increasingly, however, SOES is costing market makers more in terms of surveillance and capital, which disadvantages the retail investors for

[44] See letter from Morris Mendelson, Professor Emeritus of Finance, The Wharton School of the University of Pennsylvania, to Jonathan G. Katz, Secretary, SEC, at Exhibit D (May 10, 1993).

[45] The effects of active intra-day trading on market quality might be discerned, for example, by excluding those traders from SOES at random periodic intervals. Such an approach would be impractical.

[46] Where, as here, the Commission has determined that a specific procedure, such as statistical analysis, may not provide meaningful assistance in making the determinations it is required to make under the statute, the agency must, nonetheless, "produce, by whatever means the agency chooses, a record that does meet the * * * level of performance" required under applicable statutory and judicial standards. *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 338 (DC Cir. 1989).

[47] S. Rep at 37.

[48] See *infra* notes 52–54 and accompanying text.

[49] See, e.g., 1987 Market Break Report at 9–14, n.43.

whom the system originally was designed.

The Commission's conclusions reflect its studies of the 1987 and 1989 market breaks. The Commission has found that mandatory SOES participation provides critical liquidity in situations of severe market stress.[50] The Commission believes that it is more important to ensure that investors seeking to establish or liquidate an inventory position have ready access to a liquid Nasdaq market and SOES than to protect the ability of customers to use SOES for intra-day trading strategies.[51]

1. Active Intra-day Trading through SOES Undermines Market Quality

The Commission believes that there are increased costs associated with active intra-day trading activity through SOES[52] that undermine Nasdaq market quality. The Commission believes that these include increased inventory holding costs[53] and information costs,[54] which can be expected to produce wider spreads. The Commission's analysis reflects the market reality that market makers demand a competitive return on capital. To the extent that they can pass on their costs, market makers raise prices to compensate for the increased costs of doing business. Market makers raise prices by widening spreads, which results in marginally higher prices for all customers. These higher prices can be expected to reduce market liquidity even further. Assuming a competitive market, market makers may abandon marginal market making activity if they are unable to generate sufficient volume at wider spreads.[55]

In addition, comment letters from market makers and trade associations report that active intra-day trading through SOES adversely affects the ability of market makers to execute larger orders.[56] As described above, contemporaneous execution reports and quotation updates can signal larger orders coming to market. Speculating that initial trades are part of a larger order being executed in portions by the market makers at the inside quote, and that the larger order may move the market, intra-day traders react by executing multiple SOES transactions against the market makers at the inside quote. If the market moves in response to these SOES executions, the customer with the large order will receive inferior prices for the balance of its order.[57]

Active intra-day trading activity through SOES can also contribute to instability in the market. Waves of 1,000-share executions on the same side of the market have the potential to aggravate price swings. Nearly simultaneous executions of 1,000-share lots that follow the price trend can draw available supply (or demand) at the inside offer (or bid) and attract the attention of other traders to the stock which further exaggerates price swings. The availability of guaranteed execution in size encourages this trading activity.

In addition, these waves of executions can make it difficult to maintain orderly markets. Given the increased volatility associated with these waves of intra-day trading activity, market makers are subject to increased risks that concentrated waves of orders will cause the market to move away. As a result, individual market makers may be unwilling to narrow the current spread and commit additional capital to the market by raising the bid of lowering the offer.[58] When market makers commit

[50] As noted above, market maker participation in SOES was made mandatory in1988 in response to problems that occurred in Nasdaq during the 1987 market break. The Commission found that during the 1989 market break, SOES was able to handle the increased retail order flow, and the Nasdaq market operated much more effectively than in 1987. See Division of Market Regulation, Market Analysis of October 13 and 16, 1989 110 (May 1990); 1987 Market Break Report at 9–12 to 9–15, 9–24 to 9–26.

[51] In this regard, the Commission believes that the reduction in maximum order size in conjunction with the reduction in the minimum exposure limit for unpreferenced orders would not significantly affect the liquidity for Nasdaq securities during times of market stress. As noted, market makers using the automated update function will not be subject to closed quotes during the 5-minute grace period that ordinarily would follow exhaustion of their exposure limits. Moreover, the other modifications effected by this rule change—*e.g.*, the absence of short sales through SOES—should, on balance, facilitate access for retail investors to SOES during periods of market stress.

[52] The Commission believes that intra-day trading activity executed through SOES increases the costs of making markets, based on evidence from general academic research on spreads and volatility, as well as evidence inferred from business practices. Not all customers present the same costs to market makers, and in some markets the terms offered to different types of customers differ significantly. Studies of market maker spreads consistently identify the "adverse selection" cost presented by customers as one of the factors affecting spreads. *See, e.g.*, Stoll, Inferring the Components of the Bid-Ask Spread: Theory and Empirical Tests, 44 J. Fin. 115 (1989); Jaffe & Winkler, Optimal Speculation Against an Efficient Market, 31 J. Fin. 49 (1976); Bagehot, The Only Game in Town, 27 Fin. Analysts J. 12 (1971). The term "adverse selection" in this context refers to the likelihood that the market maker will trade with a party who possesses information not possessed by the market maker, and on whose trades the market maker may consequently lose money. Intra-day traders commenting on the rule change relate that the information on which they are basing their trading decisions is primarily the sequence of trading prices and quotations. Much of their profit comes from exploiting momentary differentials in quotations among market makers. In contrast, the trading of ordinary retail investors is not aimed at exploiting such temporary differentials. Thus, on average, ordinary retail trades through SOES present lower costs to market makers If intra-day traders place their orders over the telephone, on average more time passes between when the market has moved away from a market maker's quote and when the order is placed. Consequently, the quote is more likely to have been updated, and the market maker is less likely to lose money on the trade.

[53] The role of the dealer in financial markets is to provide immediacy for customer orders by standing ready to trade for his or her own account. The price that dealers charge for this service is the bid-asked spread, which is a function of the dealer's costs. Benston & Hagerman, Determinants of Bid-Asked Spreads in the OTC Market, J. Fin. Econ. 353, 354 (1974). Principal among the dealer's costs are inventory holding costs and information costs. Stoll, The Supply of Dealer Services in Securities Markets, 33 J. Fin. 1133, 1133–52 (1978); Stoll, The Pricing of Securities Dealers Services: An Empirical Study of NASDAQ Stocks, 33 J. Fin. 1153, 1153–70 (1978). Inventory holding costs arise when the dealer accommodates customer demands for immediacy and takes a position that is inconsistent with the risk-return preferences of his or her optimal portfolio. The inventory cost component of the bid-asked spread compensates the dealer for the price-risk and opportunity cost of holding securities. Customers who follow intra-day price trends and trade virtually instantly through SOES increase the price risk of holding securities by monitoring market makers more closely than other market participants and executing against them on SOES when they fail to update their quotations virtually simultaneously with market moves.

[54] The presence in SOES of active traders with access to electronic news and quotation services increases the likelihood that market makers are dealing with information traders. Intra-day traders are "information traders" not because their "information" reflects superior analysis of issuer fundamentals, but because they are faster in reacting to new information in the market-whether it be price movements or news-than other customers. In equilibrium, the volume and sequence of trading eventually reveals the presence of informed traders. In the short term, however, market makers are unable to distinguish traders with better or more current information from uninformed traders. The information cost component of the bid-asked spread protects the market maker against possible losses from dealing with information traders—*i.e.*, adverse selection costs. See Stoll, Supply of Dealer Services, at 1144. Because of the automatic execution capability of SOES, market makers may not have an adequate opportunity to react to market moves and adjust their price before being subject to multiple executions. Accordingly, market makers can be expected to widen their spreads to compensate for the increased risk of receiving multiple automatic executions from information traders through SOES.

[55] Securities Exchange Act Release No. 26361, Concurring Opinion of Commissioners Grundfest and Fleischman.

[56] See letter to Jonathan G. Katz Secretary, SEC, from David L. Kahn, Crowell Weedon and Co. (June 18, 1993); George R. Mooring, et. al., J.J.B. Hilliard, W.L. Lyons, Inc., at 1-2 (June 16, 1993); Robert Paymar, President, Summit Investment Corp., at 1 (May 25, 1993); Allen Wilson, trading Department, Sutro & Co., at 1–2 (June 9, 1993); Arthur J. Pacheco, Chairman, Institutional Committee, Securities Traders Association, at 2 (May 17, 1993).

[57] Of course, if the intra-day traders have guessed wrong and there are no additional orders, the market will have moved in response to incorrect speculation. See supra note 26 and accompanying text.

[58] Individual market makers see only a fraction of the entire order flow, and quote markets based on incomplete information of trading interest. Furthermore, Nasdaq markets cannot be closed in response to order imbalances; market makers must

Continued

less capital and quote less competitive markets, pries can be expected to deteriorate more rapidly. Accordingly, the Commission believes that it is appropriate for the NASD to take measured steps to redress the economic incentives for frequent intra-day trading inherent in SOES to prevent SOES activity from having a negative effect on market prices and volatility.

2. Active Intra-day Trading Through SOES Does Not Contribute Off-Setting Benefits to Market Quality

The Commission does not believe that intra-day trading strategies through SOES contribute significantly to market efficiency in the sense of causing prices to reflect information more accurately. By their own admission, intra-day SOES traders follow the trend of price movements, trading primarily on the basis of execution reports and quotation updates, rather than on the basis of fundamental information or superior analysis.[59] Thus, their trades, which generally are reversed shortly thereafter, do not convey new fundamental information to the market. Where trading activity is an attempt to profit from temporary price disparities among market makers as a result of non-simultaneous quotation updates, information conveyed by such trading concerns the relative efficiency of different market makers, rather than information concerning the underlying value of the security.[60] Indeed, when executing against those market makers that have not yet been able to update their quotations in response to a market move, intra-day SOES traders trade at non-equilibrium prices,[61] which conveys inaccurate information to the market about the level of prices.

The Commission recognizes that intra-day traders who monitor the market may cause prices to reflect changes in economic conditions more quickly. Nevertheless, the Commission believes that limitations on the ability of intra-day traders to receive instantaneous execution of their orders through SOES would not significantly reduce the incentives for market makers to incorporate all economically relevant information quickly. Market makers have an incentive to maintain accurate quotes because market maker quotations must be firm pursuant to the Commission's firm Quote Rule.[62] In addition, various broker-dealers operate their own internal small order execution systems that execute orders based on the inside quotations in Nasdaq.[63] These broker-dealers have an economic incentive to ensure that quotes of an aberrant market maker are not stale.

In addition, the Commission disagrees with commenters who suggest that intra-day trading activity necessarily contributes liquidity and depth to the market. The liquidity contribution of the increased volume from active intra-day trading may be illusory, at best.[64] For example, active traders closing out sales effected minutes before often make no contribution to market liquidity other than to offset the liquidity they demanded in acquiring their short position. In any event, to the extent that these trades may contribute to liquidity, their liquidity contribution does not depend on whether they occur through SOES, as opposed to through SelectNet or over the telephone.

C. Analysis of the Proposed Modifications

The Commission has evaluated each of the proposed modifications to SOES, and concludes that each of the modifications reduces the adverse effects of active trading through SOES and better enables market makers to manage risk while maintaining continuous participation in SOES. In addition, the Commission does not believe that any of the modifications will have a significant negative effect on market quality. To the extent that any of the modifications may result in a potential loss of liquidity for small investor orders, the Commission believes that these reductions are marginal and are outweighed by the benefits of preserving market maker participation in SOES and increasing the quality of executions for public and institutional orders as a result of the modifications.

1. Decrease in the SOES Maximum Order Size

The Commission concludes that the benefits to the market in terms of limiting active trading through SOES outweigh any limited decrease in liquidity for small retail orders as a result of reducing the SOES maximum order size. The Commission believes that reducing the maximum size order eligible for execution through SOES from 1,000 to 500 shares reduces the economic incentives for intra-day trading strategies through SOES, and reduces the exposure of market makers to such activity. In addition, the Commission believes that the reduction in maximum order size will have little effect on the retail investors for whom SOES was primarily intended. in fact, the Commission believes that the modifications actually may enhance liquidity for small orders during active markets by reducing market makers' exposure to intra-day trading strategies through SOES and encouraging market makers to quote more competitive markets and commit more capital of the market.[65]

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continue to quote 1,000-share markets and risk their capital. The uncertainty of establishing equilibrium prices in fast markets means that market makers will trade in smaller size. See, e.g., 1987 Market Break Report at 9–1.

[59] See. *e.g.* letters to Jonathan G. Katz, Secretary, SEC, from Mark D. Shefts, President, All-Tech Investment Group, Inc., at 10, 12, 15 (May 11, 1993); Harvey L. Pitt, Fried, Frank, Harris, Shriver & Jacobson, Counsel for Dina Securities, Inc., at 4 (August 6, 1993) ("Dina August letter"); Behar, Bypassing the Brokers, at 42–43.

[60] It is only because they seek to exploit fleeting changes in prices that these traders require instantaneous execution of their orders. Generally, profiting from fundamental information does not require instantaneous executions and intra-day, round-trip trading, or even the ability to trade through SOES at all. Were they trading on the basis of superior analysis, these traders could still profit by trading through SelectNet or over the telephone.

[61] That is, these trades occur at prices that no longer reflect the market for the security because the market makers subject to these SOES executions have not yet had an opportunity to update their quotations.

[62] See 17 CFR 240.11Ac1–1(c).

[63] Broker-dealers operating proprietary order execution systems are subject to best execution requirements and must execute internalized orders at the inside market, even if that quotation is out of line with the rest of the market. See NASD Manual, Rules of Fair Practice, Art. III, Sec. 1, Interpretation of the Board of Governors, Transactions in the OTC Market, (CCH) ¶2151.03.

[64] An increase in market activity does not necessarily produce an increase in market liquidity. For example, it may be generally assumed that higher transaction volume reduces a market maker's inventory carrying costs, thereby reducing spreads and increasing a market maker's willingness to accommodate large trades. Tinic, The Economics of Liquidity Services, 86 Q. J. Econ. 77, 93 (1972); Demsetz, The Cost of Transacting, 82 Q. J. Econ. 33, 50 (1968). Nevertheless, the liquidity gains attributable to increased volume are contingent on an even distribution of transaction volume—in other words, nearly equivalent numbers of buy and sell orders. Tinic, Liquidity Services at 80–81. Concentrated volume that follows the trend of price movements would not be expected to produce the liquidity gains normally associated with increased transaction volume.

[65] The Commission recognizes that its approval of the reduction in maximum order size represents a shift from previous Commission statements that a 1,000-share SOES maximum order size is necessary to ensure liquidity for small retail orders during periods of market volatility. See Securities Exchange Act Release No. 25791. These statements were made in connection with enhancements to SOES after the market break of 1987. Since that time, however, the Commission has gained experience with respect to the effects of active intra-day trading through SOES. Furthermore, the Commission's statements that a 1,000-share maximum order size is necessary to ensure liquidity for small retail orders during periods of market stress did not anticipate subsequent enhancements to Nasdaq. Since the Commission's statements, the NASD has proposed, and the Commission has approved, additional safeguards to ensure liquidity in times of market stress. These enhancements included the introduction of SelectNet, which reduces reliance on the telephone and provides for the efficient negotiation of orders, including orders that exceed the SOES maximum order size. In

Some commenters objecting to a reduction in the maximum order size argue that because the Firm Quote Rule requires market makers to be firm for orders up to their published size—that is, 1,000 shares or more for the highest tier of Nasdaq NMS securities—the Rule should be interpreted to require that market makers be firm for orders of the same size that are received through SOES. The Commission believes that a reduction in the SOES maximum order size is consistent with the size requirement of the Commission's Firm Quote Rule.[66] The Firm Quote Rule requires market makers to honor orders in amounts up to their displayed quote sizes; however, nothing in the Firm Quote Rule imposes specific quote sizes on market makers. In the Nasdaq market, existing NASD rules impose varying quotation size requirements upon market makers based upon the characteristics of the trading medium.[67] Thus, the rules permit a market maker to trade in different sizes over the telephone than through SOES.[68] For example, a market maker may offer 2,000 shares of a security at its quoted price for execution over the telephone or SelectNet, but under NASD rules, need only execute 1,000 shares at its quoted price in SOES.[69]

The Commission's Firm Quote Rule requires only that the market maker honor its quote in amounts up to the market maker's obligated size; it does not dictate the means by which customers are entitled to receive such executions.[70] The reduction in maximum order size is consistent with the Firm Quote Rule because market makers remain obligated to honor orders greater than 500 shares over the telephone or SelectNet.

In this regard, the Commission acknowledges the comments from public customers regarding the difficulty of reaching market makers on the telephone and the problem of market makers refusing to trade at their quotations.[71] The Commission takes these allegations seriously, especially given that short sales and orders larger than 500 shares now may receive executions only through SelectNet or over the telephone. The Commission expects rigorous NASD enforcement of market makers' firm quote obligations,[72] and in its oversight capacity, will scrutinize the NASD's enforcement of these obligations, and its investigation of backing away complaints.

2. Reduction in the SOES Minimum Exposure Limit

The Commission believes that the reduction in the minimum exposure limit provides market makers with a better opportunity to react to market movements.[73] Currently, market makers can be subject to as many as five 1,000-share executions through SOES. Although the system allows market makers 15 seconds between orders to reassess their markets, market makers still may not be able to react in time to avoid subsequent executions at their prices. Thus, a market maker willing to commit to only 1,000-share at its prices may be subject to multiple 1,000-share executions at those prices before it has an opportunity to react. Reducing the minimum exposure limit will reduce the exposure of market makers to multiple executions through SOES.

In addition, the Commission believes that eliminating exposure limits for preferenced orders may reduce the potential for market makers to deplete their exposure limits and enhance the opportunity for customers to receive expeditious executions of their orders in SOES. Preferenced orders should never again trigger the closed quote and five-minute grace period that follows depletion of a market maker's exposure limit, and to the extent of preferenced orders, should serve to increase liquidity. Therefore, the Commission believes that on balance, the modifications will have a negligible effect on liquidity for SOES orders.[74]

Allowing market makers to lower the minimum exposure limit for unpreferenced orders from five to two times the maximum order size, and eliminating exposure limits for preferenced orders, does not represent unfair discrimination. Under a preferencing arrangement, the broker-dealer presumably agrees not to take advantage of the market maker when it is showing an untimely inside quotation, in return for which the market maker waives its exposure limit.[75] "It would be peculiar indeed to force upon the market maker and its customer the broker-dealer, both investment professionals," an exposure limit "neither party wants."[76] The Commission believes that it is not unfair for a market maker to waive the protection of its exposure limit for certain customers. In this sense, it is no different from situations in which a firm negotiates individual exposure limits on its trading desk in deciding how much

addition, in 1990 the Commission approved a rule change that established a minimum quotation size in Nasdaq of 1,000 shares for the highest tier of Nasdaq NMS securities. The Commission believes that in light of these enhancements, a reduction in the maximum order size would not have a substantial negative effect on market liquidity during times of market stress and actually may improve liquidity.

[66] See 17 CFR 240.11Ac1-1(c)(2).

[67] NASD Manual, Sched. D to the By-Laws, Part VI, Sec. 2(b), (CCH) ¶ 1819. Indeed, historically, NASD rules provided for different quote sizes for SOES than for telephone execution. Prior to adoption of the 1990 display size requirement of 1,000 shares for the highest tier of Nasdaq NMS stocks, all Nasdaq securities were subject to a display size requirement of only 100 shares. At the same time, market makers were subject to executions of SOES orders of up to 1,000 shares.

[68] See NASD Manual, Sched. D to the By-Laws, Part VI, Sec. 2(a) (CCH) ¶ 1819.

[69] It is worth noting that the same situation arises with respect to automated execution systems on the regional exchanges. For example, on the Philadelphia Stock Exchange, specialists often post quotes that exceed the maximum size order eligible for execution through PACE, its automated execution system. See Securities Exchange Act Release No. 26968 (June 23, 1989), 54 FR 26141 (July 5, 1989) (maximum size order eligible for execution through Philadelphia Automated Communication and Execution System is 599 shares). Similarly, specialists on the American Stock Exchange often quote sizes that exceed the maximum size order eligible for execution through Auto-Ex, an automated system which executes customer market and marketable limit orders of up to 599 shares during periods of extremely high order flow. See Securities Exchange Act Release No. 32393 (June 1, 1993), 58 FR 32159 (June 8, 1993).

[70] The Commission believes that in connection with a system like SOES which provides automatic execution of orders, it is appropriate to limit the size of orders eligible for execution. *See* 17 CFR 240.11Ac1-1(d). Larger orders entail increased risks and costs for market makers. *See* Easley & O'Hara, Adverse Selection and Large Trade Volume: Implications for Market Efficiency, 27, J. Fin. & Quant. Analysis 185, 186-205 (1992) (the larger the order size, the more likely it is that the market maker is trading with an informed trader, which raises the risks of taking a position). It is economically rational that these orders should receive a form of execution that provides market makers a better opportunity to react.

[71] See letters to Jonathan G. Katz, Secretary, SEC, from Kelly Jordan (received June 10, 1993); John M. Contento (May 11, 1993).

[72] Commission and NASD rules require market makers to honor their quotations. 17 CFR 240.11Ac1-1(c)(2); NASD Manual, Sched. D to the By-Laws, Part VI, Sec. 2(b), (CCH) ¶ 1819. Further, NASD rules provide for disciplinary procedures and sanctions for violations. NASD Manual, Rules of Fair Practice, Art. V, Sec. 1, (CCH) ¶ 2301.

[73] Ordinarily, a market maker would have a reasonable opportunity to update its quotations following an execution, and consistent with its obligations under the Commission's Firm Quote Rule, may decline to trade at its published quotations while it is in the process of updating. With SOES, market makers are subject to multiple executions and may not have sufficient time to update their quotations following an execution before receiving subsequent executions through SOES.

[74] Again, the Commission recognizes that the reduction in the minimum exposure limit is inconsistent with its statements in approving previous modifications to SOES. In approving the 1988 Rules and 1991 Rules, the Commission noted its reluctance to lowering the minimum exposure limit, "which affects the liquidity of the entire OTC market." Securities Exchange Act Release No. 29809 at 23; Securities Exchange Act Release No. 26361 at 15-16. For the reasons discussed above, the Commission believes that additional modifications are now required to reduce the adverse effects of such trading activity in the Nasdaq market.

[75] *Cf. Timpinaro*, 2 F.3d at 457.

[76] *Timpinaro*, 2 F.3d at 457.

capital it is willing to commit to larger orders.

3. Automated Quotation Updates

The Commission believes that the proposed automated quotation update function enhances the ability of market makers to react to automatic executions through SOES, with little effect on market liquidity.[77] Under the Commission's Firm Quote Rule, market makers are entitled to update their quotations following an execution and prior to accepting a second order at their published quotes.[78] Many firms have developed proprietary software to automate this function internally.[79] In many respects, the NASD's proposal expands the availability of new technology to all market makers at lower costs.[80] Furthermore, the Commission believes that the automated update function will enable market makers to respond more quickly to market moves, thereby increasing pricing efficiency.

Commenters opposing the rule change believe that the automated quotation update function in conjunction with the reduction in the minimum exposure limit to only 500 shares for market makers using the update function will result in more frequent quotation updates.[81] These commenters argue that as a result, volatility will increase during periods of active trading. The Commission recognizes that use of the update function in active markets may result in more frequent quotation updates, but believes that the update function merely enables market makers to respond more quickly to price movements resulting from SOES order flow, and should increase pricing efficiency. Accordingly, introduction of the automated update function should not adversely affect market quality.[82]

Furthermore, the Commission believes that on balance, the automated update function will not reduce liquidity for SOES orders. As described above, market makers electing to use the update function may lower their exposure limit to the maximum order size for that security. Because market makers using the update function will not be subject to closed quotes on SOES following depletion of their exposure limits, the automated update function reduces the potential for a 5-minute interruption in pricing that occurs when market makers have exhausted their exposure limits. In addition, the Commission believes that the automated update function will help ensure that quotations progress in a continuous, orderly manner during periods of market stress.

4. Prohibition Against Selling Short Through SOES

The Commission recognizes that as a general matter, short sellers benefit the market in terms of increased price efficiency.[83] Nevertheless, the Commission believes that prohibiting selling short through SOES is a means reasonably designed to reduce the costs to market makers and investors that result from active intra-day trading activity through SOES. Given the costs of intra-day trading through SOES,[84] and the availability of other means to execute short sales (over the telephone or through SelectNet), the Commission believes that any burden on short sellers is outweighed by the benefits of potentially narrower spreads and enhanced liquidity in Nasdaq securities. Indeed, evidence submitted by the NASD tends to show that short sales among typical retail investors are infrequent and rarely executed through SOES.[85] It follows that the preponderance of short sales executed through SOES represent the trades of intra-day traders reacting to price movements. Accordingly, the Commission believes that prohibiting the execution of short sales through SOES is an effective means of limiting intra-day trading through SOES, with little concomitant effect on retail investors.

D. The Proposed Modifications Do Not Impose Unnecessary or Inappropriate Burdens on Competition

Although the Commission believes that the modifications are appropriate to preserve market maker participation in SOES and a liquid Nasdaq market, the Commission still must assess the effects of the rule change on competition. In enacting section 15A(b)(9) of the Act, Congress obligated the Commission to "balance the perceived anti-competitive effect of the regulatory policy or decision at issue against the purposes of the Exchange Act that would be advanced thereby and the costs of doing so."[86] Although the Commission is

[77] In comparison, the Commission has allowed regional exchange specialists to use automated quotation update systems—commonly referred to as "Autoquote" systems—that permit specialists on the regional exchanges to track the quotations of the primary exchanges and to disseminate quotations automatically in response to changes in the quotations of the primary market, even where no transaction has occurred in the regional market. See generally, Securities Exchange Act Release No. 17583 (February 27, 1981), 46 FR 15713 (March 9, 1981).

[78] The Firm Quote Rule requires market makers to execute orders at prices at least as favorable as their quoted prices. The Rule also allows market makers a reasonable period of time to update their quotations following an execution; allows market makers to reject an order if they are in the process of updating their quotations; and provides for a size limitation on liability at a given quote. 17 CFR 240.11Ac1-1(c)(2). See also, Securities Exchange Act Release No. 14415 (January 26, 1978), 43 FR 4342 (February 1, 1978). The Commission believes that the proposed automated update function is consistent with the Firm Quote Rule: the update function allows market makers the opportunity to update their quotations after executions on SOES, and protects market makers from multiple executions before they can update.

[79] See Securities Exchange Act Release No. 32432 (June 8, 1993), 58 FR 33127 (June 15, 1993).

[80] The Commission believes that the automated quotation update function is consistent with the NASD's "autoquote" policy. This policy prohibits systems that effect automatic quotation updates or track inside quotations in Nasdaq because of the potential effect of the additional quotation traffic on Nasdaq system capacity. Securities Exchange Act Release No. 32432. The policy, however, provides an exception for the automated update of a market maker's quotation in response to an execution by that market maker. The NASD has asserted that the limited quotation traffic attributable to individual market maker quotation updates following an execution will not overload Nasdaq system capacity. NASD Automated Update letter at 2.

[81] See, *e.g.*, letters to Jonathan G. Katz, Secretary, SEC, from Douglas P. Ralston, President, Shearman, Ralston Inc., at 4 (May 10, 1993); Dina August letter at 15.

[82] In connection with its approval of the instant rule change, the Commission is requiring the NASD to provide an interim report on the effects of the automated quotation update function six months after the pilot is implemented. In this regard, the Commission expects the NASD to monitor market makers' use of the automated update function and provide the Commission with data as to the number of market makers using the update function in each security, and the exposure limits and update intervals market makers have selected for purposes of the update function.

[83] See Securities Exchange Act Release No. 29278 (June 7, 1991), 56 FR 27280 (June 13, 1991). Efficient markets require that prices fully reflect all buy and sell interest, including that of market participants who believe that a stock is overvalued. Shortsellers contribute to pricing efficiency because their trades assure that their perceptions of the issuer are reflected in its stock price.

[84] As described above [see *supra* notes 48–50, 52–54, and accompanying text], intra-day SOES traders subject market makers to increased costs by monitoring the market more closely than other market participants and executing against them through SOES when they fail to update their quotations virtually simultaneously with market moves. SOES is a special form of access to the market that market makers can afford to offer only for orders that pose less risks and costs. Market makers are willing to provide automatic execution of small investor orders because of the low risks and costs associated with such orders. In other words, access to SOES is a form of non-price discount that market makers offer for execution of less expensive orders. *Cf. Timpinaro*, 2 F.3d at 457 ("Non-price discounts are an everyday feature of business; not only is there nothing inherently 'unfair' about them, they have the same pro-competitive effect as a price discount."). See also Ginsburg, Non-Price Competition, 38 Antitrust Bull. 83 (1993). Given that most short sales through SOES are attributable to intra-day traders, the Commission believes that it is fair and economically rational to limit the exposure of market makers to shortselling through SOES.

[85] See Securities Exchange Act Release No. 32143 at 17; NASD July letter at 13.

[86] S.Rep. No. 75, 94th Cong., 1st. Sess., at 13 (1975). The drafters formulated the Commission's duty in this respect variously as the "explicit obligation to balance, against other regulatory

sensitive to avoiding unnecessary competitive burdens, the statute does not require the NASD to achieve its objective in the least anti-competitive manner.[87] Rather, the statute requires a Commission determination that any anti-competitive effects are necessary or appropriate to achieve the objectives of the Act. The Commission has scrutinized the potential anti-competitive effects of the rule change, and has determined that the rule change does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission believes that it is appropriate to exclude from SOES discernable trading practices that impose excessive risks and costs on market makers and jeopardize market quality. Different kinds of customers present different costs to market makers.[88] Market makers are willing to guarantee execution for retail investors' orders in light of the relatively low potential risks associated with such order flow.[89] The Commission believes that establishing different minimum exposure limits for unpreferenced and preferenced order flow is appropriate because unpreferenced order flow includes the trades of active traders.[90]

Furthermore, the Commission does not believe that active customers will be at a competitive disadvantage because they cannot obtain automatic execution of short sales and orders over 500 shares.[91] The Commission notes that this limitation applies to all market participants rather than specifically limiting a class of investors.[92] Moreover, short sales and orders over 500 shares continue to be eligible for negotiated execution through SelectNet or over the telephone. Therefore, the Commission believes that any discrimination or anti-competitive effects are outweighed by the benefits of narrower spreads and a more liquid market for Nasdaq securities.[93] Accordingly, the Commission believes that any discrimination or anti-competitive effect is appropriate in light of the increase in Nasdaq market quality.

VI. Conclusion

The Commission, in the exercise of the authority delegated to it by Congress, and in light of its experience regulating securities markets and market participants, has determined that the instant modifications to SOES further objectives of investor protection and fair and orderly markets, and that these goals, on balance, outweigh any marginal effects on liquidity for small retail orders, and any anti-competitive effects on order entry firms and their customers. The Commission concludes that the ability of active traders to place trades through a system designed for retail investors can impair market efficiency and jeopardize the level of market making capital devoted to Nasdaq issues. The Commission believes that the rule change is an appropriate response to active trading through SOES, and that the modifications will reduce the effects of concentrated intra-day SOES activity on the market. The Commission concludes that the rule change strikes a balance between the need to preserve the efficiency and integrity of the market with the need for customer access to immediate executions through SOES.

The Commission believes that the instant rule change is a reasonable effort by the NASD to address the liquidity effects of active intra-day trading activity through SOES. The proposal will be effective for one year,[94] by which time the Commission expects it will revisit many of the issues considered today. Any further action the NASD seeks with respect to SOES—extension of these modifications upon expiration, or introduction of other changes—will require an independent consideration under Section 19 of the Act.[95] In that regard, the Commission expects the NASD to monitor the quality of its markets and assess the effects of these changes on market quality for Nasdaq securities. If feasible, the NASD should provide a quantitative and statistical assessment of the effects of the modifications on market quality.

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criteria and considerations, the competitive implications of self-regulatory and Commission action," and the "responsibility * * * to balance the perceived anti-competitive effects of the regulatory policy or decision at issue against the purposes of the Exchange Act that would be advanced thereby and the costs of doing so," and the weighing of "the need for and effectiveness of regulatory actions in achieving the purposes [of the Exchange Act] * * * against any detrimental impact on competition." *Id.* at 13–14. See also *Bradford National Clearing Corp. and Bradford Securities Processing Services, Inc.* v. *SEC*, 590 F.2d 1085, 1105 (DC Cir. 1978).

[87] *Bradford*, 590 F.2d at 1105.

[88] See Securities Exchange Act Release No. 26361, Concurring Opinion of Commissioners Grundfest and Fleischman.

[89] Many securities exchanges with automated execution systems limit trading that is inconsistent with the purpose of those systems as facilities for executing retail orders. These exchanges include the Philadelphia Stock Exchange (options and equities), American Stock Exchange (options), Chicago Stock Exchange, Cincinnati Stock Exchange, Boston Stock Exchange, Pacific Stock Exchange (options and equities), and the Chicago Board Options Exchange ("CBOE"). See, *e.g.*, Securities Exchange Act Release No. 26968 (Philadelphia Automated Communication and Execution System: automated execution of agency orders—*i.e.*, public customer orders not for account of broker-dealer or any account in which broker-dealer has direct or indirect interest—of up to 599 snares); Securities Exchange Act Release No. 28411 (September 6, 1990), 55 FR 37784 (September 13, 1990) (CBOE's Retail Automatic Execution System ("RAES"), limited to public customer orders).

In addition, various proprietary trading systems ("PTSs") exclude investors who do not meet specified criteria of creditworthiness because the proprietary nature of the systems exposes them to a greater risk of default by their customers. Two PTSs make additional distinctions: AZX, Inc. (formerly Wunsch Auction Systems, Inc.) is limited to participants trading for their own accounts, thus excluding customers who rely on a broker to effect their trades; Institutional Networks Corp. (Instinet) permits institutional traders to limit their market activity to other institutions, thereby excluding customers represented by broker-dealers from their negotiations.

[90] This market segmentation is an example of efficient price discrimination, and is similar to the segregation of wholesale and retail customers that results in different brokerage commissions schedules for retail and institutional clients.

[91] In addition, the Commission does not believe that the modifications deprive SAT firm customers of best execution of their orders. Best execution refers to the duty of a broker-dealer to execute customer orders so that the customers' total cost or proceeds are the most favorable under the circumstances. Securities Exchange Act Release No. 30920 (July 14, 1992), 57 FR 32587, 32595 (July 22, 1992) (Market 2000 concept release). The Act speaks of best execution in terms of assuring exonomically efficient execution of securities transactions and the practicality of brokers executing investor orders in the best market, but does not guarantee maximum speed of execution. See 15 U.S.C. 78k–1. Moreover, best execution does not require that every system, regardless of the purpose for which the system was designed, be made available for the execution of an order. If access to SOES is unavailable for execution of an order because of the system's design limitations with respect to dealer negotiation, order size, or trading practices, orders executed elsewhere, even if less speedy, still may be consistent with best execution.

[92] See also text accompanying *supra* notes 75–76. Commenters argue that the rule change discriminates among broker-dealers by prohibiting order entry firms from using SOES to execute customer short sales, while permitting market makers to sell short through SOES for their own accounts. See letter from Junius W. Peake, Monfort Executive Professor of Finance, University of Northern Colorado, to Jonathan G. Katz, Secretary, SEC, at 7; Dina August letter at 17. This argument is based on a misperception of existing SOES rules. NASD rules prohibit market makers from using SOES for proprietary orders. NASD Manual, SOES Rules, Secs. (a)(12), (c)(3)(C)–(D), (CCH) ¶¶ 2451, 2460. When market makers execute SOES buy orders, they are merely responding to orders they have received; they are not using SOES to effect portfolio preferences and accumulate a short position.

[93] Indeed, the Commission believes that the proposed rule change may actually enhance competition because it facilitates the ability of broker-dealers to make markets in more securities. Such market making competition is itself an important goal of the Act because it increases liquidity and promotes competition among broker-dealers.

[94] See Amendment No. 4.

[95] Although the modifications should significantly limit active trading on SOES, the NASD has indicated that it may seek additional rul changes to limit such trading further. The Commission will evaluate the need for further modifications in light of experience gained with respect to the current modifications.

The NASD should consider whether additional criteria for evaluating the effectiveness of the modifications are appropriate, and should include in its assessment of the modifications all factors that it deems relevant in evaluating the effects of the modifications. If an assessment is not feasible, the NASD should provide a reasoned explanation supporting that determination.

Accordingly, the Commission finds that the rule change is consistent with the Act and the rules and regulations thereunder applicable to the NASD and, in particular, sections 15A(b)(6), 15A(b)(9), and 15A(b)(11). In addition, the Commission finds that the rule change is consistent with the Congressional objectives for the equity markets, set out in Section 11A, of achieving more efficient and effective market operations, fair competition among brokers and dealers, and the economically efficient execution of investor orders in the best market.

It is therefore ordered, Pursuant to section 19(b)(2) of the Act, that the instant rule change SR–NASD–93–16 be, and hereby is, approved in part on a one-year pilot basis, effective January 7, 1994.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–31934 Filed 12–29–93; 8:45 am]

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[Release No. 34–33372; File No. SR–NYSE–93–40]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by New York Stock Exchange, Inc. Relating To Amendments To Exchange Rule 95 To Add New Intra-Day Trading Provisions.

December 23, 1993.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on October 28, 1993, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rules change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed amendments to Rule 95 would require a Floor broker who acquires a position for a customer, while representing orders at the minimum variation for that customer, to obtain a new liquidating order, entered subsequent to the acquisition of the position, prior to liquidating that position that day on the Exchange.[1]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed amendments to Rule 95 is to provide that in instances where a Floor broker acquires a position for an account during a particular trading session while representing at the same time, on behalf of that account, market or limit orders at the minimum variation on both sides of the market, the broker may liquidate or cover the position established during that trading session only pursuant to a new order.[2] The new liquidating order must be time-recorded both upstairs and upon receipt of the trading Floor.

For the purposes of this rule, an account would be deemed to be any account in which the same person or persons was directly or indirectly interested. The rule would also require a Floor broker representing an order to liquidate or cover a position for an account, established during the same trading session at a time that the broker represented orders at the minimum variation on both sides of the market for such account, to execute that liquidating or covering order before executing any other order on the same side of the market for the same account.[3] This requirement would apply unless such other order was liquidating or covering a position carried over from a prior trading session,[4] or was liquidating or covering a position acquired during that same trading session and was entered subsequent to the acquisition of the position.[5]

The amendments to Rule 95 are intended to address trading situations where a Floor broker, representing at the same time buy and sell orders at the minimum variation for the same customer, may be perceived as having somewhat of an advantage over other market participants in that he or she may be able to trade for the same customer without leaving the crowd. By requiring entry of a new order to liquidate as described above, the amendments can be expected to minimize any such perceived advantage by those engaging in this trading strategy.

New Paragraph 95.20 includes examples of how the provisions would operate. New Paragraph 95.30 includes examples of the types of orders that may, and may not be, entered when a member is representing buy and sell orders for the same customer at the same time.[6]

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[1] In addition to addressing intra-day trading, the Exchange also has proposed to codify its existing policy on how NYSE Rule 95, which prohibits Floor members from effecting discretionary transactions, applies to brokers. See *infra*, note 6.

[2] The Commission notes that the NYSE proposal would apply only when a Floor broker simultaneously represents market or limit orders for the same customer on both sides of a minimum variation market. The proposed amendments to Rule 95 would not affect the handling of system orders or of orders represented by a broker when the spread is more than the minimum variation.

Once the broker acquires a position on behalf of that customer, proposed Rule 95(c) would impose certain restrictions on how the broker could liquidate or cover that position *during the same trading session.* Specifically, the broker would be required to obtain a "new" liquidating order (*i.e.*, one entered subsequent to the acquisition of the contra-side position).

[3] Proposed Rule 95(d) would, as a general matter, require that a liquidating order entered pursuant to proposed Rule 95(c) be executed before any other order for that customer on the same side of the market as the liquidating order.

[4] The NYSE proposal would permit a broker to execute certain orders although the contra-side position continued to exist. Specifically, proposed Paragraph 95.10 would create an exception for orders to liquidate or cover a position (1) carried over from a previous trading session, (2) assumed as part of a strategy relating to bona fide arbitrage or (3) assumed in reliance on the exemption for block petitioners.

[5] The NYSE has clarified that a broker who acquires multiple positions and enters multiple liquidating orders would not be required to execute a subsequent liquidating order before a pre-existing one. Telephone conversation between Brian McNamara, Managing Director, Market Surveillance, NYSE, and Beth Stekler, Attorney, Division of Market Regulation, SEC, on November 19, 1993.

[6] The NYSE has indicated that Paragraph 95.30 would apply to all brokers, not just those engaged

2. Statutory Basis

The basis under the Act for the proposed rule change is the requirement under section 6(b)(5) that an Exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of, a free and open market and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such other period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the purposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR–NYSE–93–40 and should be submitted by January 20, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

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in intra-day trading. According to the Exchange, this paragraph would codify an existing policy by providing examples of what types of orders a broker could handle simultaneously, without violating Rule 95's prohibition on Floor members effecting discretionary transactions. Telephone conversation between Brian McNamara, Managing Director, Market Surveillance, NYSE, and Beth Stekler, Attorney, Division of Market Regulation, SEC, on November 19, 1993.

[Release No. 34–33369; File No. SR;NYSE–93–30]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change Relating to Measure of Specialist Capital Utilization Pilot Program

December 22, 1993.

On June 29, 1993, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt an additional measure of specialist performance. The Exchange requested that the Commission approve this proposed rule change on a one-year pilot basis.

The proposed rule change was published for comment in Securities Exchange Act Release No. 34–32751 (August 16, 1993), 58 FR 44716 (August 24, 1993). No comments were received on the proposal. This order approves the proposed rule change on a one-year pilot basis.

II. Description of the Proposal

The NYSE proposes to implement, for a one-year pilot period, a measure of specialist performance dealing with specialist utilization of capital for market-making. This measure of performance focuses on a specialist unit's use of its own capital in relation to the total dollar value of trading activity in the unit's stocks. Ratings based on a unit's capital utilization would be given to the Exchange's Allocation Committee as one of the objective measures it considers when allocating equity securities to NYSE specialist units under its Allocation Policy.[3] The specialist unit also would be given capital utilization percentages for each stock they trade to be used for internal management purposes.

Two different capital utilization measures would be derived for each stock traded by a specialist unit. The first percentage would be calculated by dividing the average daily dollar value of the unit's stabilizing purchases and sales in a stock by that stock's average daily total dollar value of shares traded. The second percentage would be calculated by dividing the average daily dollar value of the unit's stabilizing plus reliquifying transactions[4] by the stock's average daily total dollar value of shares traded. These two measures would be calculated for two different trading periods: (1) Base or non-volatile periods and periods when there is a change of one percent or more in the S&P 500 Stock Price Index,[5] and (2) base of non-volatile periods and the past ten percent most volatile days.[6] Thus, four capital utilization measures[7] would be calculated for each of the two trading periods for a total of eight different capital utilization percentages for each stock traded by a specialist unit. These

[1] 15 U.S.C. 78s(b)(1) (1988).

[2] 17 CFR 240.19b–4 (1991).

[3] The Commission recently approved revisions to the NYSE's Allocation Policy. Securities Exchange Act Release No. 34–33121 (October 29, 1993), 58 FR 59085 (November 5, 1993) (file no. SR–NYSE–92–15). The revised Allocation Policy specifies that the Committee will base its allocation decisions on the Specialist Performance Evaluation Questionnaire ("SPEQ"), objective performance measures, and the Committee's expert professional judgment. The revised Allocation Policy states explicitly that its objective measures of performance include, among other things, a specialist's TTV rate, stabilization rate, and such other measures as may be adopted.

[4] A reliquifying transaction is one in which the specialist reduces a position in a specialty stock by selling part of a long position on a zero-minus tick, or purchasing to cover part of a short position on a zero-plus tick.

[5] The base or non-volatile period includes the total average daily dollar value for the trading days within the twelve month period excluding those days during which there was a change of 1% or more in the S&P 500 Price Index. The volatile period includes the total average daily dollar value for the trading days within the twelve month period during which there was a change of 1% or more in the S&P 500 Price Index.

[6] The base or non-volatile period includes the total average daily dollar value for the days within the twelve month trading period that were not among the 10% most volatile. The volatile period includes the average daily dollar value for the days within the twelve month period that were the 10% most volatile.

[7] The four measures are (1) stabilizing trades during non-volatile periods, (2) stabilizing plus reliquifying trades during non-volatile periods, (3) stabilizing trades during volatile periods, and (4) stabilizing plus reliquifying trades during volatile periods.

figures would be provided to the specialist units on a monthly basis for the prior twelve months.[8]

To compare a specialist's unit's capital utilization to other units, stocks would be separated into three broad groupings: (1) Stocks included in the top 200 stocks in the S&P 500 Stock Index and other Exchange-listed stocks that are at least as active, (2) the remainder of the S&P 500 and any stocks among the 500 most active stocks traded on the Exchange, and (3) all other stocks traded on the Exchange.[9] Each of the eight capital utilization percentages would be calculated for the aggregate of all the stocks a specialist unit trades in each of the three groupings of stocks.[10] A specialist unit, therefore, would receive eight utilization percentages for each of the three groupings of stocks.

The specialists units; capital utilization percentages for each grouping of stocks would be used to separate the units into tiers. Within each grouping of stocks, a Floor-wide mean capital utilization percentage would be calculated. A unit would be in Tier 1 if its capital utilization percentage is more than 1.1 standard deviations above the mean, Tier 2 if its percentage is within 1.1 standard deviations above or below the mean, and Tier 3 it its percentage is more than 1.1 standard deviations below the mean. Thus, a specialist unit would receive eight tier ratings for each of three groupings of stocks, for a total of 24 tier ratings.[11]

The Allocation Committee would receive a specialist unit's 8 tier ratings for each of the three groupings of stock as one of the objective performance measures considered under the Exchange's Allocation Policy. The Exchange would place specialist units into the tiers alphabetically to avoid providing the Allocation Committee with a ranking of the units based upon percentages that, in some instances, could be statistically insignificant. The Allocation Committee would receive specialist capital utilization information on a "rolling" twelve-month basis.

The Exchange proposed that this new measure of specialist performance be implemented on a one-year pilot basis. During this period, the Market Performance Committee would receive quarterly reports on this initiative, with a view toward their recommending such enhancements or modifications as may seem appropriate based on actual experience with this measure.[12] Any modification or enhancements would be filed with the Commission, and would be implemented only with the Commission's approval.

III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with the requirements of section 6(b)(5) of the Act.[13] Section 6(b)(5) requires that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, and, in general, to protect investors and the public interest. Further, the Commission finds that the proposal is consistent with section 11(b) of the Act[14] and Rule 11b–1 thereunder,[15] which allow exchanges to maintain fair and orderly markets. For the reasons set forth below, the Commission believes that the consideration of specialist capital utilization by the Allocation Committee should enhance the Exchange's allocation process, encourage improved specialist performance and, thereby, protect investors and the public interest.

Specialists play a crucial role in providing stability, liquidity, and continuity to the trading of securities. Among the obligations imposed upon specialists by the Exchange, and by the Act and the rules thereunder, is the maintenance of fair and orderly markets in their designated securities. To ensure that specialists fulfill these obligations, it is important that the Exchange prescribe stock allocation procedures and policies that provide specialists with an initiative to strive for optimal performance. The Commission fully supports and encourages the NYSE's effort to develop an objective measure of specialist capital utilization to encourage improved specialist performance and market quality.

The Commission believes that the proposed specialist capital utilization tier ratings should provide the NYSE Allocation Committee with an objective measure of specialist performance that will refine the Exchange's allocation process and, thereby, encourage improved specialist performance. The NYSE's Allocation Policy emphasizes that the most significant allocation criterion is specialist performance. In the Commission's view, performance based stock allocations not only help to ensure that stocks are allocated to specialists who will make the best markets, but will provide an incentive for specialists to improve their performance or maintain superior performance.

The Commission believes that objective indications of performance should play an important role in allocation decisions. Specifically, the Commission believes that objective performance measures can identify poor market-making performance. In the Commission's view, performance based stock allocations not only help to ensure that stocks are allocated to specialists who will make the best market, but will provide an incentive for specialists to improve their performance or maintain superior performance.

The Commission believes that capital utilization is a relevant measure of specialist performance because it indicates the extent to which a specialist unit commits capital to and participates in the market for its securities. The Commission also believes that, in general, active specialist participation contributes to liquidity in the market for securities.

The Commission believes that the NYSE's proposal to require that capital utilization performance data be presented to the Allocation Committee in three tiers, with units listed alphabetically in each comparable group, should enable units with similar capital utilization percentages to compete effectively with units with comparable scores. The NYSE argues that the units comprising each tier would have capital utilization percentages which are not, from a statistical perspective, significantly different from the other units' scores in that tier. The Commission believes that the presentation of the results in three tiers should provide the Allocation Committee with appropriate groupings of specialist units for its use in allocation decisions under its Allocation Policy. This may help to ensure that all

[8] The Exchange will also indicate to the specialist units whether their stocks are high, mid-range, or low beta stocks. A stock would be a low beta if its beta is below 0.5, a mid-range beta stock if its beta is 0.5 to 1.5, and a high beta stock if its beta is above 1.5.

[9] These three groups do not include the following: foreign stocks, preferred stocks, warrants, when issued stocks, IPOs (for the first 30 days), closed-end funds, stocks selling $5 and under, and stocks with less than 2,000 shares average daily trading volume.

[10] For example, if a specialist unit trades three stocks included in the first grouping, the capital utilization percentages would be calculated by adding the unit's average daily dollar value of its stabilizing purchases and sales for all three stocks and dividing the total by the sum of the average daily total dollar value of shares traded for those three stocks.

[11] A particular specialist unit may not necessarily trade stocks in all three groupings, in which case a unit would receive 8 tier ratings if it only traded stocks in one groupings and 16 tier ratings if it only traded stocks in two of the three groupings.

[12] The specialist capital utilization measure is not being added as a basis for initiating a Performance Improvement Action under NYSE Rule 103A(b).

[13] 15 U.S.C. 78f(b)(5) (1988).

[14] 15 U.S.C. 78k(b), (1988).

[15] 17 CFR 240.11b–1 (1993).

specialists have a fair opportunity to compete for allocations.

Finally, the Commission believes that it is appropriate for the NYSE to implement the specialist unit capital utilization measure on a one-year pilot basis. The one-year period will provide the Exchange and the Commission with an opportunity to study the effects of the use of the measure on the NYSE's allocation process. During the pilot period, the Commission expects the NYSE to monitor carefully the effects of the revised policy and report its findings to the Commission. Specifically, the Commission requests that the NYSE report, in addition to the report requirements requested for the Allocation Policy pilot program[16] the capital utilization data as presented to the Allocation Committee in three tiers.[17] The Commission requests that the NYSE submit its report on these matters by August 1, 1994. Any requests to modify this pilot, to extend its effectiveness or to seek permanent approval of the pilot procedures also should be submitted to the Commission by August 1, 1994.

IV. Conclusion

It is therefore ordered, Pursuant to section 19(b)(2) of the Act,[18] that the proposed rule change (SR–NYSE–93–30) is approved for a one year period ending December 31, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–31881 Filed 12–29–93; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–33362; File No. SR–PTC–93–06]

December 21, 1993

Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change by Participants Trust Company Relating to a Modification of PTC's Fees

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on December 14, 1993, Participants Trust Company ("PTC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

italics indicate additions

[brackets] indicate deletions

PARTICIPANTS TRUST COMPANY SCHEDULE OF FEES

Modified Fees (effective January 1, 1994)

Service	*Fee*
Account Maintenance, Full Service Participant:	
First Six Business Accounts	$[5,000] *4,000*/month
Each Additional Account	$250/account/month
Book-Entry Delivery/Receipt (includes all DK's and FTX Transactions)	$[5.15] *4.00* each
Funds Movement (End-of-Day)	$[4.50] *4.00* each
Position Maintenance/P & I Disbursement**	$[1.65] *1.50*/security/month
Deposits:	
Manual	$[6.15] *5.00*/cert.*
Automated Bulk (200-1000 pools)	$4.00/cert.*
Automated Bulk (more than 1000 pools)	$3.00/cert.*
Repo Movements	$[5.15] *4.00* each

New Fees—(effective upon availability of new services)

Service	*Fee*
Position Maintenance/P & I Disbursement on Serial Notes	*$.50/unit/month*[2]
CLF Movements	*$.50 per position/$50.00 maximum*

* Plus GNMA transfer fee, $10.00 per pool.

** Reflects the change in name of the service that was formerly titled "P&I Disbursement."

[2] In the original filing made by PTC, this fee is stated as $.50/unit/pool. In a December 13, 1993 letter, PTC clarified that this was a typographical error and instead the figure should be stated as $.50/unit/month. Letter from Carol A. Jameson, Assistant Counsel, PTC to Francois Mazur, Staff Attorney, Commission (December 13, 1993).

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[16] The Commission requested that the Exchange report on the following matters: (1) The number of allocations reviewed by the Committee and the number of applicants for each allocation; (2) SPEQ performance data as presented to the Allocation Committee in four tiers, with the addition of each specialist's individual rank and range of ranks; (3) results of objective performance measures for each allocation applicant; (4) a description of factors used by the Committee in exercising its professional judgment in each allocation decision (e.g., disciplinary action); and (5) the Committee's allocation decisions. Securities Exchange Act Release No. 34–33121 (October 29, 1993) 58 FR 59085 (November 5, 1993) (File no. SR–NYSE–92–45).

[17] The Commission notes that this request for information is not exclusive and that the NYSE should add any additional data and analysis to the report in order to assess the effectiveness of the capital utilization measure.

[18] 15 U.S.C. 78s(b)(2) (1988).

[19] 17 CFR 200.30–3(a)(12) (1993).

[1] 15 U.S.C. 78s(b)(1).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

(a) The purpose of the proposed rule change is to modify PTC's fees for five of its services (i.e., Account Maintenance, Book-Entry Delivery and Receipt of Securities and Funds, Repo Movements, Position Maintenance/P&I Disbursements, and Deposits) and to establish fees for two new service enhancements that PTC expects to offer to Participants in the near future (i.e., processing GNMA serial notes and substitution of individual collateral items in a collateral loan facility, or "CLF", transaction). The modified fees will be effective January 1, 1994. The fees for the new service enhancements will be introduced when the new services are available to Participants, which is expected to occur in the first half of 1994. PTC believes that the amounts of the fees are appropriate based on PTC's projected earnings and expenses and its program to reduce rebates to Participants to the level required to cover the variability in transaction volume.

(b) Since the proposed rule change relates to the equitable allocation of dues, fees, and other charges among Participants, it is consistent with the requirement of section 17A(b)(3)(D) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

PTC does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

PTC has not solicited, and does not intend to solicit, comments on this proposed rule change. PTC has not received any unsolicited written comments from Participants or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b–4 thereunder because it establishes or changes a due, fee, or other charge of the Self-Regulatory organization. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. section 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to SR–PTC–93–06 and should be submitted by January 20, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–31940 Filed 12–29–93; 8:45 am]

BILLING CODE 8010–01–M

[Investment Company Act Release No. 19982; 812–8550]

The Calvert Fund, et al.; Notice of Application

December 23, 1993.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: The Calvert Fund, Calvert Social Investment Fund, Calvert-Ariel Growth Fund, Calvert World Values Fund, Inc., Calvert Tax-Free Reserves, Calvert Municipal Fund, Inc., Calvert Cash Reserves, First Variable Rate Fund (collectively, the "Funds"), Calvert Asset Management Company, Inc. ("CAM"), Calvert Securities Corporation ("CSC"), and Ariel Capital Management, Inc. ("ACM").

RELEVANT ACT SECTIONS: Order requested under section 6(c) of the Act for conditional exemptions from sections 2(a)(32), 2(a)(35), 18(f), 18(g), 18(i), 22(c), and 22(d) of the Act and rule 22c–1 thereunder.

SUMMARY OF APPLICATION: Applicants seek an order that would permit the Funds to issue an unlimited number of classes of securities representing interests in the same portfolio of securities, and to assess a contingent deferred sales charge ("CDSC") on certain redemptions of shares, and, under certain circumstances, to waive the CDSC.

FILING DATE: The application was filed on August 30, 1993, and amended on November 16, 1993. In a letter dated December 23, 1993, applicants' counsel stated that an additional amendment will be filed, the substance of which is reflected in this notice.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 17, 1994, and should be accompanied by proof of service on applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicants (except ACM), 4550 Montgomery Avenue, Suite 1000N, Bethesda, Maryland 20814; ACM, 307 North Michigan Avenue, suite 1020, Chicago, Illinois 60601.

FOR FURTHER INFORMATION CONTACT: Joseph G. Mari, Senior Special Counsel, (202) 272–3030, or Robert A. Robertson, Branch Chief, (202) 272–3018 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. The Funds are open-end management investment companies registered under the Act. CAM is the investment adviser to all the Funds, except Calvert-Ariel Growth Fund, for which it serves as investment manager. ACM is the investment adviser to Calvert-Ariel Growth Fund. CSC is the distributor of the Funds. CAM and CSC are indirect, wholly-owned subsidiaries of the Acacia Mutual Life Insurance Company.

2. Applicants seek the requested relief on behalf of the Funds and all other open-end management investment companies to be established in the future (a) whose investment adviser is CAM or a person controlling, controlled or under common control with CAM (each, an "Adviser"), or whose principal underwriter is CSC or a person controlling, controlled or under common control with CSC (each, a "Distributor"), and (b) that hold themselves out to investors as being related to the investment companies listed as applicants for purposes of investment and investor services (all such registered investment companies when referring to the entire registered investment company and not its individual portfolio or series are referred to as "Company" or "Companies," and when referring to the individual portfolio or series of a Company, are referred to as Fund or Funds).

3. Applicants propose to establish a multiple class distribution system in which each Fund would be able to offer a variety of classes (the "Alternative Purchase Plans"). The Funds would be able to select among distribution options mixing different loads, asset-based sales charges, service fees, and transfer agency fees for each participating Fund. Each option would represent a different class of shares. Each class of shares offered by a Fund will represent interests in the same portfolio of investments of that Fund, and the only differences among the classes of the same Fund will be as set forth in condition 1 below. All classes, whether existing, proposed or to be created in the future, will comply with the sales charge limitations of article III, section 26(d) of the NASD's Rules of Fair Practice. Applicants reserve the right to modify the characteristics of the classes initially contemplated and to add other distribution options to the array using different combinations of the above characteristics.

4. Three of the six classes initially contemplated by the non-money market ("Variable NAV") Funds would require payment of a front-end sales load. The first class, the "Existing Front-End Load Option," now offered by the Funds, would continue to require payment of a moderate front-end load, to impose moderate rule 12b–1 fees, and to charge no CDSC. The second class, the "Higher Front-End Load Option," would charge a high front-end load, but no CDSC and may impose very low rule 12b–1 fees. The third class, the "Low Front-End Load/CDSC Option," would charge a low front-end load, a low CDSC, and very low rule 12b–1 fees.

5. The fourth and fifth classes initially contemplated, the Variable NAV Fund options, would not carry front-end loads but would impose other distribution charges. The fourth class, the straight "CDSC Option," would charge a moderate to high CDSC and moderate to high rule 12b–1 fee, without any front-end load. The fifth class, the "Pay-As-You-Go Option," would charge no front-end load, but would impose relatively high rule 12b–1 fees and may impose a CDSC on shares redeemed within a specified period, generally one to two years, after purchase.

6. A sixth class, the "Institutional Option," would impose no front-end load or CDSC but may impose very low rule 12b–1 fees and would be offered only to institutional investors, which would consist of the following five categories of investors: (a) Unaffiliated benefit plans; (b) tax-exempt retirement plans of Adviser and its affiliates; (c) banks and insurance companies purchasing for their own account; (d) investment companies not affiliated with Adviser; and (e) endowment funds of non-profit organizations. The unaffiliated benefit plans in category (a) will have several common features. Among these features are total assets in excess of $10 million or such other amounts as the Funds may establish, a separate trustee for the plan who is vested with investment discretion as to plan assets, certain limitations on the ability of plan beneficiaries to access their plan investments without incurring adverse tax consequences, and such other characteristics as the Funds may establish. Applicants will exclude self-directed plans from this category.

7. The applicants that are money market funds ("Money Market Funds") also may offer different classes. The existing shares of each Money Market Fund, "Class A Option" shares, will charge no front-end load, may impose low rule 12b–1 fees, and may choose to assess a CDSC only on redemptions of those shares that may have been purchased by exchange from a Variable NAV Fund sold pursuant to full waiver of the front-end sales charge. The Money Market Funds also initially contemplate the creation of a new class, "Class B Option" shares, to provide a money market fund alternative into which Variable NAV Fund CDSC Option shares may exchange. The Class B Option shares will charge no front-end load, currently plan to impose no rule 12b–1 fees, and would assess a CDSC on certain redemptions of shares acquired by exchange from a Variable NAV Fund CDSC Option.

8. Several characteristics substantially distinguish the direct types of ownership interests of individuals in the Institutional Option shares as compared to the other options. While individuals purchasing shares are direct owners of such securities and normally possess investment and voting power with respect thereto, an entity purchasing Institutional Option shares would be the direct owner of such shares. Except for self-directed retirement plans affiliated with Adviser, the trustee of the plan, or the institutional manager or trustee, would possess the investment and voting power regarding the Fund shares.

9. Applicants contemplate that each of the proposed classes of a Fund will be exchangeable for: (a) The same class of another Fund and/or, (b) a class of another Fund that has a similar characteristic pricing structure and/or rule 12b–1 fees, and (c) for shares of certain money market funds sponsored by Adviser. Money Market Fund shares may be exchangeable for shares of any of the available classes in the Funds. If Money Market Fund shares are purchased pursuant to an exchange privilege, however, they will thereafter only be exchangeable for the class of shares involved in the original exchange into the Money Market Fund shares. All exchanges that are made at other than relative net asset value will be made in accordance with rule 11a–3.

10. Shares of one or more classes ("Higher 12b–1 Option" classes) may convert automatically after a period of time (one to eight years or more after purchase) to shares of another class without the imposition of any additional sales charge, and thereafter be subject to the lower rule 12b–1 fee, if any, applicable to that other class (the "Lower 12b–1 Option" class). Higher 12b–1 Option shares in a shareholder's Fund account that were purchased through the reinvestment of dividends and other distributions paid in respect of Higher 12b–1 Option shares will be considered to be held in a separate sub-account. Each time any Higher 12b–1 Option shares in the shareholder's Fund account convert to a Lower 12b–1 Option class, a *pro rata* portion of the Higher 12b–1 Option shares then in the sub-account also will convert to shares of the Lower 12b–1 Option class.

11. The net asset value of all outstanding shares of all classes would be computed separately for each class of shares by first allocating gross income and expenses (other than rule 12b–1 fees, the transfer agency fees of each class, and other expenses properly attributable to a particular class) to each class of shares based on the net assets attributable to each class at the beginning of the day and then by separately recording the differing rule 12b–1 fees, the transfer agency fees of each class, and any other expenses properly attributable to the class. The net asset value attributable to each share of each class would then be calculated by dividing the net assets calculated for each class by the number of shares outstanding in that class.

12. For Funds that offer classes with a CDSC Option, the CDSC typically ranges from 1% to 5% (but may be higher or lower) on shares redeemed in the first year of purchase. The CDSC is typically reduced at a rate of 1% per annum over the applicable CDSC period, so that redemptions after that period will not be subject to any CDSC. Under the proposed Alternative Purchase Plans, the amount of and time period over which a CDSC is imposed may vary within a given CDSC Option class. The CDSC will not be imposed on redemptions of those CDSC Option shares that were purchased more than a specified period (the "CDSC Period") prior to the redemption or on CDSC Option shares derived from reinvestment of dividends or other distributions, including capital gains. Furthermore, no CDSC will be imposed on an amount that represents an increase in the value of the CDSC option shares resulting from capital appreciation above the amount paid for those shares purchased during the CDSC period.

13. Applicants request authority to waive the CDSC on redemptions: (a) Made within one year following the death or disability, as defined in section 72(m)(7) of the Internal Revenue Code of 1986, as amended (the "Code") of a shareholder holding CDSC Option classes; (b) in connection with a lump-sum or other distribution from a retirement plan qualified under section 401(a) of the Code after termination of employment, required distributions in the case of an individual retirement account or section 403(b) custodial account after the shareholder attains age 70½, the return of an excess contribution pursuant to sections 408(d)(4) or (5) of the Code, the return of excess deferral amounts pursuant to section 401(k)(8) or 402(g)(2) of the Code, the return of aggregate contributions pursuant to section 401(m)(6) of the Code, or from the death or disability of the shareholder/employee (see sections 72(t)(2)(A)(ii) and 72(t)(2)(A)(iii) of the Code) ("Retirement Plans"); (c) by trust accounts made within one year following the death or disability of the beneficiary or grantor, trustee or other fiduciary; (d) by profit-sharing or stock bonus plans upon "hardship" of the employee, as determined by the plan administrator and as defined in the Code; (e) pursuant to a qualified domestic affairs order, as defined in section 414(p) of the Code; (f) by any Retirement Plan whose accounts are held directly with the Funds' transfer agent and for which the transfer agent does individual account record keeping and by benefit plans sponsored by CSC or its subsidiaries of shares acquired with amounts used to repay a loan from such plans and on which a CDSC previously was imposed; (g) of shares purchased with dividends or distribution earned in other Funds; (h) made under the Funds' "Systematic Check Redemptions" program as described in the prospectus for shareholders with accounts of at least $10,000 who request regular monthly or quarterly redemptions checks for a fixed amount; and (i) that are involuntary pursuant to the Funds' policy on minimum account balances.

Applicant's Legal Analysis

1. Applicants request an exemptive order under section 6(c) of the Act to the extent the proposed issuance of the Alternative Purchase Plans might be deemed: (a) to result in a "senior security" within the meaning of section 18(g) of the Act and thus be prohibited by section 18(f)(1) of the Act, and (b) to violate the equal voting provisions of section 18(i) of the Act.

2. The Alternative Purchase Plans do not create the potential for the abuses that section 18 was designed to redress. They do not involve borrowings and do not adversely affect the Funds' existing assets or reserves, and they will not increase the speculative character of the Funds' shares. The classes of securities that were present in the capital structures that prompted the SEC to recommend the adoption of section 18 (funded debt, preference stocks, and convertible securities) are not present in applicants' proposal. In addition, the allocation of expenses and voting rights relating to the rule 12b–1 plans is equitable and would not discriminate against any group of shareholders. Although investors purchasing some classes of share would pay lower rule 12b–1 fees than would others, each class of shares will have exclusive voting rights on matters affecting its rule 12b–1 plan.

3. Applicants also request an exemption under section 6(c) from sections 2(a)(32), 2(a)(35), 22(c), and 22(d) of the Act and rule 22c–1 thereunder to the extent necessary to permit the Funds to assess a CDSC on certain redemptions of Alternative Purchase Plans shares, and to waive, reduce, or defer the CDSC in certain instances. Applicants submit that the proposed CDSC arrangement is fair, consistent with the policy and provisions of the Act, and is in the best interests of the Funds' shareholders. The CDSC Option classes would permit shareholders to have the advantage of greater investment dollars working for them from the time of their purchase of such share than if a sales load of conventional size were imposed at the time of the purchase.

Applicants' Conditions

Applicants agree that the order granting the requested relief shall be subject to the following conditions:

A. Multi-Class System

1. Each class of shares will represent interests in the same portfolio of investments of a Fund, and will be identical in all respects, except as set forth below. The only differences among the classes of the same Fund will relate solely to (a) the impact of (1) the disproportionate rule 12b–1 fees, (2) Class Expenses which are limited to (i) transfer agent fees identified by the transfer agent as being attributable to a specific class of shares; (ii) printing and postage expenses related to preparing and distributing materials such as shareholder reports, prospectuses, and

proxies to current shareholders; (iii) blue sky registration fees incurred by a class of shares; (iv) SEC registration fees incurred by a class of shares; (v) the expense of administrative personnel and services as required to support the shareholders of a specific class; (vi) litigation or other legal expense or audit or other accounting expense relating solely to one class of shares; and (vii) directors'/trustees' fees incurred as a result of issues relating to one class of shares; and (3) any other expense subsequently identified that properly should be allocated to one or more classes which shall be approved by the Commission pursuant to an amended order; (b) that the class will vote separately regarding the rule 12b–1 Plan, if any, adopted by each class of each Fund, except as set forth in condition 14 below; (c) the difference in exchange privileges of the shares; (d) the designation of each class of shares of each Fund; and (e) the difference in conversion features of the classes of shares.

2. The directors/trustees of the Companies, including a majority of the independent directors/trustees, will approve the creation and issuance of any new classes of shares in their respective Funds. The minutes of the meetings of the directors/trustees of each of the participating Funds regarding the deliberations of the directors/trustees with respect to the approvals necessary to add or change a class of shares will reflect in detail the reasons for the directors'/trustees' determination that offering any of the proposed Alternative Purchase Plans is in the best interest of the Funds and their respective shareholders.

3. On an ongoing basis, the directors/trustees of the Companies, pursuant to their fiduciary responsibilities under the Act and otherwise, will monitor each Fund for the existence of any material conflicts among the interests of the various classes of shares offered by each Fund. The directors/trustees, including a majority of the independent directors/trustees, shall take such action as is reasonably necessary to eliminate any such conflicts that may develop. Adviser and Distributor will be responsible for reporting any potential or existing conflicts to the directors/trustees. If a conflict arises, Adviser and Distributor, at their own cost, will remedy such conflict, up to and including establishing a new registered management investment company.

4. The directors/trustees of the Funds with rule 12b–1 plans will receive quarterly statements concerning distribution and shareholder servicing expenditures complying with paragraph (b)(3)(ii) of rule 12b–1, as it may be amended from time to time. In the statements, only expenditures properly attributable to the sale or servicing of a particular class of shares will be used to justify the rule 12b–1 fee charged to that class. Expenditures not related to the sale or servicing of a particular class will not be presented to the directors/trustees to justify Rule 12b–1 Fees charged to shareholders of that class. The statements, including the allocations upon which they are based, will be subject to the review and approval of the independent directors/trustees in the exercise of their fiduciary duties.

5. Dividends paid by a Fund regarding its various classes of shares, to the extent any dividends are paid, will be calculated in the same manner, at the same time, on the same day and will be in the same amount, except that rule 12b–1 fee payments relating to each respective class of shares will be borne exclusively by that class and except that any Class Expenses attributable solely to one class will be borne exclusively by that class.

6. The methodology and procedures for calculating the net asset value and dividends and distributions of multiple classes and the proper allocation of expenses among them has been reviewed by an expert (the "Independent Examiner"), who has rendered a report to the applicants, which has been provided to the staff of the SEC, that such methodology and procedures are adequate to ensure that such calculations and allocations will be made in an appropriate manner. On an ongoing basis, the Independent Examiner, or an appropriate substitute Independent Examiner, will monitor the manner in which the calculations and allocations are being made and, based upon such review, will render at least annually a report to the Funds that the calculations and allocations are being made properly. The reports of the Independent Examiner shall be filed as part of the periodic reports filed with the SEC pursuant to sections 30(a) and 30(b)(1) of the Act. The work papers of the Independent Examiner with respect to such reports, following request by a Fund (which each Fund agrees to provide), will be available for inspection by the SEC staff upon the written request to a Fund for such workpapers by a senior member of the SEC's Division of Investment Management, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, an Assistant Director, and any Regional Administrators or Associate and Assistant Administrators. The initial report of the Independent Examiner is a "Report on Policies and Procedures Placed in Operation" and the ongoing reports will be "Reports on Policies and Procedures Placed in Operation and Tests of Operating Effectiveness" as defined and described in SAS No. 70 of the AICPA, as it may be amended from time to time, or in similar auditing standards as may be adopted by the AICPA from time to time.

7. Applicants have adequate facilities in place to ensure implementation of the methodology and procedures for calculating the net asset value and dividends and distributions of the various classes of shares and the proper allocation of expenses among the various classes of shares, and this representation has been concurred with by the Independent Examiner in the initial report referred to in condition 6 above and will be concurred with by the Independent Examiner, or an appropriate substitute Independent Examiner, on an ongoing basis at least annually in the ongoing reports referred to in condition 6 above. Applicants will take immediate corrective action if this representation is not concurred in by the Independent Examiner or an appropriate substitute Independent Examiner.

8. The prospectus of each Fund will contain a statement to the effect that a salesperson and any other person entitled to receive compensation for selling or servicing Fund shares may receive different levels of compensation with respect to one particular class of shares over another in the Fund.

9. Distributor will adopt compliance standards as to when each class of shares may appropriately be sold to particular investors. The compliance standards will require all investors eligible to purchase Institutional Option shares of a Fund offering such shares to invest in the Institutional Option shares rather than other Option shares. Applicants will require all persons selling shares of the Funds to conform to such standards.

10. The conditions pursuant to which the exemptive order is granted and the duties and responsibilities of the directors/trustees of the Funds with respect to the Alternative Purchase Plans will be set forth in guidelines which will be furnished to the directors/trustees.

11. Each of the Funds will disclose, in each of its prospectuses, the respective expenses, performance data, distribution arrangements, services, fees, initial sales loads, deferred sales loads, conversion features, and exchange privileges applicable to each class of shares offered through such

prospectus. Shares of options other than the Institutional Option (which is offered only to certain specified categories of institutional investors described above) will be offered and sold through a single prospectus. Institutional Option shares of a Fund will be offered solely pursuant to a separate prospectus and the prospectus for the options other than the Institutional Option of that Fund will disclose the existence of the Institutional Option shares of the Funds and will identify the entities eligible to purchase such shares. The prospectus for the Institutional Option will disclose the existence of the Fund's other options. Each Fund will disclose the respective expenses and performance data applicable to all classes of shares in every shareholder report. The shareholder reports will contain, in the statement of assets and liabilities and statement of operations, information related to the Fund as a whole generally and not on a per class basis. Each Fund's per share data ("Financial Highlights"), however, will be prepared on a per class basis with respect to all classes of shares of such Fund. To the extent any advertisement or sales literature describes the expenses or performance data applicable to other than Institutional Option shares, it also will disclose the respective expenses and/or performance data applicable to each such option. Advertising materials reflecting the expenses or performance data for Institutional Option shares will be available only to institutional investors eligible to invest in Institutional Option shares. The information provided by applicants for publication in any newspaper, or similar listing of the Funds' net asset values and public offering prices will present each class of shares separately.

12. Applicants acknowledge that the grant of the exemptive order requested by this application will not imply SEC approval, authorization or acquiescence in any particular level of payments that the Funds may make pursuant to rule 12b-1 Plans in reliance on the exemptive order.

13. Any class of shares with a conversion feature ("Purchase Class") will convert into another class ("Target Class") of shares on the basis of the relative net asset values of the two classes, without the imposition of any sales load, fee or other charge. After conversion, the converted Shares will be subject to an asset-based sales charge and/or service fee (as those terms are defined in article III, section 26 of the NASD's Rules of Fair Practice), if any, that in the aggregate are lower than the asset-based sales charge and service fee to which they were subject prior to the conversion.

14. If a Fund implements any amendment to a rule 12b-1 plan (or, if presented to shareholders, adopts or implements any amendment of a non-rule 12b-1 shareholder services plan) that would increase materially the amount that may be borne by a Target Class under the plan, then Purchase Class shares will stop converting into shares of such Target Class, unless Purchase Class shareholders, voting separately as a class, approve the amendment. The directors/trustees shall take such action as is necessary to ensure that existing Purchase Class shares are exchanged or converted into a new class of shares ("New Target Class"), identical in all material respects to Target Class shares as they existed prior to implementation of the amendment, no later than the date such shares previously were scheduled to convert into Target Class shares. If deemed advisable by the directors/trustees to implement the foregoing, such action may include the exchange of all existing Purchase Class shares for a new class ("New Purchase Class") of shares, identical to existing Purchase Class shares in all material respects except that the New Purchase Class will convert into the New Target Class. The New Target Class and New Purchase Class may be formed without further exemptive relief. Exchanges or conversions described in this condition shall be effected in a manner that the directors/trustees reasonably believe will not be subject to federal taxation. In accordance with condition 3, any additional cost associated with the creation, exchange, or conversion of the New Target Class or New Purchase Class shares shall be borne solely by Adviser and Distributor. Purchase Class shares sold after the implementation of the amendment may convert into Target Class shares subject to the higher maximum payment, provided that the material features of the Target Class plan and the relationship of such plan to the Purchase Class are disclosed in an effective registration statement.

15. The initial determination of the class expenses that will be allocated to a particular class and any subsequent changes thereto will be reviewed and approved by a vote of the board of directors/trustees of the Companies including a majority of the directors/trustees who are not interested persons of the Companies. Any person authorized to direct the allocation and disposition of monies paid or payable by the Funds to meet class expenses shall provide to the board of directors/trustees and the directors/trustees shall review, at least quarterly, a written report of the amounts so expended and the purposes for which such expenditures were made.

B. The CDSC

Applicants will comply with the provisions of proposed rule 6c-10 under the Act, Investment Company Act Release No. 16619 (Nov. 2, 1988), as such rule is currently proposed and as it may be reproposed, adopted or amended.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93-31935 Filed 12-28-93; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-19980; 812-8584]

The OFFITBANK Investment Fund, Inc., et al.; Application

December 22, 1993.

AGENCY: Securities and Exchange Commission ("SEC" or "Commission").

ACTION: Notice of application for exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: The OFFITBANK Investment Fund, Inc. (the "Fund"); The Senior Securities Fund, L.P. (the "Partnership"); OFFITBANK Senior Fund, Inc. (the "General Partner"); and OFFITBANK (the "Adviser").

RELEVANT ACT SECTIONS: Order requested under section 17(b) granting an exemption from section 17(a).

SUMMARY OF APPLICATION: Applicants seek an order to permit a transfer of shares of common stock of OFFITBANK High Yield Fund ("OHYF"), a portfolio of the Fund, for portfolio securities of the Partnership.

FILING DATE: The application was filed on September 20, 1993, and amended on November 15, 1993 and December 20, 1993.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on January 17, 1994, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested.

Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 Fifth Street, NW., Washington, DC 20549. Applicants, 520 Madison Avenue, New York, New York 10022.

FOR FURTHER INFORMATION CONTACT: Felicia H. Kung, Senior Attorney, at (202) 504–2803, or Elizabeth G. Osterman, Branch Chief, at (202) 272–3016 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicants' Representations

1. The Partnership is a limited partnership organized under the laws of the State of Delaware. The Partnership is not registered under the Act in reliance on section 3(c)(1) of the Act, and the Partnership interests have not been registered under the Securities Act of 1933 in reliance on section 4(2) thereof. The General Partner is the sole general partner of the partnership and is a wholly owned subsidiary of the Adviser. The General Partner has maintained an investment in the Partnership equal to not less than $500,000 or 1% of the net assets of the Partnership and is allocated net income, gains, and losses of the Partnership in proportion to its investment.

2. The Fund, a newly organized Maryland corporation, is registered as an open-end management investment company. A notification of registration under the Act on Form N–8A was filed on behalf of the Fund on September 20, 1993. On October 8, 1993, the Fund filed a registration statement under the Act and the Securities Act of 1933 on Form N–1A. The Fund will be a no-load fund. Initially, it will offer three series of shares, including OFFITBANK Emerging Markets Fund ("OEMF"), OFFITBANK Investment Grade Global Bond Fund ("OIGGBF"), and OHYF. Applicants request exemptive relief solely with respect to OHYF because it is the only investment portfolio of the Fund that will participate in the proposed transfer of shares of common stock for portfolio securities of a corresponding limited partnership.

3. The Adviser, a New York State chartered trust company, acts as investment adviser to the Partnership and will act as investment adviser to OHYF. OHYF has been designed as a successor investment vehicle to the Partnership, and has the same investment objectives as the Partnership, i.e., the generation of high current income and capital appreciation. After completion of the proposed transaction, the former portfolio manager of the Partnership, who also will be the portfolio manager of OHYF, intends for the foreseeable future to manage the assets of OHYF in substantially the same manner as he previously had managed the Partnership, except as may be necessary or desirable.

(a) In order to qualify as a regulated investment company under the Internal Revenue Code of 1986, as amended;

(b) In order to comply with investment restrictions adopted by OHYF in accordance with the requirements of the Act or securities laws of states where OHYF Shares will be offered, or

(c) In light of changed market conditions.

4. Applicants propose that the General Partner will liquidate and dissolve the Partnership (the "Liquidation"). The Partnership's assets will be distributed to the limited partners and the General Partner in accordance with the respective final balances of their capital accounts as of the closing date of the transaction. The limited partners will receive their distributive shares of the Partnership's assets in cash if they have not elected to participate in the proposed transfer of the limited partners' distributive share of the Partnership's assets to OHYF in exchange for OHYF shares (the "Transfer"), or in OHYF Shares if they elect to participate in the Transfer (such limited partners, "Transferring Limited Partners"). The General Partner will not participate in the Transfer with respect to its own distributive share in the Partnership and will receive cash in the Liquidation.

5. To the extent that the limited partners elect to participate in the Transfer, subject to the conditions described in this notice and the application, the General Partner will transfer to OHYF all or a portion of the Transferring Limited Partners' distributive share of the Partnership's assets, consisting of portfolio securities, cash and cash equivalents (the "Transferred Assets") in exchange for OHYF Shares. The General Partner will then distribute the OHYF Shares to the Transferring Limited Partners. The number of OHYF Shares to be transferred to the Transferring Limited Partners will be based on the value of the Transferred Assets as of the close of business on the day before the closing date of the transaction ("Determination Date"). Transferred Assets, other than cash, cash equivalents, and over-the-counter fixed income securities not quoted in the NASDAQ System ("OTC Securities"), will be valued on the Determination Date at their independent "current market price," defined in rule 17a–7 of the Act. Transferred Assets that are OTC Securities will be valued on the Determination Date at their bid price because such bid prices are the basis upon which the OTC Securities currently are valued by the Partnership and will be valued by OHYF after the Transfer. Transferred Assets will not include portfolio securities if, in the Adviser's opinion, the acquisition of the securities would result in a violation of OHYF's investment objectives, policies or restrictions.

6. In connection with the Liquidation, the limited partners will be provided with an Information Statement containing a detailed description of the transaction and its effects, the Fund, and each limited partner's option in the Liquidation to participate in the Transfer or receive cash. The Information Statement will include a discussion of the tax consequences of the transaction and the reasons that the transaction has been proposed. The Information Statement will be delivered to each limited partner, along with a copy of the Fund's prospectus, after the prospectus has been declared effective.

7. Following the Transfer, the Transferring Limited Partners will constitute all of the holders of OHYF shares, except for OHYF shares representing seed capital contributed to the Fund by the Fund's distributor pursuant to section 14(a) of the Act. The Liquidation and Transfer will be effected immediately prior to the public offering of OHYF shares. The OHYF Shares will be issued at an offering price equal to net asset value.

8. The Partnership will discharge all of its known liabilities and obligations on or prior to the Determination Date. If determined to be appropriate by the General Partner, the Partnership will establish a reserve for unknown and contingent liabilities and obligations. To the extent a reserve is established and not fully utilized by the closing date, then any funds remaining in such reserve will be distributed to the limited partners on a *pro rata* basis in the Liquidation. After Liquidation, the Partnership will be terminated in accordance with the Partnership's Limited Partnership Agreement and Delaware law.

9. The Adviser, either directly or through the General Partner, will pay all the expenses of the Liquidation and Transfer, and the initial organizational expenses of the Fund Other than those

expenses to be paid by the Adviser or the General Partner, applicants do not expect any additional expenses to be incurred in connection with the transaction. No brokerage commissions, fees (except customary transfer fees) or other remuneration will be paid.

10. The Transfer will not be effected unless and until each of the following has occurred:

(a) The Fund's Registration Statement has been declared effective;

(b) The Commission has issued an order relating to the application;

(c) The Fund has received an opinion of counsel that the Transfer will have the following tax consequences to the Transferring Limited Partners, OHYF and the Partnership:

(i) No gain or loss will be realized by the Transferring Limited Partners or the Partnership upon the Liquidation and the distribution of OHYF Shares to the Transferring Limited Partners in liquidation of their Partnership interests;

(ii) No gain or loss will be recognized by the Partnership upon the Transfer;

(iii) No gain or loss will be recognized by OHYF upon the Transfer;

(iv) The basis to OHYF of each Partnership portfolio security obtained in the Transfer will be the same as the basis of the security held by the Partnership immediately prior to the Transfer;

(v) The basis of OHYF Shares transferred to each Transferring Limited Partner will be equal to such Transferring Limited Partner's basis in his interest in the Partnership;

(vi) The holding period of the portfolio securities transferred to OHYF will be the same as the holding period of the securities in the hands of the Partnership immediately prior to the Transfer; and

(vii) The holding period of OHYF Shares received in the Liquidation by each Transferring Limited Partner will include the period during which the portfolio securities transferred were held by the Partnership; and

(d) The Fund's Board of Directors has approved the Transfer.

11. The General Partner has considered the desirability of the transaction from the point of view of the Partnership, and the General Partner has concluded that: (a) The transaction is in the best interests of the Partnership and the limited partners, and (b) the Transfer will not dilute the financial interests of the Transferring Limited Partners when their Partnership interests are converted to OHYF Shares.

12. Not later than the date on which the Fund's registration statement is declared effective, the Fund's Board of Directors, a majority of which are non-interested persons of the Fund, will consider the desirability of the Transfer from the point of view of both OHYF and the Partnership prior to commencing the transaction. The Transfer will not be offered as an option to the limited partners unless a majority of the Board of Directors of the Fund, including a majority of the non-interested members of such Board, conclude that:

(a) The Transfer is in the best interests of OHYF, the Partnership, and the limited partners;

(b) The Transfer will not dilute the financial interests of OHYF's sole shareholder or of the Transferring Limited Partners when they receive OHYF Shares in the Liquidation; and

(c) The terms of the Transfer have been designed to meet the criteria contained in section 17(b) of the Act, i.e., that the Transfer be reasonable and fair, not involve overreaching, and be consistent with the policies of OHYF.

Applicants' Legal Analysis

1. Applicants seek an exemption from the provisions of section 17(a) to the extent necessary to permit the Transfer. Section 17(a), in pertinent part, prohibits an affiliated person of a registered investment company, or an affiliated person of such person, from selling to or purchasing from such investment company any security or other property. Applicants state that under section 2(a)(3) of the Act the Partnership, the Adviser and the General Partner are affiliated persons of the Fund, or affiliated persons of an affiliated person of the Fund. Thus, unless the requested relief is granted, the proposed Transfer may be deemed to be prohibited under section 17(a) if the Transfer is viewed either as principal transactions (a) between the Fund and the partners of the Partnership or (b) between the Fund and the Partnership.

2. Section 17(b) provides that the Commission may exempt any person from the provisions of section 17(a) if evidence establishes that:

(a) The terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned,

(b) The proposed transaction is consistent with the policy of each registered investment company concerned, and

(c) The proposed transaction is consistent with the general purposes of the Act.

3. Applicants contend that, because the investment objectives and policies of OHYF and the Partnership are substantially identical, it is consistent with the OHYF's policies to acquire securities that the Adviser has purchased previously on the basis of substantially similar objectives and policies. Further, the Transfer would provide OHYF with the opportunity to purchase the portfolio securities of the Partnership at the current market price and with lower transaction costs than would be possible if OHYF purchased such securities in the open market. In addition, applicants assert that combining the Partnership and OHYF, rather than operating two separate entities, will be more convenient administratively and will create certain economies of scale.

4. Applicants state that the proposed Transfer does not give rise to the abuses that section 17(a) was designed to prevent. Applicants assert that a primary purpose underlying section 17(a) was to prevent a person with a pecuniary interest as a seller of securities from using his position with a registered investment company to benefit himself to the detriment of the company's shareholders. Applicants state that OHYF will not have commenced operations prior to the Transfer and will have no assets to dissipate or shareholders to dilute. After the Transfer, Transferring Limited Partners will hold substantially the same assets as OHYF shareholders as they previously had held as limited partners. In this sense, applicants assert that the Transfer can be viewed as a change in the form in which assets are held, rather than as a disposition giving rise to section 17(a) concerns.

5. Applicants assert that the terms of the Transfer are reasonable and fair to OHYF, the Transferring Limited Partners, and future shareholders of OHYF, and do not involve overreaching on the part of any applicant.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 93–31880 Filed 12–29–93; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF STATE

Office of the Secretary

[Public Notice 1921]

B&M International Bridge at Brownsville Texas: Expansion

AGENCY: Department of State.

ACTION: Notice of receipt of application to expand an international bridge.

SUMMARY: The Department of State is announcing the receipt of an application to expand the existing B&M International Bridge at Brownsville, Texas, from the bridge owner, the Brownsville and Matamoros Bridge Company of Brownsville, Texas. Authorization for construction of the existing bridge was provided by Act of Congress May 20, 1908, 35 Stat. 166–69, as amended 35 Stat. 576.

ADDRESSES: Copies of the Design Studies Update submitted by the Brownsville and Matamoros Bridge Company on June 30, 1993 may be obtained from Stephen R. Gibson, Coordinator, U.S.–Mexico Border Affairs, Office of Mexican Affairs, room 4258, Department of State, Washington, DC 20520 (Telephone 202–647–8529).

SUPPLEMENTARY INFORMATION: The Department of State has determined that the proposed expansion of the B&M Bridge falls within the terms of the original authorization by Act of Congress, and that a Presidential Permit is therefore not required by the International Bridge Act of 1972, (33 U.S.C. 535 *et seq.*) and E.O. 11423, 33 FR 11741 (1968) as amended by E.O. 12847, 58 FR 96 (1993). However, the Design Studies Update will be reviewed by concerned Federal and State agencies. Interested persons may submit their views regarding the application in writing by January 31, 1994 to the Coordinator for U.S.–Mexico Border Affairs at the above address.

Dated: December 16, 1993.

Stephen R. Gibson,

Coordinator, U.S.–Mexico Border Affairs, Office of Mexican Affairs.

[FR Doc. 93–31973 Filed 12–29–93; 8:45 am]

BILLING CODE 4710–29–M

[Public Notice 1920]

Progreso/Nuevo Progreso International Bridge at Progreso, Texas: Replacement

AGENCY: Department of State.

ACTION: Notice of receipt of application to replace an international bridge.

SUMMARY: The Department of State is announcing the receipt of a proposal to replace the existing Progreso/Nuevo Progreso International Bridge at Progreso, Texas from the bridge owner, the B & P Bridge Company of Weslaco, Texas. Authorization for construction of the existing bridge was provided by Act of Congress May 1, 1928, 45 Stat. 471.

ADDRESSES: Copies of the proposal submitted by the B & P Bridge Company on August 10, 1993 may be obtained from Stephen R. Gibson, Coordinator, U.S.-Mexico Border Affairs, Office of Mexican Affairs, room 4258, Department of State, Washington, DC 20520 (Telephone 202–647–8529).

SUPPLEMENTARY INFORMATION: The Department of State has determined that the proposed replacement of the Progreso Bridge falls within the terms of the original authorization by Act of Congress, and that a Presidential Permit is therefore not required by the International Bridge Act of 1972, (33 U.S.C. 535 *et seq.*) and E.O. 11423, 33 FR 11741 (1968) as amended by E.O. 12847, 58 FR 96 (1993). However, the B & P Bridge Company's proposal will be reviewed by concerned Federal and State agencies. Interested persons may submit their views regarding the proposal in writing by January 31, 1994, to the Coordinator for U.S.-Mexico Border Affairs at the above address.

Dated: December 16, 1993.

Stephen R. Gibson,

Coordinator, U.S.-Mexico Border Affairs, Office of Mexican Affairs.

[FR Doc. 93–31974 Filed 12–29–93; 8:45 am]

BILLING CODE 4710–29–M

[Public Notice 1926]

Determination Under Section 498B(c) of The Foreign Assistance Act of 1961, As Amended

Pursuant to section 498B(c) of the Foreign Assistance Act of 1961, as amended (the "Act"), and section 2(c) of Executive Order 12884, I hereby determine that the following enterprise funds should be established and supported under chapter 11 of part I of the Act:

(1) The Russian-American Enterprise Fund;

(2) The Fund for Large Enterprise Restructuring; and

(3) The Central Asia Regional Enterprise Fund.

This determination shall be published in the **Federal Register.**

Dated: December 10, 1993.

Thomas W. Simons, Jr.,

Coordinator of U.S. Assistance to the New Independent States.

[FR Doc. 93–31975 Filed 12–29–93; 8:45 am]

BILLING CODE 4710–08–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

[CGD 93–087]

Suspension of the National Environmental Policy Act (NEPA) Process for Proposed Housing Project, Haiku Valley, Kaneohe, Oahu, HI

AGENCY: Coast Guard, DOT.

ACTION: Notice.

SUMMARY: The proposed development of 144 units of housing in the Haiku Valley, Kaneohe, Hawaii is being held in abeyance due to uncertainties about future availability of additional housing. The NEPA process, including preparation of the Draft Environmental Impact Statement (DEIS), is suspended immediately. The need for construction of additional Coast Guard owned housing units will be reevaluated.

FOR FURTHER INFORMATION CONTACT: U.S. Coast Guard, Mr. Bill Grannis, Civil Engineering Unit, Prince Kalanianole Federal Building, 300 Ala Moana Blvd., Honolulu, HI 96850–4982 (808) 541–3103. Office hours are between 8 a.m. and 3 p.m., Monday through Friday, except holidays.

SUPPLEMENTARY INFORMATION: The Notice of Intent to prepare the DEIS was published in the **Federal Register** on Tuesday, December 8, 1992. The decision to suspend the NEPA process was made so the Coast Guard's need for development of additional units of housing (beyond those currently approved) could be reevaluated due to changing circumstances. The NEPA process will not be resumed without publishing a Notice of Intent in the **Federal Register** and notifying those who have participated in the process to date.

Dated: December 22, 1993.

W.E. Kozak,

Captain, U.S. Coast Guard, Chief, Civil Engineering Division.

[FR Doc. 93–31989 Filed 12–29–93; 8:45 am]

BILLING CODE 4910–14–M

National Highway Traffic Safety Administration

[Docket No. 93–75; Notice 2]

Determination That Nonconforming 1993 BMW 850i Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of determination by NHTSA that nonconforming 1993 BMW

850i passenger cars are eligible for importation.

SUMMARY: This notice announces the determination by NHTSA that 1993 BMW 850i passenger cars not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because they are substantially similar to a vehicle originally manufactured for importation into and sale in the United States and certified by its manufacturer as complying with the safety standards (the U.S.-certified version of the 1993 BMW 850i), and they are capable of being readily modified to conform to the standards.

DATE: The determination is effective December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under section 108(c)(3)(A)(i) of the National Traffic and Motor Vehicle Safety Act (the Act), 15 U.S.C. 1397(c)(3)(A)(i), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards must be refused admission into the United States on and after January 31, 1990, unless NHTSA has determined that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under section 114 of the Act, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility determinations may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA determines, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this determination in the **Federal Register.**

Champagne Imports, Inc. of Lansdale, Pennsylvania (Registered Importer R–90–009) petitioned NHTSA to determine whether 1993 BMW 850i passenger cars are eligible for importation into the United States. NHTSA published notice of the petition on October 26, 1993 (58 FR 57668) to afford an opportunity for public comment. The reader is referred to that notice for a thorough description of the petition. No comments were received in response to the notice. Based on its review of the information submitted by the petitioner, NHTSA has determined to grant the petition.

Vehicle Eligibility Number for Subject Vehicles

The importer of a vehicle admissible under any final determination must indicate on the form HS–7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. VSP #55 is the vehicle eligibility number assigned to vehicles admissible under this determination.

Final Determination

Accordingly, on the basis of the foregoing, NHTSA hereby determines that a 1993 BMW 850i not originally manufactured to comply with all applicable Federal motor vehicle safety standards is substantially similar to a 1993 BMW 850i originally manufactured for importation into and sale in the United States and certified under section 114 of the National Traffic and Motor Vehicle Safety Act, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Authority: 15 U.S.C. 1397(c)(3)(A)(i)(I) and (C)(ii); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: December 21, 1993.

William A. Boehly,

Associate Administrator for Enforcement.

[FR Doc. 93–31990 Filed 12–29–93; 8:45 am]

BILLING CODE 4910–59–M

[Docket No. 93–76; Notice 2]

Determination That Nonconforming 1992 Mercedes-Benz 300SL Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of determination by NHTSA that nonconforming 1992 Mercedes-Benz 300SL passenger cars are eligible for importation.

SUMMARY: This notice announces the determination by NHTSA that 1992 Mercedes-Benz 300SL passenger cars not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because they are substantially similar to a vehicle originally manufactured for importation into and sale in the United States and certified by its manufacturer as complying with the safety standards (the U.S.-certified version of the 1992 Mercedes-Benz 300SL), and they are capable of being readily modified to conform to the standards.

DATES: The determination is effective December 30, 1993.

FOR FURTHER INFORMATION CONTACT: Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under section 108(c)(3)(A)(i) of the National Traffic and Motor Vehicle Safety Act (the Act), 15 U.S.C. 1397(c)(3)(A)(i), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards must be refused admission into the United States on and after January 31, 1990, unless NHTSA has determined that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under section 114 of the Act, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility determinations may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA determines, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this determination in the **Federal Register.**

Champagne Imports, Inc. of Lansdale, Pennsylvania (Registered Importer R–90–009) petitioned NHTSA to determine whether 1992 Mercedes-Benz 300SL passenger cars are eligible for importation into the United States. NHTSA published notice of the petition on October 26, 1993 (58 FR 57667) to afford an opportunity for public comment. The reader is referred to that notice for a thorough description of the petition. The model identification number that the notice provided for the 1992 Mercedes-Benz 300 SL was "Model ID 129.006." That number was

in error, and should properly have read "Model ID 129.061."

No comments were received in response to the notice. Based on its review of the information submitted by the petitioner, NHTSA has determined to grant the petition.

Vehicle Eligibility Number for Subject Vehicles

The importer of a vehicle admissible under any final determination must indicate on the form HS–7 accompanying entry the appropriate vehicle eligibility number indicating that the vehicle is eligible for entry. VSP 54 is the vehicle eligibility number assigned to vehicles admissible under this determination.

Final Determination

Accordingly, on the basis of the foregoing, NHTSA hereby determines that a 1992 Mercedes-Benz 300SL (Model ID 129.061) not originally manufactured to comply with all applicable Federal motor vehicle safety standards is substantially similar to a 1992 Mercedes-Benz 300 SL originally manufactured for importation into and sale in the United States and certified under section 114 of the National Traffic and Motor Vehicle Safety Act, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Authority: 15 U.S.C. 1397(c)(3) (A)(i)(I) and (C)(ii); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: December 21, 1993.

William A. Boehly,

Associate Administrator for Enforcement.

[FR Doc. 93–31991 Filed 12–29–93; 8:45 am]

BILLING CODE 4910–59–M

[Docket No. 93–89; Notice 1]

Receipt of Petition for Determination That Nonconforming 1992 Mercedes-Benz 500SL Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for determination that nonconforming 1992 Mercedes-Benz 500SL passenger cars are eligible for importation.

SUMMARY: This notice announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a determination that a 1992 Mercedes-Benz 500SL that was not originally manufactured to comply with all applicable Federal motor vehicle safety standards is eligible for importation into the United States because (1) It is substantially similar to a vehicle that was originally manufactured for importation into and sale in the United States and that was certified by its manufacturer as complying with the safety standards, and (2) it is capable of being readily modified to conform to the standards.

DATES: The closing date for comments on the petition is January 31, 1994.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Docket Section, room 5109, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. (Docket hours are from 9:30 a.m. to 4 p.m.)

FOR FURTHER INFORMATION CONTACT: Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under section 108(c)(3)(A)(i) of the National Traffic and Motor Vehicle Safety Act (the Act), 15 U.S.C. 1397(c)(3)(A)(i), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States on and after January 31, 1990, unless NHTSA has determined that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under section 114 of the Act, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility determinations may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA determines, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this determination in the **Federal Register.**

Liphardt & Associates, Inc. of Ronkonkoma, New York ("Liphardt") (Registered Importer R–92–004) has petitioned NHTSA to determine whether 1992 Mercedes-Benz 500SL. (Model ID 129.066) passenger cars are eligible for importation into the United States. The vehicle which Liphardt believes is substantially similar is the 1992 Mercedes-Benz 500SL that Daimler Benz A.G. manufactured for importation into and sale in the United States, and certified as conforming to all applicable Federal motor vehicle safety standards.

The petitioner states that it carefully compared the non-U.S.-certified 500SL to its U.S.-certified counterpart, and found the two vehicles to be substantially similar with respect to compliance with most applicable Federal motor vehicle safety standards.

Liphardt submitted information with its petition intended to demonstrate that the non-U.S.-certified 500SL, as originally manufactured, conforms to many Federal motor vehicle safety standards in the same manner as its U.S.-certified counterpart, or is capable of being readily modified to conform to those standards.

Specifically, the petitioner claims that the non-U.S. certified 1992 model 500SL is identical to the U.S.-certified 1992 model 500SL with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence * * *,* 103 *Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 105 *Hydraulic Brake Systems,* 106 *Brake Hoses,* 107 *Reflecting Surfaces,* 109 *New Pneumatic Tires,* 111 *Rearview Mirrors,* 113 *Hood Latch Systems,* 116 *Brake Fluid,* 124 *Accelerator Control Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 203 *Impact Protection for the Driver From the Steering Control System,* 204 *Steering Control Rearward Displacement,* 205 *Glazing Materials,* 206 *Door Locks and Door Retention Components;* 207 *Seating Systems,* 209 *Seat Belt Assemblies,* 210 *Seat Belt Assembly Anchorages,* 211 *Wheel Nuts, Wheel Discs and Hubcaps,* 212 *Windshield Retention,* 214 *Side Door Strength,* 216 *Roof Crush Resistance,* 219 *Windshield Zone Intrusion,* and 302 *Flammability of Interior Materials.*

Petitioner also contends that the non-U.S.-certified 1992 model 500SL is capable of being readily modified to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* substitution of a lens marked "Brake" for a lens with an ECE symbol on the brake failure indicator lamp.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* (a) Installation of U.S.-model headlamp assemblies which incorporate sealed beam headlamps and front sidemarkers; (b) installation of U.S.-model taillamp assemblies which incorporate rear sidemarkers; (c) installation of a high mounted stop lamp.

Standard No. 110 *Tire Selection and Rims:* Installation of a tire information placard.

Standard No. 114 *Theft Protection:* Installation of a buzzer relay and warning buzzer in the steering lock electrical circuit.

Standard No. 115 *Vehicle Identification Number:* Installation of a buzzer relay and a warning buzzer in the steering lock electrical circuit.

Standard No. 115 *Vehicle Identification Number:* Installation of a VIN plate that can be read from outside the left windshield pillar, and a vin reference label on the edge of the door or latch post nearest the driver.

Standard No. 118 *Power-Operated Window Systems:* Rewiring of the power window system so that the window transport is inoperative when the ignition is switched off.

Standard No. 208 *Occupant Crash Protection:* (a) Installation of an ignition switch-actuated seat belt warning lamp; (b) installation of a knee bolster and mounting hardware to augment the passive restraint system. The petitioner claims that the vehicle comes equipped with air bags and Type 2 seat belts that comply with the standard.

Standard No. 301 *Fuel System Integrity:* Installation of a rollover valve in the fuel tank vent line between the fuel tank and the evaporative emissions collection canister.

Additionally, the petitioner states that the bumpers on the non-U.S.-certified 1992 model 500SL must be reinforced to comply with the Bumper Standard found in 49 CFR part 581.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 15 U.S.C. 1397(c)(3)(A)(i)(I) and (C)(ii); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: December 21, 1993.

William A. Boehly,

Associate Administrator for Enforcement.

[FR Doc. 93-31992 Filed 12-29-93; 8:45 am]

BILLING CODE 4910-59-M

[Docket No. 93-90; Notice 1]

Receipt of Petition for Determination That Nonconforming 1993 BMW 730i Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for determination that nonconforming 1993 BMW 730i passenger cars are eligible for importation.

SUMMARY: This notice announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a determination that a 1993 BMW 730i that was not originally manufactured to comply with all applicable Federal motor vehicle safety standards is eligible for importation into the United States because (1) it is substantially similar to a vehicle that was originally manufactured for importation into and sale in the United States and that was certified by its manufacturer as complying with the safety standards, and (2) it is capable of being readily modified to conform to the standards.

DATES: The closing date for comments on the petition is January 31, 1994.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Docket Section, room 5109, National Highway Traffic Safety Administration, 400 Seventh St., SW, Washington, DC 20590. [Docket hours are from 9:30 a.m. to 4 p.m.]

FOR FURTHER INFORMATION CONTACT: Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202-366-5306).

SUPPLEMENTARY INFORMATION:

Background

Under section 108(c)(3)(A)(i) of the National Traffic and Motor Vehicle Safety Act (the Act), 15 U.S.C. 1397(c)(3)(A)(i), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States on and after January 31, 1990, unless NHTSA has determined that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under section 114 of the Act, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility determinations may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA determines, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this determination in the **Federal Register.**

Champagne Imports Inc. of Lansdale, Pennsylvania ("Champagne") (Registered Importer R-90-009) has petitioned NHTSA to determine whether 1993 BMW 730i passenger cars that were originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States. The vehicle that Champagne believes is substantially similar is the 1993 BMW 740i, which was manufactured for importation into and sale in the United States and certified by its manufacturer, Bayerische Motoren-Werke A.G., as conforming to all applicable Federal motor vehicle safety standards.

The petitioner states that it has carefully compared the 1993 BMW 730i to the 1993 BMW 740i, and found the two vehicles to be substantially similar with respect to most applicable Federal motor vehicle safety standards.

Champagne submitted information with its petition intended to demonstrate that the 1993 model 730i, as originally manufactured, conforms to many Federal motor vehicle safety standards in the same manner as the 1993 model 740i that was offered for sale in the United States, or is capable of being readily modified to conform to those standards.

Specifically, the petitioner claims that the 1993 model 730i is identical to the certified 1993 model 740i with respect to compliance with Standards Nos. 102 *Transmission Shift Lever Sequence * * *,* 103 *Defrosting and Defogging Systems,* 104 *Windshield Wiping and Washing Systems,* 105 *Hydraulic Brake Systems,* 106 *Brake Hoses,* 107 *Reflecting Surfaces,* 109 *New Pneumatic Tires,* 113 *Hood Latch Systems,* 116 *Brake Fluid,* 124 *Accelerator Control Systems,* 201 *Occupant Protection in Interior Impact,* 202 *Head Restraints,* 203 *Impact Protection for the Driver*

From the Steering Control System, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 211 *Wheel Nuts, Wheel Discs and Hubcaps*, 212 *Windshield Retention*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, and 302 *Flammability of Interior Materials*.

Petitioner also contends that the 1993 BMW 730i is capable of being readily modified to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* (a) Substitution of a lens marked "Brake" for a lens with an ECE symbol on the brake failure indicator lamp; (b) installation of a seat belt warning lamp; (c) recalibration of the speedometer/odometer from kilometers to miles per hour.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* (a) Installation of U.S.-model headlamp assemblies which incorporates sealed beam headlamps and front sidemarkers; (b) installation of U.S.-model taillamp assemblies which incorporate rear sidemarkers; (c) installation of a high mounted stop lamp.

Standard No. 110 *Tire Selection and Rims:* Installation of a tire information placard.

Standard No. 111 *Rearview Mirrors:* Replacement of the passenger side rearview mirror, which is convex but lacks the required warning statement.

Standard No. 114 *Theft Protection:* Installation of a warning buzzer microswitch in the steering lock electrical circuit, and a warning buzzer.

Standard No. 115 *Vehicle Identification Number:* Installation of a VIN plate that can be read from outside the left windshield pillar, and a VIN reference label on the edge of the door or latch post nearest the driver.

Standard No. 118 *Power-Operated Window Systems:* Rewiring of the power window system so that the window transport is inoperative when the ignition is switched off.

Standard No. 208 *Occupant Crash Protection:* (a) Installation of a U.S.-model seat belt in the driver's position, or a belt webbing-actuated microswitch inside the driver's seat belt retractor; (b) installation of an ignition switch-actuated seat belt warning lamp and buzzer. The petitioner states that the 1993 model 730i is equipped with an automatic restraint system consisting of a driver side air bag, knee bolster, and control unit, which have part numbers that are identical to those found on the U.S. certified 1993 model 740i.

Standard No. 214 *Side Door Strength:* Installation of reinforcing beams.

Standard No. 301 *Fuel System Integrity:* Installation of a rollover valve in the fuel tank vent line between the fuel tank and the evaporative emissions canister.

Additionally, the petitioner states that the bumpers on the 1993 model 730i must be reinforced to comply with the Bumper Standard found in 49 CFR part 581.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW, Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: January 31, 1994.

Authority: 15 U.S.C. 1397(c)(3)(A)(i)(I) and (C)(ii); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: December 23, 1993.

William A. Boehly,

Associate Administrator for Enforcement.

[FR Doc. 93-31993 Filed 12-29-93; 8:45 am]

BILLING CODE 4910-59-M

[Docket No. 93-01; Notice 1]

Receipt of Petition for Determination That Nonconforming 1988 Saab 9000 Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for determination that nonconforming 1988 Saab 9000 passenger cars are eligible for importation.

SUMMARY: This notice announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a determination that a 1988 Saab 9000 that was not originally manufactured to comply with all applicable Federal motor vehicle safety standards is eligible for importation into the United States because (1) it is substantially similar to a vehicle that was originally manufactured for importation into and sale in the United States and that was certified by its manufacturer as complying with the safety standards, and (2) it is capable of being readily modified to conform to the standards.

DATES: The closing date for comments on the petition is January 31, 1994.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Docket Section, room 5109, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. (Docket hours are from 9:30 a.m. to 4 p.m.)

FOR FURTHER INFORMATION CONTACT: Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202-366-5306).

SUPPLEMENTARY INFORMATION:

Background

Under section 108(c)(3)(A)(i) of the National Traffic and Motor Vehicle Safety Act (the Act), 15 U.S.C. 1397(C)(3)(A)(i), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States on and after January 31, 1990, unless NHTSA has determined that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under section 114 of the Act, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility determinations may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA determines, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this determination in the **Federal Register.**

J.K. Motors, Inc. of Kingsville, Maryland (J.K.) (Registered Importer R-90-006) has petitioned NHTSA to determine whether 1988 Saab 9000 passenger cars are eligible for

importation into the United States. The vehicle which J.K. believes is substantially similar is the 1988 Saab 9000 that Saab Automobile, A.B. manufactured for importation into and sale in the United States, and certified as conforming to all applicable Federal motor vehicle safety standards.

The petitioner states that it carefully compared the non-U.S.-certified 1988 Saab 9000 to its U.S.-certified counterpart, and found the two vehicles to be substantially similar with respect to compliance with most applicable Federal motor vehicle safety standards.

J.K. submitted information with its petition intended to demonstrate that the non-U.S. certified 1988 Saab 9000, as originally manufactured, conforms to many Federal motor vehicle safety standards in the same manner as its U.S.-certified counterpart, or is capable of being readily modified to conform to those standards.

Specifically, the petitioner claims that the non-U.S.-certified 1988 Saab 9000 is identical to the U.S.-certified 1988 Saab 9000 with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence * * **, 103 *Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 105 *Hydraulic Brake Systems*, 106 *Brake Hoses*, 107 *Reflecting Surfaces*, 109 *New Pneumatic Tires*, 113 *Hood Latch Systems*, 116 *Brake Fluid*, 124 *Accelerator Control Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 203 *Impact Protection for the Driver From the Steering Control System*, 204 *Steering Control Rearward Displacement*, 206 *Door Locks and Door Retention Components*, 205 *Glazing Materials*, 207 *Seating Systems*, 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 211 *Wheel Nuts, Wheel Discs and Hubcaps*, 212 *Windshield Retention*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, and 302 *Flammability of Interior Materials*.

Petitioner also contends that the non-U.S.-certified 1988 Saab 9000 is capable of being readily modified to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays:* (a) Substitution of a lens marked "Brake" for a lens with an ECE symbol on the brake failure indicator lamp; (b) recalibration of the speedometer/odometer from kilometers to miles per hour.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment:* (a) Installation of U.S.-model headlamp assemblies which incorporate sealed beam headlamps and front sidemarkers; (b) installation of U.S.-model taillamp assemblies which incorporate rear sidemarkers; (c) installation of a high mounted stop lamp.

Standard No. 110 *Tire Selection and Rims:* Installation of a tire information placard.

Standard No. 111 *Rearview Mirrors:* Replacement of the passenger side rearview mirror, which is convex but lacks the required warning statement.

Standard No. 114 *Theft Protection:* Installation of a buzzer microswitch in the steering lock assembly, and a warning buzzer.

Standard No. 115 *Vehicle Identification Number:* Installation of a VIN plate that can be read from outside the left windshield pillar, and a VIN reference label on the edge of the door or latch post nearest the driver.

Standard No. 118 *Power-Operated Window Systems:* Rewiring of the power window system so that the window transport is inoperative when the ignition is switched off.

Standard No. 208 *Occupant Crash Protection:* Installation of an audible seat belt warning system.

Standard No. 214 *Side Door Strength:* Installation of reinforcing beams.

Standard No. 301 *Fuel System Integrity:* Installation of a rollover valve in the fuel tank vent line between the fuel and the evaporative emissions collection canister.

Additionally, the petitioner states that the bumpers on the non-U.S.-certified 1988 Saab 9000 must be reinforced to comply with the Bumper Standard found in 49 CFR part 581.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 15 U.S.C. 1397(c)(3)(A)(i)(I) and (C)(ii); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: December 23, 1993.

William A. Boehly,

Associate Administrator for Enforcement.

[FR Doc. 93–31994 Filed 12–29–93; 8:45 am]

BILLING CODE 4910–59–M

[Docket No. 93–92; Notice 1]

Receipt of Petition for Determination That Nonconforming 1977 BMW R100S Motorcycles Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for determination that nonconforming 1977 BMW R100S motorcycles are eligible for importation.

SUMMARY: This notice requests comments on a petition submitted to the National Highway Traffic Safety Administration (NHTSA) for a determination that a 1977 BMW R100S motorcycle that was not originally manufactured to comply with all applicable Federal motor vehicle safety standards is eligible for importation into the United States because (1) it is substantially similar to a vehicle that was originally manufactured for importation into and sale in the United States and that was certified by its manufacturer as complying with the safety standards, and (2) it is capable of being readily modified to conform to the standards.

DATES: The closing date for comments on the petition is January 31, 1994.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Docket Section, room 5109, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. (Docket hours are from 9:30 a.m. to 4 p.m.)

FOR FURTHER INFORMATION CONTACT: Ted Bayler, Office of Vehicle Safety Compliance, NHTSA (202–366–5306).

SUPPLEMENTARY INFORMATION:

Background

Under section 108(c)(3)(A)(i) of the National Traffic and Motor Vehicle Safety Act (the Act), 15 U.S.C. 1397(c)(3)(A)(i), a motor vehicle that was not originally manufactured to conform to all applicable federal motor vehicle safety standards shall be refused admission into the United States on and after January 31, 1990, unless NHTSA has determined that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under section 114 of the Act,

and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily modified to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility determinations may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA determines, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this determination in the **Federal Register.**

G&K Automotive Conversion, Inc. of Santa Ana, California ("G&K") (Registered Importer R–90–007) has petitioned NHTSA to determine whether 1977 BMW R100S motorcycles are eligible for importation into the United States. The vehicle that G&K believes is substantially similar is the 1977 BMW R100S that was manufactured for importation into and sale in the United States and that was certified by its manufacturer, Beyerische Motoren-Werke A.G., as complying with all applicable Federal motor vehicle safety standards.

The petitioner stated that it examined the non-U.S. certified 1977 BMW R100S, and determined that it is substantially similar to its U.S. certified counterpart. Based on this examination, the petitioner contends that the non-U.S. certified 1977 BMW R100S, as originally manufactured, conforms to many Federal motor vehicle safety standards in the same manner as its U.S. certified counterpart, or is capable of being readily modified to conform to those standards.

Specifically, the petitioner claims that the two models are identical with respect to compliance with Standards Nos. 106 *Brake Hoses,* 108 *Lamps, Reflective Devices and Associated Equipment,* 111 *Rearview Mirrors,* 115 *Vehicle Identification Number,* 116 *Brake Fluid,* 119 *New Pneumatic Tires for Vehicles other than Passenger Cars,* 122 *Motorcycle Brake Systems,* and 205 *Glazing Materials.*

Petitioner also contends that the non-U.S. certified 1977 BMW R100S is capable of being readily modified to meet the following standards in the manner indicated:

Standard No. 120 *Tire Selection and Rims for Motor Vehicles other than Passenger Cars:* By adding an appropriate tire information label.

Standard No. 123 *Motorcycles Controls and Displays:* By recalibrating the speedometer/odometer from kilometers to miles per hour.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW., Washington, DC 20590. It is requested but not required that 10 copies be submitted.

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: January 31, 1994.

Authority: 15 U.S.C. 1397(c)(3)(A)(i)(I) and (C)(ii); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: December 21, 1993.

William A. Boehly,

Associate Administrator for Enforcement.

[FR Doc. 93–31995 Filed 12–29–93; 8:45 am]

BILLING CODE 4910–59–M

Research and Special Programs Administration

International Standards on the Transport of Dangerous Goods; Competent Authority Ruling

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Competent authority notice.

SUMMARY: The U.S. Hazardous Materials Regulations (HMR; 49 CFR 171–180) authorize the transportation of hazardous materials in accordance with the International Maritime Dangerous Goods Code (IMDG Code) when a portion of the journey is by vessel. This notice advises the public of an IMDG Code container packing certificate requirement which becomes effective worldwide on January 1, 1994.

FOR FURTHER INFORMATION CONTACT: Lt. Commander Phillip Olenik, Telephone (202) 267–1577, Hazardous Materials Branch, G-MTH–1, U.S. Coast Guard, 2100 Second Street, SW., Washington, DC 20593–0001.

SUPPLEMENTARY INFORMATION: The Associate Administrator for Hazardous Materials Safety, RSPA, is designated as United States Competent Authority (49 CFR 171.8) for matters related to approvals subject to the provisions of the International Maritime Organization (IMO) International Maritime Dangerous Goods Code (IMDG Code) and the International Civil Aviation Organization (ICAO) Technical Instructions on the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions). Section 171.12 of the HMR authorizes shipments of hazardous materials to be packaged, marked, classed, labeled, placarded, described, stowed and segregated, and certified in accordance with the provisions of the IMDG Code in place of certain corresponding requirements in the HMR, provided a portion of the transportation is by vessel. As mandated under the International Convention on Safety of Life at Sea (SOLAS), as amended effective January 1, 1994, when hazardous materials (called dangerous goods in the IMDG Code) are packed into a freight container or road transport vehicle for transportation by vessel, those responsible for packing the unit must provide a certificate or declaration to the water carrier attesting that:

(1) The container was clean, dry and fit to receive the goods;

(2) For consignments involving goods of Class 1, other than Division 1.4, the container is structurally serviceable in accordance with IMDG Code criteria;

(3) No incompatible goods have been packed into the container;

(4) All packages have been externally inspected for damage, and only sound packages have been loaded;

(5) All packages have been properly packed and secured;

(6) When dangerous goods are transported in bulk packagings, the cargo has been distributed in the container;

(7) The container and packages are properly marked, labeled and placarded;

(8) When solid carbon dioxide (dry ice) is used for cooling purposes, the container is externally marked or labeled in a conspicuous place at the door end, with the words: "DANGEROUS CO_2—GAS (DRY ICE) INSIDE, VENTILATE THOROUGHLY BEFORE ENTERING"; and

(9) The required dangerous goods declaration has been received for each dangerous goods consignment packed in the container. The above items may be certified either in a separate document or in a signed statement provided on the dangerous goods shipping document.

The freight container packing certification requirement was adopted several years ago under Amendment 24 to the IMDG Code and becomes effective worldwide on January 1, 1994, as mandated under the SOLAS Convention. Persons who offer hazardous materials for transportation (including freight forwarders and non vessel operating common carriers) or transport hazardous materials by vessel may not be fully aware of this requirement. This notice serves to remind such offerors and transporters that, as of January 1, 1994, all freight container shipments of dangerous goods that are, or will become subject to, the IMDG Code must comply with the container packing certification requirement.

Issued in Washington, DC on December 23, 1993.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 93-31977 Filed 12-29-93; 8:45 am]

BILLING CODE 4910-60-P

[Notice No. 93-23]

International Standards on the Transport of Dangerous Goods: Request for Comments

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Request for comments.

SUMMARY: The RSPA Associate Administrator for Hazardous Materials Safety, on behalf of the Department of State, represents the United States at meetings of the United Nations (UN) Committee of Experts on the Transport of Dangerous Goods (the UN Committee) in Geneva, Switzerland. The UN Committee is responsible for the United Nations Recommendations on the Transport of Dangerous Goods (UN Recommendations), which form the basis for the International Civil Aviation Organization (ICAO) Technical Instructions on the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions), and the International Maritime Organization (IMO) International Maritime Dangerous Goods Code (IMDG Code). The UN Committee is currently considering amendments to its criteria for classifying toxic substances. RSPA is requesting comments on potential amendments to these classification criteria to assist in developing a U.S. position at the ninth session of the UN Sub-Committee, which will be held July 4-15, 1994.

DATES: Comments are requested on or before February 28, 1994.

ADDRESSES: Address comments to the Dockets Unit (DHM-30), Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001. Comments should identify the notice number and be submitted in five copies. Persons wishing to receive confirmation of receipt of their comments should include a self-addressed stamped post card. The Dockets Unit is located in room 8421 of the Nassif Building, 400 Seventh Street, SW., Washington, DC. Public dockets may be reviewed between the hours of 8:30 a.m. and 5 p.m. Monday through Friday, except for legal Federal holidays.

FOR FURTHER INFORMATION CONTACT: Frits Wybenga, International Standards Coordinator for Hazardous Materials Safety, telephone (202) 366-0656, or Beth Romo, Office of Hazardous Materials Standards, telephone (202) 366-4488, RSPA, Department of Transportation, Washington, DC 20590-0001.

SUPPLEMENTARY INFORMATION: Efforts are now underway in a number of international fora to develop internationally harmonized multiregulatory classification criteria for hazardous materials. Most recently, the recommendation to develop an internationally harmonized classification system was expressed in paragraph 19.28 of Chapter 19 of Agenda 21 (entitled Environmentally Sound Management of Toxic Chemicals Including Prevention of Illegal International Traffic in Toxic and Dangerous Products) of the UN Conference on the Environment and Development (UNCED). It states that "Governments, through the cooperation of relevant international organizations and industry, where appropriate, should launch a project with a view to establishing and elaborating a harmonized classification and compatible labelling system for chemicals for use in all UN official languages including adequate pictograms." UNCED acknowledged the existence of a "comprehensive scheme" elaborated by the United Nations for purposes of safe transport of dangerous goods and called for the UN Committee to involve itself in the harmonization process. In follow-up resolutions issued by the UN Economic and Social Council, the parent body of the UN Committee, all subsidiary bodies were requested to give appropriate attention to UNCED Agenda 21.

Improved harmonization of classification criteria will minimize the amount of testing of substances which may be subject to a variety of regulatory requirements (e.g., environmental, consumer protection, workplace safety and transport) in the various countries where substances are produced, used, or transported. Improved harmonization would ensure that the level of risk posed by substances will be communicated consistently in all regulations. The existing classification criteria used by various regulatory authorities are being considered in the development of the internationally harmonized multiregulatory criteria.

Several working group meetings of the Organization for Economic Cooperation and Development (OECD) have been held to develop criteria for an internationally harmonized classification system. These meetings were hosted by various OECD member countries. Draft harmonized criteria for acute oral toxicity, dermal toxicity, inhalation toxicity for gases and vapors, and inhalation toxicity for dusts and mists have been developed.

The proposed OECD criteria establish cutoff values to define ranges of toxicity. These toxicity ranges are referred to as OECD classes. The OECD classes are similar to packing groups used in transport regulations to subdivide toxic substances on the basis of degree of danger. The degrees of danger of OECD Classes 1, 2 and 3 generally correspond to the degrees of danger of Packing Groups I, II and III, as defined in the UN Recommendations and the HMR. In both the OECD and the UN systems, substances posing the greatest hazard are in the lowest numbered group. While the draft OECD criteria contain a number of toxicity cutoff values which coincide with the cutoff values used in the UN Recommendations to define the three danger levels for toxic substances, there are differences. In response to the OECD proposals, the UN Committee is currently considering whether the existing criteria in the UN Recommendations should be adjusted to coincide with the proposed OECD Clearing House criteria or whether the existing UN criteria should be retained.

To facilitate discussion at meetings of the UN Sub-Committee, RSPA prepared a document which identifies issues related to the toxicity criteria. This document, which is identified as ST/SG/AC.10/C.3/R.467, is available from RSPA's Dockets Unit (see **ADDRESSES** above). This document will provide a basis for discussion of these issues at the next session of the UN Sub-Committee.

The purpose of this notice is to solicit public comment on these issues in order for RSPA to formulate a U.S. position

for the ninth session of the UN Sub-Committee. Only issues which RSPA considers to be significant are discussed in this notice.

Acute Oral Toxicity

The acute oral toxicity LD_{50} (lethal dose for 50 percent of a test population expressed in milligrams of substance per kilogram of body weight) cutoff values for OECD Classes 1, 2, and 3 are: Class 1—5 mg/kg, Class 2—50 mg/kg and Class 3—200 or 500 mg/kg. The values defining the two highest levels of acute toxicity coincide with the values used to define UN Packing Groups I and II.

Selection of the criteria of OECD Class 3, which would be considered to correspond to the UN Packing Group III level, has proven to be an important issue. Some participants in the OECD discussions advocate a level of 200 mg/kg, while others advocate using a value of 500 mg/kg. International transport regulations and the HMR currently use LD_{50} toxicity levels of 200 mg/kg for solids and 500 mg/kg for liquids. While noting the two different values contained in the transport criteria, the majority of participants at the OECD meetings favored a single toxicity value for liquids and solids.

At the eighth session of the UN Sub-Committee, the European chemical industry organization, CEFIC, advocated using a value of 200 mg/kg for Packing Group III. CEFIC noted that this value is already being used for purposes of consumer protection and worker protection in Europe. CEFIC also expressed the opinion that there was no clear justification for having two different cutoff values for this level of acute oral toxicity, particularly when the same approach was not taken in criteria for other routes of toxicity. The Hazardous Materials Advisory Council (HMAC), in a letter to the RSPA Associate Administrator for Hazardous Materials Safety, also advocated adopting the 200 mg/kg value to define the Packing Group III level of toxicity. HMAC expressed the opinion that the 200 mg/kg value was a more appropriate level in the case of transport requirements.

In relation to acute oral toxicity, RSPA invites comments on whether the U.S. representative should support:

(1) adoption of 200 mg/kg for liquids and solids;

(2) adoption of 500 mg/kg for liquids and solids; or

(3) retention of the existing levels of 200 mg/kg for solids and 500 mg/kg for liquids.

Dermal Toxicity

The dermal toxicity LD_{50} cutoff values for OECD Classes 1, 2 and 3 are: Class 1—40 or 50 mg/kg, Class 2—200 mg/kg and Class 3—1000 mg/kg. The latter two values coincide with the values used to define UN Packing Groups II and III.

The 40 mg/kg alternative in OECD Class 1 coincides with the Packing Group I level in transport regulations. The 50 mg/kg alternative is used in European consumer and workplace safety regulations. Because these two possible values are relatively close together, RSPA does not believe that adoption of the 50 mg/kg value would significantly affect substances subject to the transport requirements.

In relation to dermal toxicity, RSPA invites comments on whether the U.S. representative should support:

(1) Retention of the existing criterion of 40 mg/l for Packing Group I, or

(2) Adoption of the alternative criterion of 50 mg/l for Packing Group I.

Inhalation Toxicity Criteria for Gases and Vapors.

The gas and vapor inhalation toxicity LC_{50} (lethal concentration for 50 percent of a test population when exposed for one hour expressed in parts per million) cutoff values for OECD Classes 1, 2 and 3 are: Class 1—250 ppm, Class 2—1000 ppm and Class 3—5000 ppm.

The OECD Class 3 cutoff value corresponds with the cutoff value of 5000 ppm for UN Packing Group III liquids and the UN criteria for toxic gases (The UN Recommendations do not subdivide toxic gases into packing groups.). The other two OECD classes do not coincide with UN Packing Group I and II values of 1000 ppm and 3000 ppm for liquids. Commenters also should note that the HMR subdivide substances that are toxic by inhalation differently than the UN Recommendations. In the HMR, toxic substances are subdivided into four zones. The cutoff value for Zone A is 200 ppm, which closely corresponds to the criterion for OECD Class 1. Zone B corresponds with OECD Class 2. The HMR and the UN Recommendations both take vapor pressure into account in classifying substances which are toxic by inhalation, while the OECD criteria do not take vapor pressure into account.

In relation to the inhalation toxicity cutoff values, RSPA invites comments on whether the U.S. representative should support:

(1) Adoption of the OECD proposed criterion of 250 ppm in the case of Packing Group I toxic liquids; and

(2) Adoption of the OECD proposed criterion of 1000 ppm in the case of Packing Group II toxic liquids; or

(3) Retention of the existing criteria of 1000 and 3000 ppm for Packing Groups I and II toxic liquids.

Comments Also Are Invited On

(4) Whether 200 ppm would be more appropriate than 250 ppm in defining Packing Group I; and

(5) Whether vapor pressure should continue to be used as part of the inhalation toxicity criteria.

Inhalation by Dusts and Mists.

The dusts and mists inhalation toxicity LC_{50} (lethal concentration for 50 percent of a test population when exposed for one hour, expressed in mg/l) cutoff values for OECD Classes 1, 2 and 3 are Class 1—0.5 mg/l, Class 2—1.0 or 2.0 mg/l and Class 3—4.0 or 10.0 mg/l.

The proposed OECD dusts and mists inhalation toxicity criteria for Classes 2 and 3 each includes two alternatives. In each case, the transport criterion (2.0 mg/l and 10.0 mg/l) is included as one of the alternatives. The other alternative values (1.0 mg/l and 4.0 mg/l) are used in European regulations for worker and consumer protection. The OECD Class 1 cutoff value corresponds with the transport criteria for Packing Group I.

RSPA is aware of concerns that the UN inhalation toxicity criteria for dusts and mists are too restrictive. It has been argued that in some instances it is difficult to determine whether mortalities are the result of the physical effects of dust coating the lungs of the test specimens or due to actual toxic effects. A second concern brought to RSPA's attention is that dust and mist inhalation toxicity is not relevant to most dangerous goods in the transport environment. Items such as aerosols may be an exception.

In relation to inhalation toxicity to dusts and mists cutoff values, RSPA invites comments on whether the U.S. representative should support:

(1) Retention of the existing criterion for Packing Group II of 2 mg/l or adoption of the alternatively proposed value of 1.0 mg/l;

(2) Retention of the existing criterion for Packing Group III of 10 mg/l or adoption of the alternatively proposed value of 4.0 mg/l. RSPA also invites comment on:

(3) The extent to which substances which are toxic by inhalation of dusts and mists should be subject to transport regulations.

In responding to this notice, commenters should provide information on the potential safety and cost impacts

of each recommended action. Noting the purpose of developing internationally harmonized criteria, RSPA invites commenters familiar with other non-transport related regulatory systems to express their views regarding how decisions by the UN Committee might affect the successful development of internationally harmonized criteria.

Issued in Washington, DC on December 27, 1993.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 93-31980 Filed 12-29-93; 8:45 am]

BILLING CODE 4910-60-P

Availability of Draft Report Entitled "Identification of Factors for Selecting Modes and Routes for Shipping High-Level Radioactive Waste and Spent Nuclear Fuel"

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of opportunity for public review of draft report; request for comments.

SUMMARY: This notice invites public review and comment on a draft report prepared to meet the requirements of Section 15 of the Hazardous Materials Transportation Uniform Safety Act (49 App U.S.C. 1813(c)) of 1990, concerning mode and route selection criteria to be used for shipments of high-level radioactive waste and spent nuclear fuel. After review of the public comments, a final report will be prepared.

DATES: Comments must be submitted 60 days after publication of this notice.

ADDRESSES: Written comments should be submitted to the Dockets Unit (DHM-30), Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590. Comments should identify the title of the report and should be submitted in five copies. Persons wishing to receive confirmation of the receipt of the comments should include a self addressed stamped postcard. The Dockets Unit is located in room 8425 of the Nassif Building 400 7th Street SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Joseph S. Nalevanko, (202) 366-4484, Office of Hazardous Materials Planning and Analysis, 400 Seventh Street SW., Washington, DC 20590, or Paul Zebe (617) 494-3271, Volpe National Transportation Systems Center, Kendall Square, Cambridge, Massachusetts 02142. The Draft Report will be available for review at the Dockets Unit between the hours of 8:30 am and 5 pm, Monday through Friday, except holidays. A limited number of copies are also available by contacting the individuals listed above.

SUPPLEMENTARY INFORMATION: Section 15(c) of the Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA) directs the Secretary of Transportation to "* * * undertake a study to determine which factors, if any, should be taken into consideration by shippers and carriers in order to select routes and modes which, in combination, would enhance overall public safety related to the transportation of high-level radioactive waste and spent nuclear fuel. Such a study shall include notice and opportunity for public comment and shall include assessing the degree to which various factors, including population densities, types and conditions of modal infrastructures (such as highways, railbeds, and waterways), quantities of high-level radioactive waste and spent nuclear fuel, emergency response capabilities, exposure and other risk factors, terrain considerations, continuity of routes, available alternative routes, and environmental impact factors, affect the overall public safety of such shipments."

The transport of high-level radioactive waste and spent nuclear fuel necessarily involves the selection of a mode (e.g., rail, highway, waterway), or combination of modes and routes to be used to transport the material. These modal selections and routing decisions by carriers and shippers may have a significant impact on the overall public safety associated with the transportation of such materials. For this reason, there is considerable interest in Congress and elsewhere on the factors or criteria, if any, that could be used by shippers and carriers in the selection of modes and routes that may be used to enhance public safety.

The Volpe National Transportation Systems Center is supporting the RSPA's Office of Hazardous Materials Safety in conducting this study. The Volpe Center has contracted with Battelle Memorial Institute to perform the necessary analyses and data gathering. The Draft Report now available for public review and comments is organized as follows:

(1) Introduction.

(2) Overview of mode and route selection practices.

(3) Identification of candidate mode and route factors.

(4) Qualitative evaluation of candidate factors and selection of primary mode and route factors.

(5) Identification of primary mode and route factors by modeling risk of transporting radioactive materials.

(6) Case study and statistical analysis of primary factors, and

(7) Overall assessment of primary mode/route selection factors.

Issued in Washington, DC on December 27 1993.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 93-31978 Filed 12-29-93; 8:45 am]

BILLING CODE 4910-60-P

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

December 23, 1993

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex, 1500 Pennsylvania Avenue NW., Washington DC 20220.

Special Request: In an effort to make the IRS form described below available to filers who need to collect this information in a timely manner, the Department of the Treasury is requesting Office of Management and Budget (OMB) review and approval by January 28, 1994. All comments must be received by close of business January 21, 1994.

Internal Revenue Service

OMB Number: New
Form Number: IRS Form 1099-C
Type of Review: New collection
Title: Cancellation of Debt
Description: Form 1099-C is used for reporting cancelled debt, as required by section 6050P of the Internal Revenue Code. It is used to verify that debtors are correctly reporting their income.
Respondents: Businesses or other for-profit. Federal agencies or employees. Non-profit institutions
Estimated Number of Respondents: 1,000,000
Estimated Burden Hours Per Respondent: 10 minutes
Frequency of Response: Annually

Estimated Total Reporting Burden: 850,000 hours
Clearance Officer: Garrick Shear, (202) 622–3869, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington DC 20224
OMB Reviewer: Milo Sunderhauf, (202) 395–6880, Office of Management and Budget, Room 3001, New Executive Office Building, Washington DC 20503

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 93–31913 Filed 12–29–93; 8:45 am]

BILLING CODE 4830–01–M

Public Information Collection Requirements Submitted to OMB for Review

December 23, 1993.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171, Treasury Annex, 1500 Pennsylvania Avenue NW., Washington DC 20220.

Departmental Offices/Economic Policy/ Office of Data Management

OMB Number: 1505–0016
Form Number: Treasury International Capital Form BQ–1
Type of Review: Extension
Title: Part 1—Reporting Bank's Own Claims, and Selected Claims of Broker or Dealer on Foreigners; Part 2—Domestic Customers' Claims on Foreigners Held by Reporting Bank, Broker or Dealer, Denominated in Dollars
Description: This report is required by law (22 USC 95a, 22 USC 286f and 3103). It is designed to gather timely and reliable information on international capital movements, including data on dollar claims of banks, other depository institutions, brokers and dealers, and of their domestic customers *vis-a-vis* foreigners.
Respondents: Businesses or other for-profit
Estimated Number of Respondents: 800
Estimated Burden Hours Per Response: 4 hours
Frequency of Response: Quarterly
Estimated Total Reporting Burden: 12,800 hours
OMB Number: 1505–0018
Form Number: Treasury International Capital Form BL–2 and Treasury International Capital Form BL–2(SA)
Type of Review: Extension
Title: Custody Liabilities of Reporting Banks, Brokers and Dealers to Foreigners, Denominated in Dollars
Description: This report is required by law (22 USC 95a, 286f and 3103) for timely and accurate information on U.S. international capital movements, including data on the custody liabilities of banks, other depository institutions, brokers and dealers *vis-a-vis* foreigners, denominated in dollars
Respondents: Businesses or other for-profit
Estimated Number of Respondents: 115
Estimated Burden Hours Per Response: 5 hours
Frequency of Response: Monthly, Semi-annually
Estimated Total Reporting Burden: 6,900 hours
OMB Number: 1505–0020
Form Number: Treasury International Capital Form BQ–2
Type of Review: Extension
Title: Part 1—Liabilities to, and Claims on, Foreigners of Reporting Bank, Broker or Dealer; Part 2—Domestic Customers' Claims on Foreigners Held by Reporting Bank, Broker or Dealer, Denominated in Foreign Currencies
Description: This report is required by law (22 U.S.C. 95a, 22 USC 286f and 3103). It is designed to gather timely and reliable information on international capital movements, including data on liabilities and claims, denominated in foreign currencies, of banks, other depository institutions, brokers and dealers, and of their domestic customers *vis-a-vis* foreigners.
Respondents: Businesses or other for-profit
Estimated Number of Respondents: 290
Estimated Burden Hours Per Response: 4 hours
Frequency of Response: Quarterly
Estimated Total Reporting Burden: 4,640 hours
Clearance Officer: Lois K. Holland, (202) 622–1563, Departmental Offices, room 3171, Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington DC 20220
OMB Reviewer: Milo Sunderhauf, (202) 395–6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503

Lois K. Holland,

Departmental Reports Management Officer.

[FR Doc. 93–31914 Filed 12–29–93; 8:45 am]

BILLING CODE 4810–25–P

UNITED STATES ENRICHMENT CORPORATION

Conflict of Interests Policy

AGENCY: United States Enrichment Corporation.

ACTION: Notice of final policy.

SUMMARY: On November 4, 1993 (58 FR 58896), the United States Enrichment Corporation (Corporation) published an interim policy to implement the Corporation's statutory conflict of interests requirements, found at 42 U.S.C. 2297b–3(j). The period for public comment extended through December 6, 1993. The Corporation received no comments with regard to the interim policy. The interim policy is adopted by the Corporation, without change, as published below.

EFFECTIVE DATE: August 16, 1993.

FOR FURTHER INFORMATION CONTACT:

Robert J. Moore, General Counsel, United States Enrichment Corporation, Two Democracy Center, 6903 Rockledge Drive, Bethesda, MD 20817 or telephone (301) 564–3200.

SUPPLEMENTARY INFORMATION:

Background

The United States Enrichment Corporation, an agency and instrumentality of the United States, was established by the Energy Policy Act of 1992 (Act), Public Law 102–486, 106 Stat. 2923, as a wholly-owned government corporation. among other things, the Corporation was established as the Government's exclusive agent for the marketing and sale of enriched uranium and uranium enrichment and related services. The Corporation's customers include private domestic and foreign entities as well as the Department of Energy.

Purpose

The Act provides that directors, officers and other management-level employees of the Corporation may not have a "financial interest" in customers, contractors, or competitors of the Corporation as well as certain other businesses. See 42 U.S.C. 2297b–3(j). This policy also addresses divestiture of financial interests that directors, officers and other management-level employees of the Corporation are prohibited from acquiring or holding.

List of Subjects

Conflicts of interests, Ethical conduct.

Issued in Washington, DC, December 20, 1993.

William H. Timbers, Jr.,

Transition Manager.

United States Enrichment Corporation Conflict of Interests Policy

I General

All employees of the United States Enrichment Corporation (Corporation) are subject to the regulations of the U.S. Office of Government Ethics that specify the Standards of Ethical Conduct for Employees of the Executive Branch, see 5 CFR part 2635. Subpart D of part 2635 (Sections 2635.401 to 2635.403) of these regulations provides for the disqualification of employees in handling certain matters in which the employee has a direct or imputed financial interest including the necessity in certain cases for employees to divest or not acquire certain financial interests. Section 2635.403 of these regulations covering prohibited financial interests notes that, in addition to the restrictions contained in that regulation, agency employees may be prohibited by other statutes from holding certain financial interests. The Corporations' enabling statute contains such restrictions with regard to Corporation Directors and Supervisory Employees (as these terms are defined in section II of this policy).

II. Definitions

For the purposes of this policy:

(a) *Customer, contractor, or competitor of the Corporation or any business that may be adversely affected by the success of the Corporation.* The Corporation's Procurement Manager shall maintain a current list of all customers, contractors, or competitors of the Corporation and any business that may be adversely affected by the success of the Corporation. The Corporation's Designated Agency Ethics Official shall periodically distribute such list to all Directors and Supervisory Employees. The term "contractor" in the preceding sentence means any entity which has a services contract for over $25,000 with the Corporation or which has a contract for over $50,000 with the Corporation to supply commercially offered supplies or equipment.

(b) *Directors* means persons appointed by the President with the advice and consent of the Senate pursuant to Section 1304(b) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2297b–3(b)).

(c) *Financial Interests.* (1) Financial Interests include both direct and indirect financial interests. A direct financial interest means the ownership or part ownership of stocks, bonds, debentures, warrants, partnership interests, or other debt or equity holdings in an entity (or in an affiliate of such entity) and includes serving as an employee, officer, director, trustee, or partner of an entity (or an affiliate of such entity), whether or not compensated for such service. The term "affiliate" in the preceding sentence refers to any individual, corporation or other organization or enterprise that controls or is controlled by such entity. An indirect financial interest includes:

(A) The holding of certain pension rights and other financial relationships that are equivalent to a direct financial interest in an entity (or in an affiliate of such entity);

(B) The Financial Interests of the employee's spouse or minor child in an entity (or in an affiliate of such entity); and

(C) The right to purchase or acquire any direct financial interest, such as a stock option or commodity future, in an entity (or in an affiliate of such entity).

(2) Financial Interests do not include:

(A) Interests in mutual funds or regulated investment companies the portfolios of which are widely diversified, and similarly constituted, commercially fungible entities;

(B) Any pension plan which holds no more than an insubstantial percentage of its assets in the form of direct financial interests in a customer, contractor, or competitor of the Corporation or any business that may be adversely affected by the success of the Corporation;

(C) Life insurance investments;

(D) State and municipal bonds;

(E) U.S. savings bonds and bank, credit union or loan association savings certificates; and

(F) Such other interests as the Corporation's Designated Agency Ethics Official may determine are not Financial Interests as defined by Section II(c)(1) of this policy by virtue, for example, of their remote or inconsequential relationship to a customer, contractor, or competitor of the Corporation or any business that may be adversely affected by the success of the Corporation.

(d) *Supervisory Employees* means Corporation officers and other management-level employees. The Corporate Vice President for Human Resources will publish annually a list of Corporation officers and other management-level employees.

III. Prohibition

Any Director or Supervisory Employee shall not acquire or hold any Financial Interests in a customer, contractor, or competitor of the Corporation or any business that may be adversely affected by the success of the Corporation.

IV. Divestiture

(a) *Reasonable period to divest.* In the event that a Director or Supervisory Employee holds a Financial Interest prohibited under Section III of this policy (whether by gift or bequest or because of an addition to the list provided for in section II(a) of this policy or otherwise), such Director or Supervisory Employee shall be given a reasonable period of time, considering the nature of his or her particular duties and the nature and marketability of such Financial Interest, within which to sell or to divest himself or herself of such Financial Interest. As long as such Director or Supervisory Employee continues to hold a prohibited Financial Interest, he or she shall disqualify himself or herself from participating in any matter which is related to or which may be affected by such Financial Interest. Except in cases of unusual hardship, as determined by the Corporation, a reasonable period of time shall not exceed 90 days from

(1) The date of the Director's appointment or the Supervisory Employee's hire or promotion; or

(2) The date on which the Director or Supervisory Employee first came to hold a Financial Interest prohibited under Section III of this policy, whether by gift or bequest or because of an addition to the list provided for in Section II(a) of this policy or otherwise.

(b) *Eligibility for special tax treatment.* Any Director or Supervisory Employee required to sell or divest himself or herself of a Financial Interest prohibited by Section III of this policy may be eligible to defer the tax consequences of such sale or divestiture pursuant to 5 CFR part 2634, subpart J.

[FR Doc. 93–31976 Filed 12–29–93; 8:45 am]

BILLING CODE 8270–01–M

UNITED STATES INFORMATION AGENCY

College and University Partnerships Program for the Russian Federation (CUPP)

AGENCY: United States Information Agency.

ACTION: Notice—Request for proposals.

SUMMARY: The Bureau of Educational and Cultural Affairs of the United States Information Agency announces a program of support for institutional partnerships between universities and colleges in the United States and the Russian Federation. The purpose of this

college and university partnerships program is to foster curriculum development and teaching methodologies, and to modernize the administrative structure at institutions of higher education in the Russian Federation.

DATES: Deadline for proposals: Proposals must be received at the Academy for Educational Development by 5 p.m. Washington, DC time on March 25, 1994. Proposals received by the Academy after this deadline will not be eligible for consideration. Faxed documents will not be accepted, nor will documents postmarked on March 25, 1994 but received at a later date. It is the responsibility of grant applicants to ensure that their proposal is received by the above deadline. Grants should begin no later than September 1, 1994.

ADDRESS: Three originals, containing tabs A–U (see "Application Checklist" in program guidelines packet), and 10 copies, containing tabs A–D of the proposal are to be submitted by the deadline to: USIA College and University Partnerships Program for the Russian Federation, c/o The Academy for Educational Development, 1875 Connecticut Ave., NW., Washington, DC 20006–1202.

FOR FURTHER INFORMATION CONTACT: For general information and requests for application packets, which include all necessary forms and guidelines for preparing budgets, contact Mr. Chris Dwyer or Ms. Deborah Trent at (202) 619–5289, or write to the following address: Specialized Programs Units (E/ASU), Attention: USIA/College and University Partnerships Program for the Russian Federation, Office of Academic Programs, Rm. 349, U.S. Information Agency, 301 4th Street, SW., Washington, DC 20547.

SUPPLEMENTARY INFORMATION:

Overview

The College and University Partnerships Program for the Russian Federation is authorized and funded under the Foreign Appropriations Bill of 1994, also known as the Russian Assistance Act. USIA administers annual university affiliations programs under the authority of the Mutual Educational and Cultural Exchange Act of 1961, P.L. 87–256 (Fulbright-Hays Act). With the above funding, USIA will support institutional relationships with the Russian Federation through grants for a period of two (2) years beginning with the 1994–95 academic year (approximately September 1, 1994).

The College and University Partnerships Program is separate from USIA's University Affiliations Program and the University Development Program in Business Management, announced annually in this publication. However, the Agency strives to achieve institutional and geographic diversity across all three university linkage programs. Institutions planning to submit proposals for more than one competition should note that USIA will not fund the same project activities under two different grants.

The College and University Partnerships Program is limited to the following specific academic disciplines: (1) Law; (2) business/economics; (3) education/continuing education/educational reform; (4) government/public policy/public administration; (5) communications/journalism. Proposals should focus on reform in one of these eligible disciplines.

Proposals must involve the development of new academic programs or the building and/or restructuring of an existing program. Participating institutions must exchange faculty and/or staff members for teaching/lecturing and consulting for periods of not less than one month. Each year at least one U.S. participant should be in residence at the foreign partner institution for one semester to serve in a coordinating role. Other activities which serve the purpose of this program include: team teaching; visits by faculty to update their academic and professional skills, observe teaching techniques and strengthen their subject area expertise; expansion of library holdings; textbook development; development of audio-visual instructional materials; development of electronic mail communications; distance learning; the translation or reprinting of U.S. texts and other materials; and community outreach in conjunction with curriculum development. Institutional partners may include *graduate-level or PhD* students in the exchange.

Proposals will be accepted to establish new institutional linkages or to allow for innovation and strengthening of existing partnerships. Feasibility studies to plan linkages will not be considered.

The competition is limited to the Russian Federation. USIA will strive to achieve broad institutional and geographic diversity across the U.S. and the Russian Federation in awarding the grants. USIA will provide up to $300,000 for each proposal selected for funding over a two-year period. Subject to the availability of funds, USIA will award up to 6 grants to U.S. community colleges and up to 14 grants to other U.S. institutions (as defined under "Eligibility") proposing partnerships with institutions in the Russian Federation. Participating institutions, both U.S. and Russian, must maintain their faculty and staff on salary and benefits (with the sole exception of personnel assigned overseas for three or more consecutive months; see "Allowable Costs").

U.S. institutions are responsible for the submission of proposals and must collaborate with their foreign partners in planning and preparing proposals. U.S. and foreign partner institutions are encouraged to consult about the proposed project with U.S. Information Service (USIS) offices in Moscow, St. Petersburg or Vladivostok.

Public reporting burden for this collection of information is estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this administrative burden, to USIA Clearance Officer, M/ADD, Room 624, U.S. Information Agency, 301 4th Street, SW., Washington, DC 20547; and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503. (Information collection involved in this program has been cleared by OMB Approval Number 3116–0179, expiration date 12/31/95.)

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social and cultural life.

Guidelines

Eligibility

In the U.S., participation in the program is open to two-year and four-year colleges and universities, including community colleges and graduate schools. Consortia of universities and/or community colleges, individually or as systems, are also eligible. The Agency encourages proposals from eligible Historically Black Colleges and Universities and other institutions in the U.S. with at least 25% minority (Native American or Native Alaskan; Asian-American or Pacific Islander; African-American [or Black, non-hispanic]; and Hispanic) student enrollment.

Participating U.S. institutions must be accredited by one of the following regional accrediting bodies: Middle States Association of Colleges and Schools; New England Association of

Schools and Colleges, Inc.; North Central Association of Colleges and Schools; Northwest Association of Schools and Colleges; Southern Association of Colleges and Schools; or Western Association of Schools and Colleges. Institutions recognized only by national or state institutional accrediting bodies are not eligible. U.S. universities and colleges applying under this program may collaborate with U.S. scholarly, professional, or international educational associations, foundations and organizations.

Overseas, participation is limited to recognized degree-granting institutions of higher education and internationally recognized or highly regarded independent research institutes. Proposals from a consortium may be submitted by a member institution with authority to represent the consortium.

Participants representing U.S. institutions and traveling under USIA grant support must be U.S. citizens. Participants representing foreign institutions must be citizens, nationals, or permanent residents of the Russian Federation. All foreign participants and programs must be in compliance with J–1 visa regulations and the proposal must make reference to this requirement.

Proposed Budget

A comprehensive line item budget must be submitted with the proposal by the deadline. Funds requested from the Agency must not exceed $300,000. Grants awarded to institutions with less than four years of experience in conducting international exchange programs will be limited to $60,000. Specific guidelines for budget preparation are available in the application packet.

Cost-sharing is encouraged. Cost-sharing may be in the form of allowable direct or indirect costs. The recipient must maintain written records to support all allowable costs which are claimed as being its contribution to cost participation, as well as cost to be paid by the Federal government. Such records are subject to audit. The basis for determining the value of cash and in-kind contributions must be in accordance with OMB Circular A110, Attachment E—Cost sharing and matching should be described in the proposal. In the event the Recipient does not provide the minimum amount of cost-sharing as stipulated in the Recipient's budget, the Agency's contribution will be reduced in proportion to the Recipients' contribution.

The recipient's proposal shall include the cost of an audit that:

1. complies with the requirements of OMB Circular No. A–133, Audits of Institutions of Higher Education and Other Nonprofit Institutions;

2. complies with the requirements of American Institute of Certified Public Accountants (AICPA) Statement of Position (SOP) No. 92–9; and

3. includes review by the recipient's independent auditor of a recipient-prepared supplemental schedule of indirect cost rate computation, if such a rate is being proposed.

The audit costs shall be identified separately for:

1. preparation of basic financial statements and other accounting services; and

2. preparation of the supplemental reports and schedules required by OMB Circular No. A–133, AICPA SOP 92–9, and the review of the supplemental schedule of indirect cost rate computation.

Allowable Costs

—Travel: international and domestic (via American flag carriers). May include one planning trip with one participant per institution.

—Per diem and maintenance, including: lodging, meals and incidental expenses.

—Salaries and benefits for faculty assigned overseas for three or more consecutive months, not to exceed 20 percent of the total amount requested from USIA. USIA strongly encourages cost-sharing in this category and requires that salaries and benefits of all other faculty and staff participating in the project be maintained.

—Membership in U.S. professional associations and fees for attendance at professional conferences in the U.S. for foreign participants.

—Educational materials, including, but not limited to: the translation and publication of instructional materials, collections to be placed in foreign partner institution libraries, and other equipment as needed. These costs may not exceed 25% of the total requested grant amount.

—Medical insurance for foreign participants during U.S. visits. Medical insurance is mandatory for all participants in J–1 visa exchange programs.

—Student exchanges: travel, per diem/maintenance, memberships and conferences (foreign students only), educational materials, medical insurance, and other project costs for *graduate level or above* student exchanges. Exchanges may include a maximum of four foreign students and two U.S. students per year.

—Other project costs, limited to: interpreters, which may include graduate or PhD students; out-of-house administrative support in Russia; office supplies; and communications expenses (*i.e.*, telephone, facsimile, postage and delivery). The above costs may not exceed 10% of the total amount requested from USIA.

Note: Indirect costs are *NOT* allowable costs under the College and University Partnerships Program.

Subject to the availability of funds, USIA will award up to 6 grants to community colleges, and up to 14 grants to other institutions (as defined under "Eligibility") proposing partnerships with institutions in the Russian Federation.

Preference will be given to proposals which: (1) Designate partner institutions located outside Moscow and St. Petersburg; or (2) demonstrate evidence of previous relations with the proposed foreign partner institution(s); or (3) designate foreign partners in cities where USIS Moscow is developing American Centers. American Centers, which house substantial libraries and provide educational advising services, will open in Yekaterinburg, Tomsk, and Rostov-on-the-Don during Fiscal Year 1994.

Application Requirements

Proposals must be submitted by the deadline and must conform to the eligibility requirements and academic fields identified in this announcement. The proposal package must include three originals, containing tabs A–U (see "Application Checklist" in the guidelines packet), and 10 copies containing tabs A–D, as well as all required documentation. Proposals must be presented as follows:

1. *A proposal cover sheet* (in addition to the Bureau cover sheet) with names of institutions, project directors, their addresses, telephone and fax numbers, and academic field(s) of proposal. A sample cover sheet format is included in the application packet.

2. *An executive summary* (abstract) of proposed project, not to exceed two double-spaced pages.

3. *A narrative,* not to exceed 20 double-spaced pages, including descriptions of institutions and participating academic departments or schools; a detailed description of the proposed partnership program, including names and qualifications of designated project directors; a statement of need for the proposed program; a detailed description of proposed activities, including who will travel,

when, and where (a timetable is recommended); anticipated benefits to participating institutions; and a plan for institutional evaluation of the project.

4. *A comprehensive line item budget* outlining specific expenditures and anticipated funding sources. Detailed information concerning eligible and ineligible items and required budget format is available in the application packet. The proposed budget must conform with the allowable costs described in this document and the guidelines found in the application packet. Budget items requiring additional explanation should be contained in a brief budget narrative.

5. *Documentation of institutional support* for the proposed linkage, including signed letters of endorsement from the president, chancellor, or director of the U.S. and foreign institutions, making specific reference to the College and University Partnerships Program and committing the institutions to maintaining exchange participants on salary and benefits during the exchange. A general letter of support or an agreement between the participating institutions without reference to the CUPP and maintenance of salaries and benefits will not fulfill this requirement. This document must be received with the rest of the proposal at AED by 5 p.m. Washington, DC time on March 25, 1994. A sample letter of endorsement and commitment is included in the application packet.

6. *Brief academic resumes,* not to exceed two single-spaced pages, of participating faculty/staff from all involved institutions. Resumes must clearly indicate: level of relevant language skills; relevant overseas experience; knowledge of prospective partner country; and relevant scholarly and non-scholarly travel, publications, and research activities.

Note: All pages in excess of the two-page limit will be discarded.

Review Process

The College and University Partnerships Program review process will be comprised of technical, academic, and Agency reviews. Proposals will be deemed technically eligible only if they adhere to the guidelines established herein and in the application packet. Technically eligible proposals will be forwarded to ad hoc panels of area and subject specialists who will weigh their academic merit, potential for fostering curriculum reform and development, and feasibility. Proposals recommended for funding by the ad hoc academic panels will be reviewed for relevance to Agency goals and the objectives of the Russian Assistance Act of 1994 by the Office of Academic Programs, the Office of European Affairs, USIS offices and the budget and contracts offices. Funding decisions are at the discretion of the Associate Director for Educational and Cultural Affairs. Final technical authority for grant awards resides with USIA's contracting officer.

Review Criteria

Academic Review Criteria

Proposals are reviewed by independent academic peer panels with geographic and disciplinary expertise which make recommendations to the Agency based on the following criteria:

1. Academic merit of the proposal, as reflected by a clear statement of program goals and means to accomplish the goals, and detailed description of project with statement on how the proposed project will be implemented and evaluated.

2. Probable impact of the proposed partnership in achieving the goal of reforming educational administration and curricula at the foreign partner institution.

3. If the proposal entails support for an established, active linkage, evidence that College and University Partnerships Program funding would significantly enhance the exchange relationship.

4. Evidence that theme(s) of proposed project fit(s) field(s) stated in this announcement.

5. Feasibility of the program plan as it relates to the stated goals and selected topics and activities.

6. Quality of scholarly and professional credentials/experience of participants in relation to the goals of the proposed exchange plan, including language proficiency.

7. Appropriateness of length of exchange visits, given project goals.

8. Evidence of strong institutional commitment by participating institutions, demonstrated in part by cost-sharing and letters of institutional support.

9. Evidence of mutual advancement of cultural and political understanding through development of individual and institutional ties.

10. Evidence from U.S. institutions of prior experience in the region and previous relations with proposed foreign partner institution(s).

Agency Review Criteria

Academic review panels will recommend proposals to USIA for further review. Agency review will be based on:

1. Academic quality, reflected in academic review commentary and recommendations.

2. Promise of long-term impact in achieving Agency/legislative objectives.

3. Feasibility of program plan.

4. USIA overseas post assessments of need and feasibility.

5. Cost-effectiveness.

6. Geographic and institutional diversity within the Russian Federation. Preference will be given to proposals which: 1) designate partner institutions located outside Moscow and St. Petersburg; or 2) demonstrate evidence of previous relations with the proposed foreign partner institution(s); or 3) designate foreign partners in cities where USIS Moscow is developing American Centers. American Centers, which house substantial libraries and provide educational advising services, will open in Yekaterinburg, Tomsk, and Rostov-on-the-Don during Fiscal Year 1994.

7. Geographic and institutional diversity among U.S. partner institutions.

Notice

The terms and conditions published in the this RFP are binding and may not be modified by any USIA representative. Explanatory information provided by the Agency that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. Final award cannot be made until funds have been fully appropriated by Congress, allocated and committed through internal USIA procedures.

Notification

All applicants will be notified of the results of the review process on or about July 15, 1994. Awarded grants will be subject to periodic reporting and evaluation requirements.

Dated: December 23, 1993.

Barry Fulton,

Acting Associate Director, Bureau of Educational and Cultural Affairs.

[FR Doc. 93-31944 Filed 12-29-93; 8:45 am]

BILLING CODE 8230-01-M

Sunshine Act Meetings

Federal Register
Vol. 58, No. 249
Thursday, December 30, 1993

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DATE AND TIME: January 11, 1994, 2:00 P.M. (Eastern Time).

PLACE: Conference Room on the Ninth Floor of the EEOC Office Building, 1801 "L" Street, N.W., Washington, D.C. 20507.

STATUS: Part of the Meeting will be open to the public and part of the Meeting will be closed.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Votes.
2. Report to the Commission—Office of Inspector General.
3. Proposed Reorganization of Commission Field Offices.

Closed Session

1. Litigation Authorization: General Counsel Recommendations.

Note: Any matter not discussed or concluded may be carried over to a later meeting. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides a recorded announcement a full week in advance on future Commission sessions. Please telephone (202) 663-7100 (voice) and (202) 663-4077 (TTD) at any time for information on these meetings.

CONTACT PERSON FOR MORE INFORMATION: Frances M. Hart, Executive Officer on (202) 663-4070.

This Notice Issued December 27, 1993.

Frances M. Hart,

Executive Officer, Executive Secretariat.

[FR Doc. 93-32007 Filed 12-27-93; 4:14 pm]

BILLING CODE 6750-06-M

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 10:00 a.m., Wednesday, January 5, 1994.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204. You may call (202) 452-3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: December 28, 1993.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 93-32087 Filed 12-28-93; 3:58 pm]

BILLING CODE 6210-01-P

LEGAL SERVICES CORPORATION

Board of Directors Meeting

TIME AND DATE: The Legal Services Corporation Board of Directors will meet on January 8, 1994. The meeting will commence at 9:00 a.m.

PLACE: The Legal Services Corporation, 750 First Street, N.E., The Board Room, Washington, D.C. 20002, (202) 336-8800.

STATUS OF MEETING: *Open*, except that a portion of the meeting may be closed pursuant to a vote of a majority of the Board of Directors to hold an executive session. At the closed session, in accordance with the aforementioned vote, the Board will consider and vote on approval of the draft minutes of the executive session held on December 6, 1993. The Board will hear, consider and act on the report of the General Counsel on litigation to which the Corporation is or may become, a party. Further, the Board will consult with the Inspector General on internal personnel, operational and investigative matters. The Board will also consult with the President on internal personnel and operational matters. Finally, the Board will deliberate regarding internal personnel and operational matters. The closing will be authorized by the relevant sections of the Government in the Sunshine Act [5 U.S.C. Sections 552b(c)(2)(5), (6), (7), and (10), and the corresponding regulations of the Legal Services Corporation [45 C.F.R. Section 1622.5(a), (d), (e), (f), and (h)].[2] The closing will be certified by the Corporation's General Counsel as authorized by the above-cited provisions of law. A copy of the General Counsel's certification will be posted for public inspection at the Corporation's headquarters, located at 750 First Street, N.E., Washington, D.C., 20002, in its eleventh floor reception area, and will otherwise be available upon request.

MATTERS TO BE CONSIDERED:

OPEN SESSION:

1. Approval of Agenda.
2. Approval of Minutes of December 6, 1993 Meeting.
3. Chairman's and Members' Reports.
4. Consider and Act on Operations and Regulations Committee Report.
   a. Consider and Act on Proposed Revisions to Section 1601.15 of the Corporation's Regulations.
5. Consider and Act on Provision for the Delivery of Legal Services Committee Report.
6. Consider and Act on Audit and Appropriations Committee Report.
   a. Consider and Act on Proposed Management and Administration Line of the Fiscal Year 1994 Consolidated Operating Budget.
   b. Consider and Act on Fiscal Year 1995 Budget Justification for the Corporation
7. Consider and Act on Presidential Search Committee Report.
8. President's Report.
9. Inspector General's Report.

CLOSED SESSION:

10. Approval of Minutes of Executive Session Held on December 6, 1993.
11. Consultation by Board with the President on Internal Personnel and Operational Matters.
12. Consider and Act on Internal Personnel and Operational Matters.
13. Consultation by Board with the Inspector General on Internal Personnel, Operational and Investigative Matters.
14. Consider and Act on the General Counsel's Report on Pending Litigation to which the Corporation is, or May Become, a Party.
    a. Consider and Act on Proposed Resolution Ratifying, Heretofore, All Actions Taken By the Prior Board on Non-Renewal of the Employment Contract of the Prior Inspector General.

OPEN SESSION: (Resumed)

15. Consider and Act on Other Business.
16. Scheduling of 1994 Board and Committee Meetings.

CONTACT PERSON FOR INFORMATION: Patricia Batie (202) 336-8800.

Upon request, meeting notices will be made available in alternate formats to accommodate visual and hearing impairments.

[2] As to the Board's consideration and approval of the draft minutes of the executive session(s) held on the above-noted date(s), the closing is authorized as noted in the **Federal Register** notice(s) corresponding to that/those Board meeting(s).

Individuals who have a disability and need an accommodation to attend the meeting may notify Patricia Batie at (202) 336–8800.

Date Issued: December 28, 1993.

Patricia D. Batie,

Corporate Secretary.

[FR Doc. 93–32088 Filed 12–28–93; 3:55 pm]

BILLING CODE 7050–01–M

federal register

Thursday
December 30, 1993

Part II

Department of the Treasury

Customs Service

19 CFR Part 10, et al.
North American Free Trade Agreement; Interim Rule

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Parts 10, 12, 24, 123, 134, 162, 174, 177, 178, 181 and 191

[T.D. 94-1]

RIN 1515-AB33

North American Free Trade Agreement

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations; solicitation of comments.

SUMMARY: This document amends the Customs Regulations on an interim basis to implement the preferential tariff treatment and other Customs-related provisions of the North American Free Trade Area Agreement entered into by the United States, Canada and Mexico.

DATES: Interim rule effective January 1, 1994; comments must be received on or before March 30, 1994.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, DC 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, NW., suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Operational Aspects: Maria Reba, Office of International Affairs (202-927-1488).

Audit Aspects: William Inch, Office of Regulatory Audit (202-927-1100).

Legal Aspects: Myles Harmon, Office of Regulations and Rulings (202-482-7000).

SUPPLEMENTARY INFORMATION:

Background

On August 13, 1992, the United States, Canada and Mexico (the "Parties") entered into an agreement, the North American Free Trade Agreement (NAFTA). The stated objectives of the NAFTA are to: Eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; promote conditions of fair competition in the free trade area; increase substantially investment opportunities in the territories of the Parties; provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory; create effective procedures for the implementation and application of the NAFTA, for its joint administration and for the resolution of disputes; and establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of the NAFTA.

The provisions of the NAFTA were adopted by the United States with the enactment of the North American Free Trade Agreement Implementation Act (the "Act"), Public Law 103-182, 107 Stat. 2057.

The principal role of the U.S. Customs Service is to administer the provisions of the NAFTA and the Act which relate to the importation of goods into the United States from Canada and Mexico. Those Customs-related NAFTA provisions which require implementation through regulation include certain tariff and non-tariff provisions within Chapter Three (National Treatment and Market Access for Goods) and the provisions of Chapter Four (Rules of Origin) and Chapter Five (Customs Procedures).

The tariff-related provisions within NAFTA Chapter Three which require regulatory action by Customs are Article 303 (Restriction on Drawback and Duty Deferral Programs), Article 305 (Temporary Admission of Goods), Article 306 (Duty-Free Entry of Certain Commercial Samples and Printed Advertising Materials) and Article 307 (Goods Re-Entered after Repair or Alteration). The non-tariff provisions of Chapter Three requiring Customs regulatory action are Article 310 (Customs User Fees), Article 311 (Country of Origin Marking) and Annex 300-B (Textile and Apparel Goods).

Chapter Four of the NAFTA sets forth the rules for determining whether an imported good qualifies as an originating good of the United States, Canada or Mexico (NAFTA country) and, as such, is therefore eligible for preferential tariff (duty-free or reduced duty) treatment as provided for under Article 302(2) and Annex 302.2 of the NAFTA. Under Article 401 within that Chapter, originating goods may be grouped in two broad categories: (1) Goods which are wholly obtained or produced entirely in one or more NAFTA countries; and (2) goods which are produced entirely in one or more NAFTA countries exclusively from materials that originate in those countries, or goods which are produced entirely in those countries and which satisfy the specific rules of origin in NAFTA Annex 401 (change in tariff classification requirement and/or regional value-content requirement). Article 402 sets forth the methods for calculating the regional value content of a good and the rules for determining the value of materials used in the production of a good. Article 403 sets forth special rules for calculating the regional value content in the case of automotive goods. Article 404 provides for accumulation of production by two or more producers. Article 405 provides a de minimis criterion. The remaining Articles within Chapter Four consist of additional sub- rules, applicable to the originating good concept, involving fungible materials, packaging materials, packing materials, transshipment, and non-qualifying operations. The basic rules of origin in Chapter Four of the NAFTA, as well as the specific rules of origin in Annex 401 of the NAFTA, are set forth in General Note 12, Harmonized Tariff Schedule of the United States (HTSUS).

Chapter Five sets forth the procedural and other customs requirements which apply under the NAFTA, in particular with regard to claims for preferential tariff treatment. Articles 501-506 of this Chapter provide for use of a Certificate of Origin for purposes of certifying that an exported good qualifies as an originating good under the Chapter Four origin rules, set forth the rights and obligations of importers regarding imported goods and of exporters and producers regarding exported goods, and set forth the rights and obligations of the customs administration of the importing country when conducting a verification of the origin of a good and when denying a claim for preferential tariff treatment. Article 507 sets forth confidentiality principles regarding business information collected pursuant to Chapter Five. Article 508 requires each Party to maintain penalties for violations of its laws and regulations relating to Chapter Five. Article 509 sets forth rules for the issuance and application of advance rulings by the customs administration of the importing country regarding whether a good meets the country of origin marking requirements of Article 311 or the origin rules of Chapter Four or other NAFTA requirements that apply to certain goods at the time of importation. Article 510 extends to exporters and producers of goods substantially the same rights of review and appeal accorded to importers regarding advance rulings or marking determinations of origin or country of origin determinations for purposes of preferential tariff treatment. Article 511 requires the Parties to establish, and implement through their respective laws or regulations, Uniform Regulations regarding the interpretation, application and administration of Chapter Four, Chapter Five and any

other matter as agreed by the Parties. Finally, Articles 512 and 513 set forth procedures for cooperation between the Parties regarding the implementation and administration of the customs-related aspects of the NAFTA.

Pursuant to Article 511 of the NAFTA, representatives of the Parties engaged in a series of trilateral discussions for the purpose of formulating uniform regulatory texts or principles in respect of Chapters Four and Five and in respect of certain provisions within Chapter Three. As regards Chapter Three, agreement was reached on certain principles to be applied for purposes of implementing the drawback provisions of Article 303. With regard to the remaining Chapter Three provisions, including the country of origin marking provisions of Article 311 and its companion Annex 311 (which provide for the establishment of "Marking Rules" for purposes of determining whether a good constitutes, and thus may be marked as, a good of a Party and which set forth disciplines on the methods and procedures for the country of origin marking of goods), those provisions are to be implemented by each Party independently and as appropriate within each Party's statutory and regulatory structure. As concerns Chapter Four, the Parties agreed to implement substantively verbatim texts of interim regulations covering all of the provisions of that Chapter. Finally, in recognition of the different existing customs legal and procedural requirements in the three countries, in the case of Chapter Five the Parties agreed to use a standards approach whereby agreement was reached on certain minimum principles to be reflected in each Party's regulations, with each Party being left free to implement those principles, and any other requirements not inconsistent therewith, in accordance with the needs of the Party's particular statutory and regulatory framework.

In order to provide transparency and facilitate their use, the majority of the NAFTA implementing regulations set forth in this document have been included within one new Part 181. However, in those cases in which NAFTA implementation is more appropriate in the context of an existing regulatory provision, the NAFTA regulatory text has been incorporated in an existing Part within the Customs Regulations. In addition, this document sets forth a number of cross-references and other consequential changes to existing regulatory provisions to clarify the relationship between those existing provisions and the new NAFTA implementing regulations. The regulatory changes are discussed below in the order in which they appear in this document.

Discussion of Amendments

Part 10

Section 10.8 is amended by adding a new paragraph (a) to reflect the inclusion of provisions implementing NAFTA Article 307 (goods re-entered after repair or alteration) in new Part 181 and by redesignating former paragraphs (a)-(l) as (b)-(m). Consequential amendments are also made to §§ 10.36a, 10.66 and 10.67.

Section 10.31(f) is amended by adding a sentence at the end to reflect the provision in NAFTA Article 305(2)(d) that, as regards the goods described in the added sentence, no bond or other security shall be required in the case of goods originating in Canada or Mexico. The other provisions of NAFTA Article 305 (temporary admission of goods) are already reflected in existing temporary importation bond or other provisions contained in Part 10 of the Customs Regulations and in Chapter 98 of the HTSUS.

Part 12

Part 12 is amended by adding a new § 12.132 to clarify the relationship between present § 12.130(f) (which requires submission of a country of origin declaration for textiles and textile products) and Annex 300–B of the NAFTA (textile and apparel goods).

Part 24

Section 24.22, which was published as a final rule in T.D. 93–85 on October 21, 1993 (58 FR 54271), is amended to reflect changes to section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c) effected by section 521 of the Act. The changes involve, for fiscal years 1994 through 1997 (in effect, from January 1, 1994 through September 30, 1997), (1) an increase in the commercial passenger arrival fee from $5 to $6.50 and (2) suspension of the exemption from the commercial passenger arrival fee in the case of persons whose journey involves certain specified locations outside the United States.

Section 24.23(c)(3) is revised (1) to remove the references to the staged reduction of user fees for processing merchandise in the case of goods originating in Canada as provided for in the United States-Canada Free Trade Agreement (CFTA) since the final staged reduction (to zero) takes effect on January 1, 1994, and (2) to reflect the user fee provisions of Article 310 and Annex 310.1 of the NAFTA as regards goods originating in Canada. The revised text makes no specific reference to goods originating in Mexico because, under Annex 310.1 of the NAFTA, existing U.S. merchandise processing fees will continue to apply, even in the case of originating goods which qualify to be marked as goods of Mexico pursuant to NAFTA Annex 311, until June 30, 1999. The last sentence of revised § 24.23(c)(3) is intended to clarify the application of the fees for processing merchandise in cases where goods originating in Canada are entered with goods that are not so originating: the fees will be applied only to the nonoriginating goods.

It should be noted that, as a result of the conclusion of the CFTA staged reductions and the revision of § 24.23(c)(3) as set forth in this document, with effect from January 1, 1994, Customs will no longer require use of a formula for purposes of applying the staged reductions to the surcharge and specific fees of § 24.23 where a shipment covers both originating and nonoriginating goods. As in the case of the ad valorem fee under § 24.23, the surcharge and specific fees will be applied in their entirety but only to the nonoriginating portion of the shipment.

Part 123

A sentence is added at the end of § 123.0 (scope) to refer to the new part 181 NAFTA regulations regarding the treatment of goods from Canada or Mexico.

Part 134

Eight sections within Part 134 are amended to reflect the provisions of NAFTA Article 311 and Annex 311, as implemented by section 207 of the Act, and two other sections in part 134 are amended for cross-reference or editorial purposes. NAFTA Annex 311: (1) Provides for the promulgation of Marking Rules used for determining whether a good is a good of a NAFTA country (the Marking Rules are not set forth or otherwise substantively dealt with in this document); and (2) sets forth general marking principles pertaining to the methods and procedures relating to the country of origin marking of such goods. The specific amendments are described below.

Section 134.0 (scope) is amended by adding a sentence to refer to subpart J of new part 181 which sets forth the review and appeal rights of exporters and producers regarding adverse marking decisions provided under NAFTA Article 510, as implemented by section 207 of the Act.

In § 134.1, two definitions ("Country of origin" and "Ultimate purchaser") are amended by adding text to reflect provisions of NAFTA Annex 311, and four definitions ("Good of a NAFTA country," "NAFTA," "NAFTA country," and "NAFTA Marking Rules") are added to clarify NAFTA references. Four other paragraphs are amended by adding text that implements NAFTA provisions.

Sections 134.22, 134.23, and 134.24 are generally amended by adding references and text concerning general marking provisions applicable to usual containers which are goods of NAFTA countries. In § 134.22, a new paragraph (d) is added to define when a good of a NAFTA country constitutes a "usual container" and to specify that such a good is not required to be marked with its country of origin, and former paragraph (d) is redesignated paragraph (e) and amended by adding text to refer to additional circumstances (set forth in § 134.32) in which the containers of excepted NAFTA goods are not required to be marked.

In § 134.32, paragraph (h) is amended by adding a "reasonable knowledge" standard in the case of NAFTA goods, and two new NAFTA marking exceptions are added relating to (1) original works of art (paragraph p) and (2) goods classifiable under HTSUS subheading 6904.10 or HTSUS heading 8541 or 8542 (paragraph q).

Section 134.35 is amended by adding a new paragraph (b) to indicate that the NAFTA Marking Rules will be used to determine when a good of a NAFTA country which is to be further processed in the United States is excepted from country of origin marking requirements.

Section 134.43 is amended to except NAFTA goods from some special marking requirements (pertaining to Native American-style jewelry and arts and crafts) and to allow for any reasonable method of marking the goods of another NAFTA country.

Section 134.45(a) is amended by adding a new paragraph (2) which permits a good of a NAFTA country to be marked with the name of the country of origin in English, French, or Spanish; however, any other required information is required to be printed in English.

Finally, in § 134.44(a), an editorial change is made which relates to acceptable methods of marking certain goods.

Part 162

Section 162.0 (scope) is amended by the addition of a cross-reference to new part 181 regarding additional records maintenance and examination provisions applicable to U.S. importers, exporters and producers.

Part 174

A cross-reference sentence has been added at the end of § 174.0 (scope) to draw the reader's attention to the inclusion in the new NAFTA regulations of provisions regarding administrative review and appeal of adverse marking decisions (see the discussion of subpart J of new part 181 below).

Section 174.12, which concerns who may file a protest, is amended by the addition of a new paragraph (a)(5) to give effect to Article 510 of the NAFTA, as implemented by section 208 of the Act through an amendment to the protest provisions of 19 U.S.C. 1514, regarding the right of an exporter or producer, who completed and signed a Certificate of Origin for an originating good, to obtain administrative review of a determination of origin pertaining to that good.

Section 174.15, regarding consolidation of protests, is amended by designating the former text as paragraph (a) and adding new text as paragraph (b) to reflect the fact that, under the NAFTA as implemented by the Act, persons who are not directly involved in a U.S. import transaction (that is, Canadian and Mexican exporters and producers) have protest rights as do U.S. importers as regards NAFTA origin determinations. In recognition of the fact that exporters, producers and importers may have different financial interests and business confidentiality concerns, paragraph (b) is intended to strike a balance between the participatory principle of Article 510 of the NAFTA and the business confidentiality principle contained in Article 507 of the NAFTA (see subpart K of new part 181).

Section 174.29 is amended by the addition of a sentence to provide that, if a protest by an exporter or producer is allowed in whole or in part and excess monies are found to have been collected on the import transaction, a refund will be payable to the party (in most cases, the importer of record) who paid the monies even if such party did not file an appropriate and timely protest.

Part 177

Exception language, regarding NAFTA advance rulings which are covered by new part 181, is added to § 177.0 (scope) and in the first sentence of § 177.1(c). See the discussion of subpart I of part 181 below as regards the relationship between NAFTA advance rulings and rulings under part 177.

Part 178

The list contained in § 178.2 is amended to conform to the redesignation of § 10.8(e) as § 10.8(f) reflected in the Part 10 changes discussed above.

Part 181

Section 181.0

Section 181.0 outlines the scope of new part 181 and includes cross-references to other parts of the regulations where certain NAFTA implementing regulations have been included as set forth in this document. This section also clarifies that, except where the context otherwise requires, the requirements contained in part 181 are in addition to general administrative and enforcement provisions set forth elsewhere in the Customs Regulations. Thus, for example, the specific merchandise entry requirements contained in part 181 are in addition to the basic entry requirements contained in parts 141–143 of the regulations.

Subpart A—General Provisions

Section 181.1 sets forth definitions of common terms used in multiple contexts or places within part 181: Although the majority of the definitions in this section are based on definitions contained in Articles 201, 318 and 514 of the NAFTA or in section 2 of the Act, other definitions have also been included to clarify the application of the regulatory texts. Additional definitions which apply in a more limited part 181 context are set forth elsewhere with the substantive provisions to which they relate.

Subpart B—Export Requirements

Section 181.11 implements NAFTA Articles 501(1) and (3) and 504(1) which concern use of a Certificate of Origin for purposes of certifying that an exported good is an originating good and thus entitled to preferential tariff treatment under the NAFTA. This section also implements NAFTA Article 504(1)(b) which requires an exporter or producer to promptly provide written notification of errors in a Certificate to any person to whom the Certificate was given.

Section 181.12(a) concerns the maintenance of records by a U.S. exporter or producer who executes a Certificate of Origin, as required by NAFTA Article 505(a) and by 19 U.S.C. 1508(b) as amended by section 205(a) of the Act. Section 181.12(b) concerns the availability of those records both to U.S. Customs and to the Canadian or Mexican customs administration (in the

latter case for purposes of an origin verification under NAFTA Article 506—see the discussion of subpart G below).

Section 181.13 concerns measures applied for a failure of a U.S. exporter or producer to comply with a requirement of part 181 and is based on NAFTA Article 504(2)(b).

Subpart C—Import Requirements

Section 181.21 sets forth the procedure for claiming NAFTA tariff benefits at the time of importation and, as provided in NAFTA Articles 502(1)(a) and (d), requires a U.S. importer to file a declaration, and to correct a declaration that contains incorrect information, in connection with the claim. Section 181.21 also implements NAFTA Article 502(1)(b) by requiring that the declaration that the goods are NAFTA originating goods be based on a Certificate of Origin which is in the possession of the importer.

Section 181.22 implements NAFTA Articles 501(2) and (5), 502(1)(c), 503 and 505(b) which concern the obligations of an importer regarding the submission of a Certificate of Origin to Customs and the maintenance of the Certificate and other relevant records regarding the imported good. Included in § 181.22 is a provision that a Certificate of Origin may be used either for a single importation or for multiple importations of identical goods.

Section 181.23, which is based on NAFTA Article 502(2)(a), authorizes the denial of NAFTA tariff benefits if the importer fails to comply with the requirements of part 181.

Subpart D—Post-Importation Duty Refund Claims

Sections 181.31 through 181.33 implement NAFTA Article 502(3) and section 206 of the Act, which allow an importer, who did not claim NAFTA tariff benefits on a qualifying good at the time of importation, to apply for a refund of any excess duties at any time within one year after the date of importation. Such a claim may be made even if liquidation of the entry would otherwise be considered final under other provisions of law.

Subpart E—Restrictions on Drawback and Duty Deferral Programs

This subpart sets forth the specific rules and procedures under NAFTA Article 303, as implemented by section 203 of the Act, regarding restrictions on drawback and duty-deferral programs (NAFTA drawback). The procedures apply to goods imported into the United States and then subsequently exported to Canada on or after January 1, 1996, or to Mexico, on or after January 1, 2001, with a claim for preferential tariff treatment pursuant to the NAFTA. The provisions of the NAFTA and the Act implemented by this subpart operate principally to limit the amount of drawback, waiver or reduction of duties so as to avoid double duty-free or reduced-duty treatment on goods or materials that originally came from a non-NAFTA country (that is, on both the good or material when imported into the United States from a non-NAFTA country and on that good or material, or other good or material incorporating that good or material, when exported to Canada or Mexico under the NAFTA).

Section 181.41 clarifies the applicability of the subpart. It sets forth the effective date of the regulatory provisions and states that the provisions of the subpart are in addition to the general requirements and procedures contained in parts 10, 19, 144, 146 and 191 of the Customs Regulations.

Section 181.42 specifies the duties and fees that are not subject to drawback under this subpart.

Section 181.43 outlines the general circumstances under which goods are eligible for drawback under the subpart.

Section 181.44 sets forth the limitation on the payment of drawback as provided for in NAFTA Article 303: upon presentation of a drawback claim, drawback of duties previously paid upon importation of a good into the United States may be granted on the lower amount of (1) the total duties paid or owed on the good in the United States, or (2) the total amount of duties paid on the exported good upon subsequent importation into Canada or Mexico. The section also sets forth the operation of this rule with regard to specific types of drawback provided for in 19 U.S.C. 1313.

Section 181.45 outlines the circumstances in which full drawback may be granted without regard to the limitation on drawback set forth in § 181.44.

Section 181.46 specifies the time and place for filing a drawback claim under the subpart.

Section 181.47 sets forth the requirements for proper completion of a drawback claim including, for each type of drawback, the documentary materials (including proof of exportation and evidence of payment of duties in Canada or Mexico) that must be submitted with the claim.

Section 181.48 identifies the persons entitled to receive drawback.

Section 181.49 provides that, with respect to manufacturing drawback claims, the persons required to keep records under this subpart or under § 191.5 shall retain such records for at least three years after the payment of the drawback claim.

Section 181.50 sets forth the procedures for payment and liquidation of drawback claims and provides that (1) liquidation of the drawback claim becomes final only when liquidation of the U.S. import entry has become final and, except for goods entitled to full drawback under § 181.45, when liquidation of the Canadian or Mexican entry has become final and (2) if accelerated drawback procedures are used, the person who received the accelerated drawback payment must make repayment if the claim is adversely affected by subsequent administrative or court action.

Section 181.51 requires a certification from the person entitled to receive drawback to ensure that there is no double payment of a drawback claim.

Section 181.52 provides for reliquidation of a drawback claim, and refund to Customs of any amount of drawback paid in excess of that allowed under § 181.44, if, after drawback has been granted under this subpart, the Canadian or Mexican customs administration refunds duties pursuant to NAFTA Article 502(3) (post-importation duty refund claims) or under any other circumstance.

Section 181.53 implements the NAFTA Article 303 provisions as regards duty-deferral programs. Accordingly, this section (1) provides for the collection of duty on a good imported into the United States pursuant to a duty-deferral program (any measure which postpones duty payment, such as bonded warehouse, foreign trade zone, and temporary importation bond provisions) when the good is withdrawn from the duty-deferral program and exported to Canada or Mexico, and (2) provides for the waiver or reduction of such duties in an amount that does not exceed the lesser of either the total duty required to be paid under this section or the total amount of customs duties subsequently paid to Canada or Mexico (provided that proof of exportation and of the payment of duties in Canada or Mexico is submitted within 60 days after the date of exportation). The section also sets forth recordkeeping requirements and provides for reliquidation of a claim granted under the section, and consequent refund of any amount waived or reduced in excess of that allowed under the section if the Canadian or Mexican customs administration grants a subsequent claim for NAFTA preferential tariff treatment.

Section 181.54 provides that allowance of a claim submitted under

this subpart shall be subject to such verification as the district director may deem necessary.

Subpart F—Commercial Samples, Printed Advertising Materials, and Goods Returned After Repair or Alteration

Section 181.61 outlines the applicability of the subpart.

Section 181.62 implements the provisions of NAFTA Article 306 concerning duty-free entry of commercial samples of negligible value. Paragraph (c) of the section includes specific standards for the mutilation of textile samples valued over US$1 and is based on the standards which Customs has administratively applied for purposes of the U.S. textile import program and for purposes of classification in subheading 9811.00.60 of the HTSUS.

Section 181.63 implements NAFTA Article 306 as regards printed advertising materials.

Section 181.64 implements NAFTA Article 307 and Annex 307.1 regarding duty treatment on goods re-entered after repair or alteration in Canada or Mexico. The documentary requirements in paragraph (c) are based on simplified documentation proposals for § 10.8 of the Customs Regulations which were published in the **Federal Register** on January 15, 1993 (58 FR 4615).

Subpart G—Origin Verifications and Determinations

Sections 181.71 through 181.76 implement the provisions of NAFTA Article 506 which concerns the conduct of verifications to determine whether imported goods are originating goods entitled to NAFTA preferential duty treatment and the issuance and application of origin determinations resulting from such verifications. This subpart also governs the conduct of verifications directed to producers of materials that are used in the production of a good for which NAFTA preferential duty treatment is claimed.

Section 181.71 provides that where a timely claim for NAFTA tariff treatment is made based on an acceptable Certificate of Origin, any denial of preferential tariff treatment must be made on the basis of an origin verification conducted under this subpart.

Section 181.72 implements the provisions of NAFTA Article 506(1)(c) by providing that, in addition to verification visits and questionnaires which are specifically authorized by Articles 506(1)(a) and (b), verifications may be also be conducted by letter. In addition, this section provides that any other verification method may be used that results in information from a Canadian or Mexican exporter or producer and that any such information must be in writing and signed by the exporter or producer if it is to be used as the basis for an adverse origin decision.

Section 181.72 also specifies the procedures under which verification letters and questionnaires are to be transmitted. It further provides that, in the case of a failure to respond to an initial verification letter, a follow-up letter will be sent (for purposes of renewing the request for information) which may also provide notice that, in the event of a non-response, preferential tariff treatment will be denied. The follow up letter must be sent by certified or registered mail or by such other method that produces a confirmation of receipt if a request for such procedure has been made by the customs administration of the Party from which the good was exported.

Section 181.73 implements NAFTA Articles 506(2) and (3) by setting forth the procedures for notification of a verification visit.

Section 181.74 sets forth procedures for the conduct of a verification visit. Included in those procedures is the right of the person visited to have observers present during the verification.

Section 181.75 implements NAFTA Article 506(9) by providing for the issuance of a written determination of origin based on an analysis of the results of the origin verification. This section also prescribes the information required to be included in the written determination and includes special content and issuance requirements in the case of a negative origin determination, including a statement of the right of the exporter or producer to submit a response to the determination within a specified period of time before the determination will take effect.

Section 181.76 sets forth the provisions governing the effective date of a determination of origin issued under § 181.75. In the case of a negative origin determination, the effective date depends on the method by which the origin determination is sent.

Section 181.76 also implements NAFTA Articles 506(10), (11) and (12) by setting forth special effective date rules where a negative origin determination by Customs is based on the tariff classification or value of materials used in the production of the good which differs from that which was applied to the materials by Canada or Mexico. Such a determination will only become effective when notification is given to the importer and to the exporter or producer who signed the Certificate of Origin pertaining to the good for which preferential tariff treatment was sought. Where that classification or value was the subject of a ruling by, or consistent treatment accorded by, the Canadian or Mexican customs administration, Customs will not apply its determination to importations made prior to the determination if advised of this difference within the period allowed for submitting a response to the determination. In addition, pursuant to § 181.76(e) the effective date of the determination is to be further postponed for a period of up to 90 days if the importer or the exporter or producer demonstrates to the satisfaction of Customs that it relied in good faith to its detriment on the ruling or consistent treatment applied by Canada or Mexico.

Subpart H—Penalties

Section 181.81(a) concerns the general application of penalties to NAFTA transactions and is based on NAFTA Article 508(1). Section 181.81(b) concerns a false certification by an exporter or producer and is based on NAFTA Article 504(2)(a) as implemented by section 205(b) of the Act.

Section 181.82(a) reflects NAFTA Articles 502(2)(b) and 504(3), as implemented by section 205(b) of the Act, with regard to exceptions to the application of penalties (1) in the case of an importer who makes a corrected declaration (as required under NAFTA Article 502(1)(d)—see § 181.21(b)) if the correction is done voluntarily and (2) in the case of an exporter or producer who provides notice of an incorrect Certificate of Origin (as required under NAFTA Article 504(1)(b)—see § 181.11(d)) if the notice is provided voluntarily. Section 181.82(b), which sets forth standards for determining whether the correction or notice is effected "voluntarily", is based on the standards applied for prior disclosures under 19 U.S.C. 1592 as set forth in § 162.74 of the Customs Regulations.

Subpart I—Advance Ruling Procedures

This subpart implements the advance ruling provisions of NAFTA Article 509 and the review provisions regarding advance rulings of NAFTA Article 510. Section 181.91 sets forth the rules regarding the applicability of the subpart and provides, in particular, that U.S. importers and Canadian and Mexican exporters and producers must use the provisions of this subpart (and thus may not use the provisions of part 177) when seeking a ruling on a subject matter specified in § 181.92(b)(6) (that is, any subject matter specified in or

authorized under Article 509(1)). The remaining sections of this subpart generally follow the provisions of part 177, except where variances are required to conform to the NAFTA and to the standards agreed by the three countries during the trilateral discussions mentioned above. The principal provisions of these sections, including the differences with part 177, are indicated below.

In addition to the issuance of rulings to exporters and producers of goods which are imported into the United States, § 181.92(b)(5) also authorizes the issuance of certain advance rulings to Canadian or Mexican producers of materials which themselves are not imported into the United States but are incorporated into goods which are imported into the United States.

Section 181.92(b)(6) implements NAFTA Article 509(1) by enumerating the issues which may be the subject of a NAFTA advance ruling.

Section 181.93 governs the content and submission of requests for advance rulings to Customs. Rulings covering certain subject matters may be submitted only to the Office of Regulations and Rulings at Customs Headquarters. Other matters may be presented either to Customs Headquarters or to the Area Director of Customs, New York Seaport. The information which must accompany the request depends on the subject matter of the ruling request.

Section 181.94 provides that where a ruling request does not comply with the provisions of the subpart, the requester shall be so notified and shall be given a specified period of time (at least 30 calendar days) to bring the request into compliance. If such information is not provided within that period, Customs will close the matter and advise the applicant of that fact.

Sections 181.95, 181.96 and 181.97 cover oral discussion of issues, changes in the status of the transaction and withdrawal of ruling requests. These sections mirror the corresponding provisions of part 177 with respect to these matters.

Section 181.98 provides that Customs may decline to issue a ruling when the matter which is the subject of the ruling involves an issue that is administratively pending with Customs or is the subject of a judicial proceeding.

Section 181.99 implements NAFTA Article 509, and reflects a standard agreed by the three countries, by providing that Customs will issue a ruling under this subpart within 120 days of receipt of all necessary information.

Subpart J—Review and Appeal of Adverse Marking Decisions

This subpart implements Article 510 of the NAFTA and section 207 of the Act regarding the review and appeal of NAFTA marking determinations. Specifically, it sets forth the circumstances and procedures under which NAFTA exporters and producers of merchandise may obtain information about, and administrative and judicial review of, an adverse marking decision.

Section 181.111 sets forth the applicability of subpart J as described above.

Section 181.112 defines the terms "adverse marking decision", "exporter" of merchandise and "producer" of merchandise for purposes of the subpart. An adverse marking decision means a decision made by the district director which an exporter or producer of merchandise believes to be contrary to the provisions of NAFTA Annex 311 and which may be protested by the importer. In order to be considered an exporter of merchandise under the subpart, such person must be located in Canada or Mexico and must maintain certain records relating to the adverse marking decision. A producer of merchandise is a person who grows, mines, harvests, fishes, traps, hunts, manufactures, processes or assembles such merchandise in Canada or Mexico.

Section 181.113 sets forth a procedure for exporters and producers to request from Customs a written statement regarding the basis of an adverse marking decision.

Section 181.114 sets forth a 30-day period for Customs to respond to a request under § 181.113 and specifies what information Customs shall provide to the exporters and producers.

Section 181.115 sets forth the circumstances in which an exporter or producer can intervene in an importer's protest regarding an adverse marking decision and the procedures for doing so.

Section 181.116 sets forth the circumstances and procedures under which an exporter or producer can file with Customs a petition for reconsideration of an adverse marking decision. It also sets forth the petitioner's right to commence a civil action in the Court of International Trade to contest the denial of a petition.

Subpart K—Confidentiality of Business Information

Section 181.121 reflects the principle of maintenance of confidentiality of business information set forth in NAFTA Article 507(1).

Section 181.122 reflects the NAFTA Article 507(2) exception to nondisclosure in the case of disclosures to governmental authorities for administrative and enforcement purposes.

Subpart L—Rules of Origin

Section 181.131 provides that the implementing regulations regarding the rules of origin provisions of HTSUS General Note 12 and NAFTA Chapter Four are contained in the Appendix to part 181.

Appendix—Rules of Origin Regulations

The Rules of Origin Regulations are set forth as an Appendix to part 181. The text is as trilaterally negotiated, except for editorial modifications, necessary and appropriate for the U.S. regulatory context.

The Appendix consists of a Title (Section 1), Parts I to VI, and Schedules I to XII. Sections 2 through 17 of Parts I through VI constitute the basic provisions for the interpretation and the application of the rules of origin of Chapter Four of the Agreement. Schedules I through XII constitute specific provisions that are necessary supplements to the basic provisions in Parts I through VI.

The first-level subdivisions of the Parts and Schedules are referred to as "sections" and are identified by Arabic numerals without parentheses. Each section is, for the most part, subdivided into "subsections" which are identified by Arabic numerals enclosed within parentheses. As necessary, a subsection may be further subdivided into "paragraphs," identified by a lowercase alphabetical symbol enclosed within parentheses; a paragraph may be subdivided into "subparagraphs," identified by a lowercase Roman numeral enclosed within parentheses paragraphs; and each subparagraph may be subdivided into "clauses," identified by uppercase alphabetical symbols enclosed within parentheses.

Parts I to VI and Schedules I to XII are both subdivided into sections. However, the numbering of the sections are sequential from Part I through Part VI, from one to seventeen whereas the numbering of the sections in the schedules are sequential within each schedule. When Sections 2 through 17 are cited in the Schedules, they are cited as "section 'x' of this Appendix." When the sections of a schedule are cited in Parts I to VI or in other schedules, they are cited as "section 'x' of Schedule 'y' "

For purposes of citing to provisions of the Appendix, the citation takes its designation from the first subdivision in the citation. For example, a reference to subsection (4) of section 7 will read "section 7(4)." Any reference to a

subsection (or any other subdivision of a section) without a corresponding reference to the section is taken to refer to a subsection (or other subdivision) within the section that the citation is made. This is done to reduce the number of text changes in the Appendix from the trilateral document.

Definitions

Section 2 sets forth terms that are defined for purposes of the Appendix. Section 8 sets forth additional terms that are defined specifically for application of the rules of origin to automotive goods. Section 3 sets forth the methodology for currency conversion if necessary to determine the value of goods or materials.

General Rules of Origin

Section 4 sets forth the basic rules of origin established in Chapter Four of the Agreement. The provisions of section 4 apply both to the determination of the status of an imported good as an originating good for purposes of preferential tariff treatment and to the determination of the status of a material as an originating material used in a good which is subject to a determination under this Appendix.

Section 4(1) lists those goods which are originating goods because they are wholly obtained or produced in one or more of the NAFTA countries. Section 4(3) provides that goods, produced entirely in the NAFTA countries from originating materials, are originating goods.

For most other goods, section 4(2)(a) through (c) sets forth the basic rules of origin for goods which are produced with any non-originating material content. Essential to these rules in section 4(2) are the specific rules of General Note 12(t), HTSUS, which are incorporated by reference in Schedule I of the Appendix. Under paragraph (a) of Section 4(2), a good will qualify as an originating good only if all non-originating materials used in the production of the good undergo the applicable change in tariff classification, set forth in General Note 12(t), as a result of processing performed entirely in the NAFTA countries. For certain cases as specified by the rules in General Note 12(t), the provision in section 4(2)(b) requires that a regional value content requirement must be satisfied in addition to a change in tariff classification, and, for other cases as specified by the rules in General Note 12(t), the provision in section 4(2)(c) requires that only a regional value content requirement must be satisfied. In all cases, the good must also satisfy other requirements of the Appendix.

Under the remaining general rules of origin, set forth in sections 4(4)(a) and (b), a good may qualify as an originating good under a regional value content requirement if the non-originating materials fail to change tariff classification because they were imported together in an unassembled condition and were classified at that time under GRI 2(a), HTSUS, as the assembled good, or because they are classified as parts in the same subheading as the good in which they are used and that subheading specifically provides for both the good and parts of the good. These rules do not apply to goods provided for in Chapters 61 through 63.

De Minimis

Section 5 sets forth *de minimis* rules for goods which may be considered to qualify as originating goods even though they fail to qualify as originating goods under the rules in section 4. There are three separate *de minimis* rules.

Subject to the exceptions in section 5(3), sections 5(1) and (2) provide for the situation in which not all non-originating materials undergo a required change in tariff classification. Under this *de minimis* rule, if the value of all such non-originating materials is not more than 7 percent of the transaction value of the good, or, if applicable, the total cost of the good, the good may be considered to be an originating good, provided that it otherwise satisfies any applicable regional value content requirement and the other requirements of the Appendix.

Section 5(5) provides for the situation in which a good, which is subject to an applicable regional value content requirement, is considered to be an originating good without satisfying the regional value content requirement if the value of all non-originating materials is not more than 7 percent of the transaction value of the good, or, if applicable, the total cost of the good.

Sections 5(6) and (7) provide for the situation in which certain fibers or yarns used in the production of a component of a textile good do not undergo a required change in tariff classification. Under this *de minimis* rule, the textile good is considered to be an originating good if the total weight of the non-originating fibers or yarns is not more than 7 percent of the total weight of the component.

Regional Value Content (RVC)

Section 6 sets forth the basic rules which apply for purposes of determining whether an imported good, other than an automotive good of sections 9 or 10, satisfies a minimum regional value content (RVC) requirement. With certain exceptions, there is an option to choose either of two methods for calculating the regional value content: The Transaction Value Method (TVM) and the Net Cost Method (NCM). Both methods require a determination of the Value of Non-Originating Materials (VNM) used in the production of the good for which the RVC calculation is required.

Transaction Value Method (TVM)

As provided in section 6(2), the RVC calculated under the TVM is based on a formula in which the VNM used to produce a good be subtracted from the "transaction value" (TV), the remainder of which is then divided by the TV to obtain the RVC for the good. In this case, the TV is the value determined in accordance with the provisions of Schedule II of the Appendix with respect to the transaction in which the producer sells the good. The TV is subject to certain adjustments. The calculation of the VNM for the TVM is addressed in subsections (4), (5) and (10) of section 6.

Subsections (7), (8) and (9) of section 6 set forth the procedure by which a producer may choose to change from the TVM to the NCM for calculation of the RVC of a good if, during a verification of origin by a customs administration, it is determined that the TV must be adjust or is unacceptable. Schedule III of the Appendix sets forth the criteria under which a TV is unacceptable. A producer, however, does not lose any rights of review and appeal of the customs administration's determination if the producer chooses to recalculate under the NCM.

Net Cost Method (NCM)

As provided in section 6(3), the RVC calculated under the NCM is based on a formula in which the VNM used to produce a good be subtracted from the NC incurred by the producer, the remainder of which is divided by the NC to obtain the RVC for the good. NC is calculated by subtracting certain excluded costs from the total cost incurred in the production of the good. Section 6(12) sets forth the criteria for determining the total cost. Sections 6(13) and 6(14) set forth the criteria for determining the value of excluded costs.

Section 6(15) provides a producer with the option to average, over a certain period, the NC and the VNM for purposes of calculating the RVC for goods produced during that period. If estimated costs are used in the calculation, section 6(18) places certain obligations on the producer to perform a year-end analysis and to inform

certain persons if the analysis results in a conclusion that the goods do not satisfy the RVC as claimed.

Materials

Section 7, together with Schedule VIII of the Appendix, sets forth the basic rules regarding the valuation of materials, the treatment of materials with regard to the change in tariff requirement, and the regional value content requirement. Sections 9 and 10 set forth specific rules that apply only to certain automotive goods.

Valuation of Materials

Generally, under section 7(1), the value of a material is (1) the customs value for the material if the producer imports the material, (2) the transaction value, as determined under Schedule VIII of the Appendix, with regard to the transaction in which the producer acquires the material, or (3) other value as determined under Schedule VIII of the Appendix if there is no transaction value or the transaction value is unacceptable. Certain costs, identified in section 7(1)(c) through (f) must be added to the value if not already included.

There are different provisions in the Appendix for determining the value of materials that are non-originating materials used in the production of certain automotive goods in sections 9 and 10. Furthermore, the values of indirect materials, packing materials, and intermediate materials are determined under different provisions in the Appendix.

Intermediate Materials

Section 7(4) through (6) provides a producer with an option to designate a self-produced material as an "intermediate material" and thereby use the total cost of the intermediate material as the value of that material for purposes of the regional value content of the good into which the intermediate material is incorporated. This will allow a producer to use the total cost of the intermediate material as an "originating" cost if the material qualifies as an originating material under the Appendix.

This option does not apply with respect to certain automotive goods of Sections 9 and 10 because special rules for those goods require the "tracing" of the value of certain non-originating materials regardless of the degree of further processing or incorporation into another material. Furthermore, under a proviso in Section 7(4), no self-produced material subject to a regional value content requirement may be designated as an intermediate material if it contains a self-produced submaterial that was subject to a regional value content requirement and that was designated as an intermediate material.

Sections 7(7) through (9) provide for the situation in which, during a verification of origin of a good, an intermediate material is determined to be non-originating. A producer has the option to rescind that designation and redesignate another self-produced material within 30 days of notification after notification of the customs administration's determination. This can be done only once, but the producer retains any rights to review and appeal of the determination.

Indirect Materials; Packaging Materials; Packing Materials; Accessories and Spare Parts

Sections 7(10) through (13) and Section 7(14) provide for the treatment of certain materials that are either considered to be "originating materials" or are disregarded with respect to their actual origin for purpose of the change in tariff classification requirement of the Appendix. These sections also set forth the different treatment of these materials for purposes of the regional value content requirement of the Appendix. These sections also provide for determining the value of these materials.

Fungible Materials; Fungible and Commingled Goods

Section 7(14) provides for the determination of the origin of materials when fungible non-originating and originating materials are used in the production of a good, and for the determination of the origin of goods which are commingled, fungible originating and non-originating goods. The inventory management methods for these purposes are set forth in Schedule X of the Appendix.

Automotive Goods

Light-duty automotive goods and heavy-duty automotive goods, as defined in Section 2 and Section 8, are subject to a regional value content requirement, under the net cost method, in addition to a change in tariff requirement. However, these goods are subject to special rules for determining the value of non-originating materials in the RVC calculation. Section 9 provides the rules for tracing the value of non-originating materials incorporated into light-duty automotive goods. Section 10 provides the rules for determining the value of non-originating materials incorporated into heavy-duty automotive goods.

Light-Duty Automotive Goods

The tracing rule for light-duty automotive goods provides that the VNM for the calculation of the RVC for these goods shall be the total of the value of all non-originating materials that are imported from a non-NAFTA territory and are listed in Schedule IV (defined as "traced material"), if the traced materials are ultimately incorporated into the good. A traced material is always considered a non-originating material for purposes of the value of non-originating materials at any stage of assembly up to the final production of a light-duty vehicle.

Generally, the value of a traced material is the value determined at the time it is received by the first person who takes title in a NAFTA country. However, section 9(2) sets forth in detail the specific situations and conditions under which the value of these traced materials will be accepted. If the producer of the good is also the importer of the traced material, the customs value, plus certain costs identified in Section 9(4), is the value for the VNM. If the producer is not the importer, then various alternatives are presented for determining the value of a traced material.

Heavy-Duty Automotive Goods

The rules for determining the value of non-originating materials in heavy-duty automotive goods require that the value of all non-originating materials listed on Schedule V (defined as "listed material") be included in VNM of the regional value content calculation for any good at any stage of assembly if those listed materials are eventually incorporated into an engine, transmission and engine or transmission assembly for use as original equipment in a heavy-duty vehicle, and ultimately into a heavy-duty vehicle. The rules also require that any other material that is non-originating used by the producer be included in the VNM of the regional value content calculation.

Generally, the value of these materials is the transaction value with respect to the material, as determined in section 10(2). However, section 10(1) sets forth in detail the specific situations and conditions under which the customs value may be used as the transaction value, and under which a transaction value with respect to these materials or, in certain circumstances, the submaterials used in making the materials, will be accepted.

Option To Average RVC

Section 11 provides that, concerning motor vehicles, a producer has the

option to average over its fiscal year the net cost and the value of non-originating materials in order to calculate the regional value content for a designated category of motor vehicles. This choice must be made timely and may not be rescinded. The categories are set forth in section 11(5).

Section 12 provides that, concerning automotive parts, a producer has the option to average the net cost and the value of non-originating materials in order to calculate the regional value content for designated categories of automotive parts. The categories are set forth in section 12(4) and the averaging periods are set forth in section 12(6).

Special Regional Value Content Requirements; New or Refit Plant

Section 13(1) sets forth the scheduled increases in the regional value content percentage for different automotive goods. Sections 13(2), 13(4) and 13(7) set forth a special 50 percent regional value content level, the averaging periods and the categories of motor vehicles, if a producer chooses to average, for the initial production of motor vehicles at new or refit plants.

Accumulation of Production

Section 14 sets forth the rules by which a producer of a good may choose to accumulate the production of producer of a material that is used in the good. The effect of accumulation is to treat the production processes of both producers as the production of a single producer for the purpose of determining whether the final good qualifies as an originating good under the rules of origin of the appendix.

Information Unavailable for Verification of Origin or Value of a Material or Good

Section 15 provides that, in the event a producer of a good or a material, "for reasons beyond the control" of that producer, is unable to produce the information necessary for the verification of the originating status or value of a good or material during a verification of origin of a good, the Customs Service is required to take certain factors into consideration before making a final determination.

Transshipment

Section 16 sets forth the rule that with certain exceptions, an originating good loses its originating status and is treated as a non-originating good if, subsequent to the production in a NAFTA country that qualifies the good as originating, the good undergoes production in a territory outside that of a NAFTA country. The good is considered to be entirely non-originating.

Non-Qualifying Operations

Section 17 sets forth the basic rule that a good is not an originating good by reason of mere dilution with a substance that does not materially alter the characteristics of the good or by any other production method or pricing practice that the object of which is to circumvent the rules of origin of the Appendix.

Schedule II

Schedule II sets forth the manner in which the regional value content of a good is to be determined under the transaction value method (Article 402.2). Pursuant to section 2 of the Schedule, transaction value is determined on a F.O.B. basis and is defined as the price actually paid or payable for the good, determined in accordance with section 3, and adjusted in accordance with section 4. The price actually paid or payable is defined as "the total payment made or to be made by the buyer to or for the benefit of the seller." However, this does not include certain costs or charges provided the latter are distinguished from the price actually paid or payable, e.g., duties and taxes paid in the country in which the buyer is located in respect of the goods, and dividends.

Additions to the price actually paid or payable are made for the value of "assists," as well as for commissions, packaging materials, royalties and proceeds. The additions are determined with respect to amounts recorded on the books of the producer.

Schedule III

Schedule III addresses the circumstances under which transaction value of a good does not exist or is unacceptable (Article 402.5). For example, transaction value does not exist where a good is not the subject of a sale or where there is a condition or consideration for which a value cannot be determined.

The principal situation in which transaction value is unacceptable is where the producer and buyer are related persons. The mere fact that they are related does not render transaction value unacceptable, however. Should a customs administration consider that the relationship influences the price it shall communicate those grounds to the producer and afford the latter an opportunity to respond. There are several methods for validating related party sales. However, if the producer is unable to demonstrate that the relationship did not influence the price actually paid or payable, the use of transaction value is precluded.

Schedule VII

Schedule VII provides methods to reasonably allocate costs to a good that are included total costs pursuant to sections 5(8), 6(11), 7(6), 7(12)(b)(ii) and 10(1(a)(i) of the Appendix, section 4(7) of Schedule II and section 5(7) of Schedule VIII.

Schedule VIII

In contrast with Schedule II which concerns the value of a good, Schedule VIII deals with the value of a *material* used in the production of a good (Article 402.9). The determination of the value of a material is a necessary component of all regional value content calculations. The principal method of determining the value of a material for origin purposes is transaction value. Where there is no transaction value or transaction value is unacceptable, the value of a material is to be based upon the methods set forth in sections 6–11 of Schedule VIII. The methods are derived from Articles 2 through 7 of the Customs Valuation Code and are to be applied sequentially in the following order: the transaction value of identical materials; the transaction value of similar materials; "deductive" value; "computed" value; and the "fallback" method.

Schedule IX

Schedule IX provides methods to determine the value of non-originating materials under the transaction value method, where non-originating materials that are the same as another in all respects, including physical characteristics, quality and reputation but excluding minor differences in appearance, are used in the production of a good.

Schedule X

Schedule X provides the inventory management methods which may be used to determine whether a good is an originating good where originating and non-originating fungible materials are used in the production of a good, or where originating and non- originating fungible goods are commingled and exported in the same form.

Schedule XI

Schedule XI provides the methods for determining whether interest costs incurred by a producer are more than 700 basis points above the yield on debt obligations of comparable maturities issued by the federal government of the country in which the producer is located for purposes of calculating non-allowable interest costs.

Schedule XII

Schedule XII provides the references to the publications that constitute the understanding of the recognized consensus or substantial authoritative support in the territory of each NAFTA country for purposes of the Generally Accepted Accounting Principles in each NAFTA country.

Part 191

A cross-reference is added to § 191.0 (scope) as regards the additional NAFTA drawback provisions contained in new part 181.

Comments

Before adopting these interim regulations as a final rule, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Franklin Court, 1099 14th Street, NW., suite 4000, Washington, DC.

Inapplicability of Notice and Delayed Effective Date Requirements

Pursuant to the provisions of 5 U.S.C. 553(a), public notice is inapplicable to these interim regulations because they are within the foreign affairs function of the United States. A failure to have regulations in place, setting forth the procedures implementing the preferential tariff treatment and related provisions of the North American Free Trade Agreement, on the date the North American Free Trade Agreement Implementation Act is effective, January 1, 1994, would provoke undesirable international consequences. In addition, because these regulations establish procedures which the public needs to know in order to claim the benefit of a tariff preference under the North American Free Trade Agreement Implementation Act, it is determined pursuant to 5 U.S.C. 553(b)(B), that notice and public procedures are impracticable, unnecessary, and contrary to the public interest. Furthermore, for the above reasons, it is determined that good cause exists under the provisions of 5 U.S.C. 553(d)(1) and (d)(3) for dispensing with a delayed effective date.

Executive Order 12866

Because this document involves a foreign affairs function of the United States and implements an international agreement, it is not subject to the provisions of E.O. 12866.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required for interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Paperwork Reduction Act

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collections of information contained in these regulations have been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1515–0205. The use of the Certificate of Origin on Customs Form 434, as provided for in § 181.11 of these regulations, has been separately reviewed and approved by the Office of Management and Budget under control number 1515–0204.

The collections of information in these regulations are in §§ 12.132, 181.11, 181.22, 181.32, 181.47, 181.53, 181.64, 181.72, 181.82, 181.93, 181.94, 181.95, 181.96, 181.102, 181.113, 181.115 and 181.116 and in the Appendix to part 181. This information is required in connection with claims for preferential tariff treatment and for the purpose of the exercise of other rights under the NAFTA and the Act and will be used by the U.S. Customs Service to determine eligibility for a tariff preference or other rights or benefits under the NAFTA and the Act. The likely respondents are business organizations including importers, exporters and manufacturers.

Estimated total annual reporting and/or recordkeeping burden: 27,468 hours.

Estimated average annual burden per respondent/recordkeeper: 6.31 hours.

Estimated number of respondents and/or recordkeepers: 4,350.

Estimated annual frequency of responses: 12.30.

Comments concerning the collections of information and the accuracy of the estimated annual burden, and suggestions for reducing that burden, should be directed to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW, Washington, DC 20229.

Drafting Information

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects

19 CFR Part 10

Alterations, Bonds, Customs duties and inspection, Exports, Imports, Preference programs, Repairs, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 12

Canada, Customs duties and inspection, Marking, Mexico, Reporting and recordkeeping requirements, Textiles and textile products, Trade agreements.

19 CFR Part 24

Accounting, Canada, Customs duties and inspection, Financial and accounting procedures, Reporting and recordkeeping requirements, Trade agreements, User fees.

19 CFR Part 123

Canada, Customs duties and inspection, Imports, Mexico, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 134

Canada, Country of origin, Customs duties and inspection, Labeling, Marking, Mexico, Packaging and containers, Trade agreements.

19 CFR Part 162

Administrative practice and procedure, Customs duties and inspection, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 174

Administrative practice and procedure, Customs duties and inspection, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 177

Administrative practice and procedure, Courts, Judicial proceedings, Rulings, Trade agreements.

19 CFR Part 178

Administrative practice and procedure, Exports, Imports, Reporting and recordkeeping requirements.

19 CFR Part 181

Administrative practice and procedure, Canada, Customs duties and inspection, Exports, Imports, Mexico, Reporting and recordkeeping requirements, Trade agreements (North American Free-Trade Agreement).

19 CFR Part 191

Canada, Commerce, Customs duties and inspection, Drawback, Mexico, Reporting and recordkeeping requirements, Trade agreements.

Amendments to the Regulations

Accordingly, chapter I of title 19, Code of Federal Regulations (19 CFR chapter I), is amended as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The authority citation for part 10 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1508, 1623, 1624;

* * * * *

2. Section 10.8 is amended by redesignating paragraphs (a) through (l) as (b) through (m) and adding a new paragraph (a) to read as follows:

§ 10.8 Articles exported for repairs or alterations.

(a) This section applies to all articles returned to the United States after having been exported for repairs or alterations other than such articles which are returned from Canada or Mexico (see § 181.64 of this chapter).

* * * * *

3. In § 10.31, paragraph (f) is amended by adding a sentence at the end to read as follows:

§ 10.31 Entry; bond.

* * * * *

(f) * * * In addition, notwithstanding any other provision of this paragraph, in the case of professional equipment necessary for carrying out the business activity, trade or profession of a business person, equipment for the press or for sound or television broadcasting, cinematographic equipment, articles imported for sports purposes and articles intended for display or demonstration, if brought into the United States by a resident of Canada or Mexico and entered under Chapter 98, Subchapter XIII, HTSUS, no bond or other security shall be required if the entered article is a good originating in Canada or Mexico within the meaning of General Note 12, HTSUS.

* * * * *

4. In § 10.36a, the first sentence of paragraph (a) is amended by removing the words "(as defined in paragraph (a) of § 10.8)" and adding, in their place, the words "(as defined in §§ 10.8 and 181.64 of this chapter)".

§ 10.66 [Amended]

5. In § 10.66, paragraph (c)(1)(iii) is amended by removing the reference "§§ 10.8(d), (f), (g), and (h)" and adding, in its place, the reference "§§ 10.8(e), (g), (h), and (i)".

§ 10.67 [Amended]

6. In § 10.67, paragraph (c) is amended by removing the reference "§ 10.8(d), (f), (g), and (h)" and adding, in its place, the reference "§ 10.8(e), (g), (h), and (i)".

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The general authority citation for Part 12 is revised to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

2. Section 12.132 is added to read as follows:

§ 12.132 Textile and apparel goods under the North American Free Trade Agreement.

The provisions of § 12.130(f) of this part regarding submission of a country of origin declaration shall apply to all textile and apparel goods which are subject to the provisions of Annex 300–B of the North American Free Trade Agreement (NAFTA). Although a separate country of origin declaration shall not be required for such goods for NAFTA purposes, the following additional requirements shall apply for purposes of this section:

(a) All commercial importations of textile and apparel goods shall be accompanied by the appropriate declaration;

(b) A declaration by each U.S., Canadian, and/or Mexican manufacturer or producer of the goods, and, if there are multiple manufacturers or producers, a separate declaration by each manufacturer or producer shall be furnished by the importer. Packaging operations shall not be considered manufacture or production for purposes of this paragraph; and

(c) If the district director is unable to determine the country of origin of the goods because the information contained in a declaration is incomplete, the shipment to which that declaration pertains shall not be entitled to preferential tariff treatment or any other benefit under the NAFTA for which it would otherwise be eligible.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority citation for Part 24 is revised to read as follows:

AUTHORITY: 5 U.S.C. 301, 19 U.S.C. 58a-58c, 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States), 1624, 31 U.S.C. 9701, unless otherwise noted.

* * * * *

2. Section 24.22 is amended by revising paragraph (g)(1) and the introductory text of paragraph (g)(2)(i)(A) to read as follows:

§ 24.22 Fees for certain services.

* * * * *

(g) *Fee for arrival of passengers aboard commercial vessels and commercial aircraft*—(1) *Fee.* Except as provided in paragraph (g)(2) of this section, a fee of $6.50 during the period from January 1, 1994 through September 30, 1997, and a fee of $5 after such period, shall be collected and remitted to Customs for services provided in connection with the arrival of each passenger aboard a commercial vessel or commercial aircraft from a place outside the customs territory of the United States.

(2) * * *

(i)(A) Except during the period from January 1, 1994 through September 30, 1997, persons whose journey:

* * * * *

3. Section 24.23 is amended by revising paragraph (c)(3) to read as follows:

§ 24.23 Fees for processing merchandise.

* * * * *

(c) * * *

(3) The ad valorem, surcharge, and specific fees provided for under paragraphs (b)(1) and (b)(2)(i) of this section shall not apply either to goods originating in Canada within the meaning of General Note 9, HTSUS, or to goods originating in Canada within the meaning of General Note 12, HTSUS, where such goods qualify to be marked as goods of Canada pursuant to Annex 311 of the North American Free Trade Agreement and without regard to whether the goods are marked. Where originating goods as described in the preceding sentence are entered or released with other goods that are not originating goods, the ad valorem, surcharge, and specific fees shall apply only to those goods which are not originating goods.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The general authority citation for part 123 is revised to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States), 1624.

* * * * *

2. Section 123.0 is amended by adding a sentence at the end to read as follows:

§ 123.0 Scope.

* * * Regulations pertaining to the treatment of goods from Canada or Mexico under the North American Free Trade Agreement are contained in part 181 of this chapter.

PART 134—COUNTRY OF ORIGIN MARKING

1. The authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States (HTSUS)), 1304, 1624.

2. Section 134.0 is amended by adding a sentence at the end to read as follows:

§ 134.0 Scope.

* * * Provisions regarding the review and appeal rights of exporters and producers resulting from adverse North American Free Trade Agreement marking decisions are contained in subpart J of part 181 of this chapter.

3. In § 134.1:

a. Paragraph (b) is amended by removing the period at the end of the second sentence and adding, in its place, the words "; however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.";

b. The introductory text to paragraph (d) is amended by removing the period at the end of the first sentence and adding, in its place, the words "; however, for a good of a NAFTA country, the "ultimate purchaser" is the last person in the United States who purchases the good in the form in which it was imported.";

c. Paragraph (d)(1) is amended by removing the period at the end and adding, in its place, the words ", or for a good of a NAFTA country, a process which results in one of the changes prescribed in the NAFTA Marking Rules as effecting a change in the article's country of origin.";

d. Paragraph (d)(2) is amended by adding a second sentence;

e. Paragraph (d)(4) is amended by removing the period at the end of the sentence and adding the words ", unless the good is a good of a NAFTA country. In that case, the purchaser of the gift is the ultimate purchaser."; and

f. New paragraphs (g), (h), (i) and (j) are added to read as follows:

§ 134.1 Definitions.

* * * * *

(d) * * *

(2) * * * With respect to a good of a NAFTA country, if the manufacturing process does not result in one of the changes prescribed in the NAFTA Marking Rules as effecting a change in the article's country of origin, the consumer who purchases the article after processing will be regarded as the ultimate purchaser.

* * * * *

(g) *Good of a NAFTA country.* A "good of a NAFTA country" is an article for which the country of origin is Canada, Mexico or the United States as determined under the NAFTA Marking Rules.

(h) *NAFTA.* "NAFTA" means the North American Free Trade Agreement entered into by the United States, Canada and Mexico on August 13, 1992.

(i) *NAFTA country.* "NAFTA country" means the territory of the United States, Canada or Mexico, as defined in Annex 201.1 of the NAFTA.

(j) *NAFTA Marking Rules.* The "NAFTA Marking Rules" are the rules promulgated for purposes of determining whether a good is a good of a NAFTA country.

4. In § 134.22:

a. Paragraph (b) is amended by removing the period at the end and adding, in its place, the words "; however, no marking is required for any good of a NAFTA country which is a usual container."; and

b. Paragraph (d) is redesignated paragraph (e) and, newly designated paragraph (e)(1) is amended by removing the period at the end of the sentence and adding, in its place, the words "or they are containers of a good of a NAFTA country within the exceptions set forth in paragraph (e), (f), (g), (h), (i), (p) or (q) of § 134.32."

c. A new paragraph (d) is added to read as follows:

§ 134.22 General rules for marking of containers or holders.

* * * * *

(d) *Usual containers—(1) "Usual container" defined.* For purposes of this subpart, a usual container means the container in which a good will ordinarily reach its ultimate purchaser. Containers which are not included in the price of the goods with which they are sold, or which impart the essential character to the whole, or which have significant uses, or lasting value independent of the contents, will generally not be regarded as usual containers. However, the fact that a container is sturdy and capable of repeated use with its contents does not preclude it from being considered a usual container so long as it is the type of container in which its contents are ordinarily sold. A usual container may be any type of container, including one which is specially shaped or fitted to contain a specific good or set of goods such as a camera case or an eyeglass case, or packing, storage and transportation materials.

(2) *A good of a NAFTA country which is a usual container.* A good of a NAFTA country which is a usual container, whether or not disposable and whether or not imported empty or filled, is not required to be marked with its own country of origin. If imported empty, the importer must be able to provide satisfactory evidence to Customs at the time of importation that it will be used only as a usual container (that it is to be filled with goods after importation and that such container is of a type in which these goods ordinarily reach the ultimate purchaser).

* * * * *

§ 134.23 [Amended]

5. In § 134.23, paragraph (a) is amended by removing the word "Containers" at the beginning of the first sentence and adding, in its place, the words "Except for goods of a NAFTA country which are usual containers, containers".

§ 134.24 [Amended]

6. In § 134.24:

a. Paragraph (c)(1) is amended by adding the words "or usual containers which are goods of a NAFTA country" after the word "holders" wherever it appears in the first sentence;

b. Paragraph (c)(2) is amended by adding the words "or the usual containers which are goods of a NAFTA country" after the word "holders" in the first sentence; and

c. Paragraph (d)(1) is amended by removing the period at the end and adding, in its place, the words "; however, such marking is not required if the contents are excepted from marking requirements under paragraph (f), (g), or (h) of § 134.32 or, in the case of a good of a NAFTA country, under paragraph (e), (f), (g), (h), (i), (p) or (q) of that section."

7. In § 134.32: Paragraph (h) is amended by adding the words ", or in the case of a good of a NAFTA country, must reasonably know," after the word

"know"; paragraph (n) is amended by removing the word "and" after the semicolon; paragraph (o) is amended by replacing the period at the end with a semicolon; and paragraphs (p) and (q) are added to read as follows:

§ 134.32 General exceptions to marking requirements.

* * * * *

(p) Goods of a NAFTA country which are original works of art; and

(q) Goods of a NAFTA country which are provided for in subheading 6904.10 or heading 8541 or 8542 of the Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. 1202).

8. Section 134.35 is amended by designating the existing text as paragraph (a) and by adding a heading to newly designated paragraph (a) and adding a new paragraph (b) to read as follows:

§ 134.35 Articles substantially changed by manufacture.

(a) *Articles other than goods of a NAFTA country.*

* * * * *

(b) *Goods of a NAFTA country.* A good of a NAFTA country which is to be processed in the United States in a manner that would result in the good becoming a good of the United States under the NAFTA Marking Rules is excepted from marking. Unless the good is processed by the importer or on its behalf, the outermost container of the good shall be marked in accord with this part.

§ 134.43 [Amended]

9. In § 134.43:

a. Paragraph (a) is amended by removing the word "Articles" at the beginning of the first sentence and adding, in its place, the words "Except for goods of a NAFTA country, articles" and by adding at the end of the paragraph the following sentence: "Goods of a NAFTA country shall be marked by any reasonable method which is legible, conspicuous and permanent as otherwise provided in this part."; and

b. Paragraphs (c)(3) and (d)(3) are amended by adding the words "or in the case of a good of a NAFTA country," after the word "section,".

§ 134.44 [Amended]

10. In § 134.44, paragraph (a) is amended by removing the words "classifiable under an item specified" and adding, in their place, the word "described".

11. Section 134.45 is amended by revising paragraph (a) to read as follows:

§ 134.45 Approved markings of country name.

(a) *Language.* (1) Except as otherwise provided in paragraph (a)(2) of this section, the markings required by this part shall include the full English name of the country of origin, unless another marking to indicate the English name of the country of origin is specifically authorized by the Commissioner of Customs. Notice of acceptable markings other than the full English name of the country of origin shall be published in the **Federal Register** and the Customs Bulletin.

(2) A good of a NAFTA country may be marked with the name of the country of origin in English, French or Spanish.

* * * * *

PART 162—RECORDKEEPING, INSPECTION, SEARCH, AND SEIZURE

1. The authority citation for part 162 continues to read in part as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624.

* * * * *

2. Section 162.0 is amended by adding a sentence at the end to read as follows:

§ 162.0 Scope.

* * * Additional provisions concerning records maintenance and examination applicable to U.S. importers, exporters and producers under the North American Free Trade Agreement are contained in part 181 of this chapter.

PART 174—PROTESTS

1. The authority citation for part 174 is revised to read as follows:

Authority: 19 U.S.C. 66, 1514, 1515, 1624.

2. Section 174.0 is amended by adding a sentence at the end to read as follows:

§ 174.0 Scope.

* * * Provisions applicable to Canadian and Mexican exporters and producers regarding administrative review and appeal of adverse marking decisions under the North American Free Trade Agreement are contained in part 181 of this chapter.

3. In § 174.12:

a. The word "or" at the end of paragraph (a)(4) is removed;

b. Paragraph (a)(5) is redesignated (a)(6);

c. Newly designated paragraph (a)(6) is amended by removing the words "paragraphs (a) (1) through (4)" and adding, in their place, the words "paragraphs (a) (1) through (5)"; and

d. A new paragraph (a)(5) is added to read as follows:

§ 174.12 Filing of protests.

(a) * * *

(5) With respect to a determination of origin under subpart G of part 181 of this chapter, any exporter or producer of the merchandise subject to that determination, if the exporter or producer completed and signed a Certificate of Origin covering the merchandise as provided for in § 181.11(a) of this chapter; or

* * * * *

4. Section 174.15 is revised to read as follows:

§ 174.15 Consolidation of protests filed by different parties.

(a) *General.* Subject to paragraph (b) of this section, separate protests relating to one category of merchandise covered by an entry shall be considered as a single protest whether filed as a single protest or filed as separate protests relating to the same category by one or more parties in interest or an authorized agent.

(b) *NAFTA transactions.* The following rules shall apply to a consolidation of multiple protests concerning a determination of origin under subpart G of part 181 of this chapter if one of the protests is filed by or on behalf of an exporter or producer described in § 174.12(a)(5) of this part:

(1) If consolidation under paragraph (a) of this section is pursuant to specific written requests for consolidation received from all interested parties who filed protests under this part, those interested parties shall be deemed to have waived their rights to confidentiality as regards business information within the meaning of § 181.121 of this chapter. In such cases, a separate notice of the decision will be issued to each interested party under this part but without regard to whether the notice reflects confidential business information obtained from one but not all of those interested parties.

(2) If consolidation under paragraph (a) of this section is done by the district director in the absence of specific written requests for consolidation from all interested parties who filed protests under this part, no waiver of confidentiality by those interested parties shall be deemed to have taken place. In such cases, a separate notice of the decision will be issued to each interested party and each such notice shall adhere to the principle of confidentiality set forth in § 181.121 of this chapter.

§ 174.29 [Amended]

5. Section 174.29 is amended by adding after the second sentence the following new sentence: "If a protest of

an exporter or producer under § 174.12(a)(5) of this part is allowed in whole or in part, any monies found to have been collected in excess shall be refunded to the party who paid the monies even if such party did not file an appropriate and timely protest under this part."

PART 177—ADMINISTRATIVE RULINGS

1. The general authority citation for part 177 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States), 1624, unless otherwise noted.

* * * * *

§ 177.0 [Amended]

2. Section 177.0, first sentence, is amended by adding at the end the words ", other than advance rulings under Article 509 of the North American Free Trade Agreement (see subpart I of part 181 of this chapter)".

§ 177.1 [Amended]

3. Section 177.1(c), first sentence, is amended by removing the words "A ruling may be requested" and adding, in their place, the words "Except as otherwise provided in subpart I of part 181 of this chapter, a ruling may be requested under this part".

178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for part 178 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

§ 178.2 [Amended]

2. In § 178.2, the column headed "19 CFR Section" is amended by removing the reference "§ 10.8(e)" and adding, in its place, the reference "§ 10.8(f)".

1. Part 181 is added to read as follows:

PART 181—NORTH AMERICAN FREE TRADE AGREEMENT

Sec.

Authority: 19 U.S.C. 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States), 1624; Pub. L. 103–182, 107 Stat. 2057.

§ 181.0 Scope.

This part implements the duty preference and related Customs provisions applicable to imported goods under the North American Free Trade Agreement (the NAFTA) entered into on August 13, 1992, and under the North American Free Trade Agreement Implementation Act (107 Stat. 2057)(the Act). Except as otherwise specified in this part, the procedures and other requirements set forth in this part are in addition to the Customs procedures and requirements of general application contained elsewhere in this chapter. Additional provisions implementing certain aspects of the NAFTA and the Act are contained in parts 10, 12, 24, 134 and 174 of this chapter.

Subpart A—General Provisions

§ 181.1 Definitions.

As used in this part, the following terms shall have the meanings indicated unless either the context in which they are used requires a different meaning or a different definition is prescribed for a particular subpart, section or other portion of this part:

(a) *Canada.* "Canada", when used in a geographical rather than governmental context, means the territory of Canada as defined in Annex 201.1 of the NAFTA.

(b) *Commercial importation.* "Commercial importation" means the importation of a good into the United States, Canada or Mexico for the purpose of sale, or any commercial, industrial or other like use.

(c) *Customs administration.* "Customs administration" means the competent authority that is responsible under the law of the United States, Canada or Mexico for the administration of its customs laws and regulations.

(d) *Customs duty.* "Customs duty" means any customs or import duty and a charge of any kind imposed in connection with the importation of a good, including any form of surtax or surcharge in connection with such importation, other than any:

(1) Charge equivalent to an internal tax imposed consistently with Article III:2 of the General Agreement on Tariffs and Trade, or any equivalent provision of a successor agreement to which the United States, Canada and Mexico are party, in respect of like, directly competitive or substitutable goods of the United States, Canada or Mexico, or in respect of goods from which the imported good has been manufactured or produced in whole or in part;

(2) Antidumping or countervailing duty that is applied pursuant to the domestic law of the United States, Canada or Mexico and that is not applied inconsistently with Chapter Nineteen of the NAFTA;

(3) Fee or other charge in connection with importation commensurate with the cost of services rendered;

(4) Premium offered or collected on an imported good arising out of any tendering system in respect of the administration of quantitative import restrictions, tariff rate quotas or tariff preference levels; and

(5) Fee applied pursuant to section 22 of the U.S. Agricultural Adjustment Act, subject to the provisions of Chapter Seven of the NAFTA.

(e) *Determination of origin.* "Determination of origin" means a determination as to whether a good qualifies as a good originating in the United States, Canada and/or Mexico under the rules set forth in General Note 12, HTSUS, and in the appendix to this part.

(f) *Exporter.* "Exporter" means an exporter located, and required under this part to maintain records regarding exportations of a good, in the United States, Canada or Mexico.

(g) *Generally Accepted Accounting Principles.* "Generally Accepted Accounting Principles" means the recognized consensus or substantial authoritative support in the United States, Canada or Mexico with respect to the recording of revenues, expenses, costs, assets and liabilities, the disclosure of information and the preparation of financial statements. Generally Accepted Accounting Principles under this definition may encompass broad guidelines of general application as well as detailed standards, practices and procedures.

(h) *HTSUS.* "HTSUS" means the Harmonized Tariff Schedule of the United States.

(i) *Importer.* "Importer" means an importer located, and required under this part to maintain records regarding importations of a good, in the United States, Canada or Mexico.

(j) *Intermediate material.* "Intermediate material" means an "intermediate material" as defined in the appendix to this part.

(k) *Marking Rules.* "Marking Rules" means the "NAFTA Marking Rules" as defined in § 134.1(j) of this chapter.

(l) *Measure.* "Measure" means any law, regulation, procedure, requirement or practice.

(m) *Mexico.* "Mexico", when used in a geographical rather than governmental context, means the territory of Mexico as defined in Annex 201.1 of the NAFTA.

(n) *NAFTA.* "NAFTA" means the North American Free Trade Agreement approved by the Congress under section 101(a) of the North American Free Trade Agreement Implementation Act (107 Stat. 2057).

(o) *NAFTA drawback.* "NAFTA drawback" means any drawback, waiver or reduction of U.S. customs duty provided for in subpart E of this part.

(p) *Net cost of a good.* "Net cost of a good" means the "net cost of a good" as defined in the appendix to this part.

(q) *Originating.* "Originating", when used with regard to a good or a material, means a good or material which qualifies as originating in the United States, Canada and/or Mexico under the rules set forth in General Note 12, HTSUS, and in the appendix to this part.

(r) *Person.* "Person" means a natural person or an enterprise.

(s) *Preferential tariff treatment.* "Preferential tariff treatment" means the duty rate applicable to an originating good or to a good to which Appendix 6.B. to Annex 300–B of the NAFTA applies.

(t) *Producer.* "Producer" means a "producer" as defined in the appendix to this part.

(u) *Production.* "Production" means "production" as defined in the appendix to this part.

(v) *Transaction value.* "Transaction value" means "transaction value" as defined in the appendix to this part.

(w) *United States.* "United States", when used in a geographical rather than governmental context, means the territory of the United States as defined in Annex 201.1 of the NAFTA.

(x) *Used.* "Used" means "used" as defined in the appendix to this part.

(y) *Value.* "Value" means the value of a good or material for purposes of calculating customs duties or for purposes of applying the provisions of the appendix to this part.

Subpart B—Export Requirements

§ 181.11 Certificate of Origin.

(a) *General.* A Certificate of Origin shall be used to certify that a good being exported either from the United States into Canada or Mexico or from Canada or Mexico into the United States qualifies as an originating good for purposes of preferential tariff treatment under the NAFTA.

(b) *Preparation of Certificate in the United States.* An exporter in the United States who completes and signs a Certificate of Origin for the purpose set forth in paragraph (a) of this section shall use Customs Form 434 or such other medium or format as approved by the Canadian or Mexican customs administration for that purpose. Where the U.S. exporter is not the producer of the good, that exporter may complete and sign a Certificate on the basis of:

(1) Its knowledge of whether the good qualifies as an originating good;

(2) Its reasonable reliance on the producer's written representation that the good qualifies as an originating good; or

(3) A completed and signed Certificate for the good voluntarily provided to the exporter by the producer.

(c) *Submission of Certificate to Customs.* An exporter in the United States, and a producer in the United States who has voluntarily provided a copy of a Certificate of Origin to that exporter pursuant to paragraph (b)(3) of this section, shall provide a copy of the Certificate to Customs upon request.

(d) *Notification of errors in Certificate.* An exporter or producer in the United States who has completed and signed a Certificate of Origin, and who has reason to believe that the Certificate contains information that is not correct, shall within 30 calendar days notify in writing all persons to whom the Certificate was given by the exporter or producer of any change that could affect the accuracy or validity of the Certificate.

§ 181.12 Maintenance and availability of records.

(a) *Maintenance of records.* An exporter or producer in the United States who completes and signs a Certificate of Origin shall maintain in the United States, for five years after the date on which the Certificate was signed, all records relating to the origin of a good for which preferential tariff treatment may be claimed in Canada or Mexico, including records associated with:

(1) The purchase of, cost of, value of, and payment for, the good that is exported from the United States;

(2) The purchase of, cost of, value of, and payment for, all materials, including indirect materials, used in the production of the good that is exported from the United States; and

(3) The production of the good in the form in which the good is exported from the United States. Such records shall be maintained in accordance with the Generally Accepted Accounting Principles applied in the United States and may be maintained in hard-copy form, on microfilm or microfiche or in automated record storage devices (for example, magnetic discs and tapes) if associated computer programs are available to facilitate retrieval of the data in a usable form.

(b) *Availability of records*—(1) *To Customs.* For purposes of determining compliance with the provisions of this part, the records required to be maintained under this section shall be made available for examination and inspection by the district director or other appropriate Customs officer in the same manner as provided in § 162.1d of this chapter in the case of U.S. importer records.

(2) *To the Canadian or Mexican customs administration.* If a U.S. exporter or producer receives notification of, and consents to, an origin verification visit by the Canadian or Mexican customs administration under Article 506 of the NAFTA (see § 181.74(e) of this part), such consent shall constitute agreement by the U.S. exporter or producer to make available to an officer of that customs administration all records required to be maintained under this section and to provide facilities for the inspection thereof. If, during the course of an origin verification of a U.S. producer, the Canadian or Mexican customs administration finds that the U.S. producer has failed to maintain its records in accordance with the Generally Accepted Accounting Principles applied in the United States; that customs administration will so inform the U.S. producer in writing and will give the U.S. producer 60 calendar days to conform the records to those Principles. If a U.S. exporter or producer fails to maintain records or make records available to the Canadian or Mexican customs administration in accordance with the provisions of this section, or if a U.S. producer fails to conform its records to Generally Accepted Accounting Principles as provided in this paragraph, the Canadian or Mexican customs administration may deny preferential tariff treatment to the good that is the subject of the verification visit.

§ 181.13 Failure to comply with requirements.

The district director may apply such measures as the circumstances may warrant where an exporter or a producer in the United States fails to comply with any requirement of this part.

Subpart C—Import Requirements

§ 181.21 Filing of claim for preferential tariff treatment upon importation.

(a) *Declaration.* In connection with a claim for preferential tariff treatment for a good under the NAFTA, the U.S. importer shall make a written declaration that the good qualifies for such treatment. The written declaration may be made by including on the entry summary, or equivalent documentation, the symbol "CA" for a good of Canada, or the symbol "MX" for a good of Mexico, as a prefix to the subheading of the HTSUS under which each qualifying good is classified. Except as otherwise provided in § 181.22 of this part and except in the case of a good to which Appendix 6.B. to Annex 300–B of the NAFTA applies (see, however, § 12.132 of this chapter), the declaration shall be based on a complete and properly executed Certificate of Origin which is in the possession of the importer and which covers the good being imported.

(b) *Corrected declaration.* If, after making the declaration required under paragraph (a) of this section or under § 181.32(b)(2) of this part, the U.S. importer has reason to believe that a Certificate of Origin on which a declaration was based contains information that is not correct, the importer shall within 30 calendar days make a corrected declaration and pay any duties that may be due. A corrected declaration shall be effected by submission of a letter or other written statement to the Customs office where the original declaration was filed.

§ 181.22 Maintenance of records and submission of Certificate by importer.

(a) *Maintenance of Records.* Each importer claiming preferential tariff treatment for a good imported into the United States shall maintain in the United States, for five years after the date of importation of the good, all documentation relating to the importation of the good. Such documentation shall include a copy of the Certificate of Origin and any other relevant records as specified in § 162.1a(a) of this chapter.

(b) *Submission of Certificate.* An importer who claims preferential tariff treatment on a good under § 181.21 of this part shall provide, at the request of the district director, a copy of each Certificate of Origin pertaining to the good which is in the possession of the importer. A Certificate of Origin submitted to Customs under this paragraph or under § 181.32(b)(3) of this part:

(1) Shall be on Customs Form 434, including privately-printed copies thereof, or on such other form as approved by the Canadian or Mexican customs administration, or, as an alternative to Customs Form 434 or such other approved form, in an approved computerized format or such other medium or format as is approved by the Office of Trade Operations, U.S. Customs Service, Washington, DC 20229. An alternative format must contain the same information and certification set forth on Customs Form 434;

(2) Shall be signed by the exporter or producer or the authorized agent of the exporter or producer;

(3) Shall be completed either in the English language or in the language of the country from which the good is exported. If the Certificate is completed in a language other than English, the importer shall also provide to the district director, upon request, a written English translation thereof;

(4) Shall be accepted by Customs for four years after the date on which the Certificate was signed by the exporter or producer; and

(5) May be applicable to:

(i) A single importation of a good into the United States, including a single shipment that results in the filing of one or more entries and a series of shipments that results in the filing of one entry; or

(ii) Multiple importations of identical goods into the United States that occur within a specified period, not exceeding 12 months, set out therein by the exporter or producer.

(c) *Acceptance of Certificate.* A Certificate of Origin shall be accepted by the district director as valid for the purpose set forth in § 181.11(a) of this part, provided that the Certificate is completed, signed and dated in

accordance with the requirements of paragraph (b) of this section. If the district director determines that a Certificate is illegible or defective or has not been completed in accordance with paragraph (b) of this section, the importer shall be given a period of not less than five working days to submit a corrected Certificate. Acceptance of a Certificate will result in the granting of preferential tariff treatment to the imported good unless, in connection with an origin verification initiated under subpart G of this part or based on a pattern of conduct within the meaning of § 181.76(b) of this part, the district director determines that the imported good does not qualify as an originating good or should not be accorded such treatment for any other reason as specifically provided for elsewhere in this part. A Certificate shall not be accepted in connection with subsequent importations during a period referred to in paragraph (b)(5)(ii) of this section if, based on an origin verification under subpart G of this part, the district director determined that a previously imported identical good covered by the Certificate did not qualify as an originating good.

(d) *Certificate Not Required.* Provided that the importation does not form part of a series of importations that may reasonably be considered to have been undertaken or arranged for the purpose of avoiding the certification requirements of this part, a Certificate of Origin shall not be required for:

(1) An importation of a good for which the district director has waived the requirement for a Certificate of Origin because the district director is otherwise satisfied that the good qualifies for preferential tariff treatment under the NAFTA;

(2) A non-commercial importation of a good; or

(3) A commercial importation of a good whose value does not exceed US$2,500, provided that, unless waived by the district director, the producer, exporter, importer or authorized agent includes on, or attaches to, the invoice or other document accompanying the shipment the following signed statement:

I hereby certify that the good covered by this shipment qualifies as an originating good for purposes of preferential tariff treatment under the NAFTA.

Check One:
( ) Producer
( ) Exporter
( ) Importer
( ) Agent

Name

Title

Address

Signature and Date

If the district director determines that the importation is part of a series of importations undertaken or arranged to avoid a certification requirement, the district director shall require for that importation that the importer have in his possession a valid Certificate of Origin to support the claim for preferential tariff treatment. For purposes of this paragraph, a "series of importations" means two or more entries covering goods arriving on the same day from the same exporter and consigned to the same person.

§ 181.23 Effect of noncompliance.

If the importer fails to comply with any requirement under this part, including submission of a Certificate of Origin under § 181.22(b) or submission of a corrected Certificate under § 181.22(c), the district director may deny preferential tariff treatment to the imported good.

Subpart D—Post-Importation Duty Refund Claims

§ 181.31 Right to make post-importation claim and refund duties.

Notwithstanding any other available remedy, including the right to amend an entry so long as liquidation of the entry has not become final, where a good would have qualified as an originating good when it was imported into the United States but no claim for preferential tariff treatment on that originating good was made at that time under § 181.21(a) of this part, the importer of that good may file a claim for a refund of any excess duties at any time within one year after the date of importation of the good in accordance with the procedures set forth in § 181.32 of this part. Customs may refund any excess duties by liquidation or reliquidation of the entry covering the good in accordance with § 181.33(c) of this part.

§ 181.32 Filing procedures.

(a) *Place of filing.* A post-importation claim for a refund under § 181.31 of this part shall be filed with the district director of the district in which the entry covering the good was filed.

(b) *Contents of claim.* A post-importation claim for a refund shall be filed by presentation of the following:

(1) A written declaration stating that the good qualified as an originating good at the time of importation and setting forth the number and date of the entry covering the good;

(2) Subject to § 181.22(d) of this part, a copy of each Certificate of Origin (see § 181.11 of this part) pertaining to the good;

(3) A written statement indicating whether or not the importer of the good provided a copy of the entry summary or equivalent documentation to any other person. If such documentation was so provided, the statement shall identify each recipient by name, Customs identification number and address and shall specify the date on which the documentation was provided;

(4) A written statement indicating whether or not the importer of the good is aware of any claim for refund, waiver or reduction of duties relating to the good within the meaning of Article 303 of the NAFTA (see subpart E of this part). If the importer is aware of any such claim, the statement shall identify each claim by number and date and shall identify the person who made the claim by name, Customs identification number and address; and

(5) A written statement indicating whether or not any person has filed a protest or a petition or request for reliquidation relating to the good under any provision of law, and if any such protest or petition or request for reliquidation has been filed, the statement shall identify the protest, petition or request by number and date.

§ 181.33 Customs processing procedures.

(a) *Status determination.* After receipt of a post-importation claim under § 181.32 of this part, the district director shall determine whether the entry covering the good has been liquidated and, if liquidation has taken place, whether the liquidation has become final.

(b) *Pending protest, petition or request for reliquidation or judicial review.* If the district director determines that any protest or any petition or request for reliquidation relating to the good has not been finally decided, the district director shall suspend action on the claim filed under this subpart until the decision on the protest, petition or request becomes final. If a summons involving the tariff classification or dutiability of the good is filed in the Court of International Trade, the district director shall suspend action on the claim filed under this subpart until judicial review has been completed.

(c) *Allowance of claim—(1) Unliquidated entry.* If the district director determines that a claim for a refund filed under this subpart should be allowed and the entry covering the good has not been liquidated, the

district director shall take into account the claim for refund under this subpart in connection with the liquidation of the entry.

(2) *Liquidated entry.* If the district director determines that a claim for a refund filed under this subpart should be allowed and the entry covering the good has been liquidated, whether or not the liquidation has become final, the entry must be reliquidated in order to effect a refund of duties pursuant to this subpart. If the entry is otherwise to be reliquidated based on administrative review of a protest or petition for reliquidation or as a result of judicial review, the district director shall reliquidate the entry taking into account the claim for refund under this subpart.

(3) *Information to be provided to Canada or Mexico.* If any information is provided to Customs pursuant to § 181.32(b)(4) or (5) of this part, that information, together with notice of the allowance of the claim and the amount of duty refunded pursuant to this subpart, shall be provided by the district director to the customs administration of the country from which the good was exported.

(d) *Denial of claim*—(1) *General.* The district director may deny a claim for a refund filed under this subpart if the claim was not filed timely, if the importer has not complied with the requirements of this subpart, if the Certificate of Origin submitted under § 181.32(b)(3) of this part cannot be accepted as valid (see § 181.22(c) of this part), or if, following initiation of an origin verification under § 181.72(a) of this part, the district director determines either that the imported good did not qualify as an originating good at the time of importation or that a basis exists upon which preferential tariff treatment may be denied or withheld under § 181.72(d), § 181.74(c) or § 181.76(b) of this part.

(2) *Unliquidated entry.* If the district director determines that a claim for a refund filed under this subpart should be denied and the entry covering the good has not been liquidated, the district director shall deny the claim in connection with the liquidation of the entry, and written notice of the denial and the reason therefor shall be given to the importer and, in the case of a denial on the merits, to any person who completed and signed a Certificate of Origin relating to the good.

(3) *Liquidated entry.* If the district director determines that a claim for a refund filed under this subpart should be denied and the entry covering the good has been liquidated, whether or not the liquidation has become final, the claim may be denied without reliquidation of the entry. If the entry is otherwise to be reliquidated based on administrative review of a protest or petition for reliquidation or as a result of judicial review, such reliquidation may include denial of the claim filed under this subpart. In either case, the district director shall give written notice of the denial and the reason therefor to the importer and, in the case of a denial on the merits, to any person who completed and signed a Certificate of Origin relating to the good.

Subpart E—Restrictions on Drawback and Duty-Deferral Programs

§ 181.41 Applicability.

This subpart sets forth the provisions applicable to drawback claims and duty-deferral programs under Article 303 of the NAFTA. Except in the case of § 181.42(d), the provisions of this subpart apply to goods which are imported into the United States and then subsequently exported from the United States to Canada on or after January 1, 1996, or to Mexico on or after January 1, 2001, and on which a claim for preferential tariff treatment pursuant to the NAFTA is made in Canada or Mexico. The requirements and procedures set forth in this subpart for NAFTA drawback are in addition to the general definitions, requirements and procedures for all drawback claims set forth in part 191 of this chapter, unless otherwise specifically provided in this subpart. Also, the requirements and procedures set forth in this subpart for NAFTA duty-deferral programs are in addition to the requirements and procedures for manipulation, manufacturing and smelting and refining warehouses contained in part 19 and part 144 of this chapter, for foreign trade zones under part 146 of this chapter, and for temporary importations under bond contained in part 10 of this chapter.

§ 181.42 Duties and fees not subject to drawback.

The following duties or fees which may be applicable to a good entered for consumption in the Customs territory of the United States are not subject to drawback under this subpart:

(a) Antidumping and countervailing duties;

(b) A premium offered or collected on a good with respect to quantitative import restrictions, tariff rate quotas or tariff preference levels;

(c) Fees applied under section 22 of the U.S. Agricultural Adjustment Act; and,

(d) Customs duties paid or owed under substitution drawback. There shall be no payment of such drawback under 19 U.S.C. 1313(j)(2) on goods exported to Canada or Mexico on or after January 1, 1994.

§ 181.43 Eligible goods subject to drawback.

Except as otherwise provided in this subpart, drawback is authorized for an imported good that is entered for consumption and is:

(a) Subsequently exported to Canada or Mexico (see 19 U.S.C. 1313(j)(1));

(b) Used as a material in the production of another good that is subsequently exported to Canada or Mexico (see 19 U.S.C. 1313(a)); or

(c) Substituted by a good of the same kind and quality as defined in § 181.44(c) of this subpart and used as a material in the production of another good that is subsequently exported to Canada or Mexico (see 19 U.S.C. 1313(b)).

§ 181.44 Calculation of drawback.

(a) *General.* Except in the case of goods specified in § 181.45 of this part, drawback of the duties previously paid upon importation of a good into the United States may be granted by the United States, upon presentation of a NAFTA drawback claim under this subpart, on the lower amount of:

(1) The total duties paid or owed on the good in the United States; or

(2) The total amount of duties paid on the exported good upon subsequent importation into Canada or Mexico.

(b) *Direct identification manufacturing drawback under 19 U.S.C. 1313(a).* Upon presentation of the NAFTA drawback claim under 19 U.S.C. 1313(a), in which the amount of drawback payable is based on the lesser amount of the customs duties paid on the good either to the United States or to Canada or Mexico, the amount of drawback refunded shall not exceed 99 percent of the duty paid on such imported merchandise into the United States.

Example 1. Upon the importation of Product X to the United States from Japan, Company A paid $2.00 in duties. Company A manufactured the imported Product X into Product Y, and subsequently exported it to Mexico. Mexico assessed $11.00 in duties upon importation of Product Y. Upon presenting a drawback claim in the United States, in accordance with 19 U.S.C. 1313(a), Company A would be entitled to a refund of 99 percent of the $2.00, or $1.98. The $2.00 paid by Company A (less 1 percent) on the importation of Product X into the United States is a lesser amount of duties than the total amount of customs duties paid to Mexico ($11.00) on Product Y.

Example 2. Upon the importation of Product X into the United States from Hong Kong, Company A entered Product X and

paid $5.00 in duties. Company A manufactured Product X into Product Y, sold it to Company B in Mexico and subsequently exported it to Mexico. Company A reserved its right to drawback. Upon Product Y's importation, Company B was assessed a free rate of duty. Company A's claim for drawback will be denied because Company A is entitled to zero drawback for the reason that, as between the duty paid in the United States and the duty paid in Mexico, the duty in Mexico was zero.

(c) *Substitution manufacturing drawback under 19 U.S.C. 1313(b).* Upon presentation of a NAFTA drawback claim under 19 U.S.C. 1313(b), on which the amount of drawback payable is based on the lesser amount of the customs duties paid on the good either to the United States or to Canada or Mexico, the amount of drawback is the same as that which would have been allowed had the substituted merchandise used in manufacture been itself imported. For purposes of drawback under this subpart, the term "same kind and quality" used in section 1313(b) (see § 191.2(m) of this chapter) shall be read as synonymous with the term "identical or similar good" used in Article 303 of the NAFTA.

Example 1. Upon importation of Product X from Japan to the United States, Company A paid $5.00 in duties. Company A substituted a same kind and quality domestic Product X for the Japanese Product X in its production of Product Y under its 19 U.S.C. 1313(b) drawback contract. Company A sold Product Y to Company B which subsequently exported it to Canada. On the importation of Product Y by Company B, Company B paid the equivalent of US$2.00 in duties assessed by Revenue Canada and waived its right to drawback to Company A. Company A is entitled to obtain drawback under 19 U.S.C. 1313(b) in the United States in the amount of $1.98 (or 99 percent of the US$2.00 equivalent Company B paid in duty to Canada) since that $2.00 was the lesser of the total amount of customs duties paid on the product to either Canada or the United States.

Example 2. Same facts as above example, but Company B paid the equivalent of US$5.00 to Revenue Canada. Company A is entitled to obtain $4.95 in drawback (a refund of 99 percent of $5.00 paid to the United States). Since the same amount of duty was assessed by each country, drawback is allowable because the drawback paid does not exceed the lesser amount paid.

(d) *Meats cured with imported salt.* Meats, whether packed or smoked, which have been cured with imported salt may be eligible for drawback in aggregate amounts of not less than $100 in duties paid on the imported salt upon exportation of the meats to Canada or Mexico (see 19 U.S.C. 1313(f)).

Example. Company Z produced Virginia smoked ham on its Smithfield, Virginia farm, using 4,000 pounds of imported salt in curing the meat. The salt was imported from an HTSUS Column 2 country, with a duty of $200. Upon exportation of the hams to Mexico, Company Z pays $250.00 in duties to Mexico. Company Z is entitled to drawback of the full 100 percent of the $200.00 in duties it paid on the importation of the salt into the United States because that $200.00 is a lesser amount than the total amount of customs duties paid to Mexico on the exported meat.

(e) *Jet aircraft engines.* A foreign-built jet aircraft engine that has been overhauled, repaired, rebuilt, or reconditioned in the United States with the use of imported merchandise, including parts, may be eligible for drawback of duties paid on the imported merchandise in aggregate amounts of not less than $100 upon exportation of the engine to Canada or Mexico (19 U.S.C. 1313(h)).

Example. A Swedish-made jet aircraft engine is repaired in the United States using imported parts from Korea on which $160.00 in duties have been paid by Company W. The engine is subsequently exported to Canada by Company W and Company W pays the equivalent of US$260.00 in duties to Canada. Upon showing the country in which the engine was manufactured and a description of the processing performed thereon in the United States on Customs Form 7575–A, appropriately modified, Company W is entitled to the full refund of the duties paid to the United States since that $160.00 was a lesser amount than the duties paid on the engine to Canada.

§ 181.45 Goods eligible for full drawback.

(a) *Goods originating in Canada or Mexico.* A Canadian or Mexican originating good that is dutiable and is imported into the United States:

(1) If subsequently exported to Canada or Mexico,

(2) If used as a material in the production of another good that is subsequently exported to Canada or Mexico, or

(3) If substituted by a good of the same kind and quality and used as a material in the production of another good that is subsequently exported to Canada or Mexico, is eligible for drawback without regard to the limitation on drawback set forth in § 181.44 of this part.

Example. Company A imports a dutiable (3 percent rate) Canadian originating good. During Company A's manufacturing process, Company A substitutes a German good of the same kind and quality (on which duty was paid at a 2.5 percent rate) in the production of another good that is subsequently exported to Canada. Company A may designate the dutiable Canadian entry and claim full drawback (99 percent) on the 3 percent duty paid under 19 U.S.C. 1313(b). (Note: NAFTA originating goods will continue to receive full drawback as they cross NAFTA borders for successive stages of production until NAFTA tariffs are fully phased out.)

(b) *Claims under 19 U.S.C. 1313(j)(1) for goods in same condition.* A good imported into the United States and subsequently exported to Canada or Mexico in the same condition is eligible for drawback under 19 U.S.C. 1313(j)(1) without regard to the limitation on drawback set forth in § 181.44 of this part.

Example. X imports a desk into the United States from England and pays $25.00 in duty. X immediately exports the desk to Z in Mexico and Z pays $10.00 in Mexican duties. X can obtain a refund of 99 percent of the $25.00 paid upon importation of the desk into the United States.

(1) *Same condition defined.* For purposes of this subpart, a reference to a good in the "same condition" includes a good that has been subjected to any of the following operations provided that no such operation materially alters the characteristics of the good:

(i) Mere dilution with water or another substance;

(ii) Cleaning, including removal of rust, grease, paint or other coatings;

(iii) Application of preservative, including lubricants, protective encapsulation, or preservation paint;

(iv) Trimming, filing, slitting or cutting;

(v) Putting up in measured doses, or packing, repacking, packaging or repackaging; or

(vi) Testing, marking, labelling, sorting or grading.

(2) *Commingling of fungible goods—*

(i) *General.* Commingling of completely fungible goods in inventory, such as parts, is permissible (see § 191.141(e) of this chapter) but one must identify entries for designation for same condition drawback; the origin of the goods shall be determined on the basis of the inventory methods set forth in the appendix to this part.

(ii) *Exception.* Agricultural goods imported from Mexico may not be commingled with fungible agricultural goods in the United States for purposes of same condition drawback under this subpart.

(c) *Goods not conforming to sample or specifications or shipped without consent of consignee under 19 U.S.C. 1313(c).* An imported good exported to Canada or Mexico by reason of failure of the good to conform to sample or specification or by reason of shipment of the good without the consent of the consignee is eligible for drawback under 19 U.S.C. 1313(c) without regard to the limitation on drawback set forth in § 181.44 of this part. Such a good must be returned to Customs custody for

exportation under Customs supervision within three years after the release from Customs custody.

Example. X orders, after seeing a sample in the ABC Company's catalog, a certain quantity of 2-by-4 lumber from ABC Company located in Honduras. ABC Company, having run out of the specific lumber, ships instead a different kind of lumber. X rejects the lumber because it did not conform to the sample and is asked to send it to a customer of ABC in Canada. X exports it within 90 days of its release from Customs custody. X may recover 99 percent of the $500 duties it paid to U.S. Customs upon the exportation of the lumber, or $495.00.

(d) *Certain goods exported to Canada.* Goods identified in Annex 303.6 of the NAFTA and in sections 203(a) (7) and (8) of the North American Free Trade Implementation Act, if exported to Canada, are eligible for drawback without regard to the limitation on drawback set forth in § 181.44 of this part.

§ 181.46 Time and place of filing drawback claim.

(a) *Time of filing.* A drawback claim under this subpart shall be filed or applied for, as applicable, within 3 years after the date of exportation of the goods on which drawback is claimed. No extension will be granted unless it is established that a Customs officer was responsible for the untimely filing. Drawback shall be allowed only if the completed good is exported within 5 years after importation of the merchandise identified or designated to support the claim. A good subject to a claim for same condition drawback must be exported before the close of the 3-year period beginning on the date of importation of the good into the United States.

(b) *Place of filing.* A drawback claim must be filed in the region(s) where the manufacturing drawback contract is on file, whether a general rate or specific rate, but exportation need not occur from the same region. Generally, for same condition drawback, the claim would be filed with Customs in the port where the examination would take place (see § 191.141(b)(3) (ii) and (iii) of this chapter). Customs must be notified at least 5 days in advance of the intended date of exportation in order to have the opportunity to examine the goods.

§ 181.47 Completion of claim for drawback.

(a) *General.* A claim for drawback shall be granted, upon the submission of appropriate documentation to substantiate compliance with the drawback laws and regulations of the United States, evidence of exportation to Canada or Mexico, and satisfactory evidence of the payment of duties to Canada or Mexico. Unless otherwise provided in this subpart, the documentation, filing procedures, time and place requirements and other applicable procedures required to determine whether a good qualifies for drawback shall be in accordance with the existing provisions of part 191 of this chapter. Claims inappropriately filed or otherwise not completed within the 3-year period specified in § 181.46 of this part shall be considered abandoned.

(b) *Complete drawback claim*—(1) *General.* A complete drawback claim under this subpart shall consist of the filing of the appropriate completed drawback entry form, proof of exportation (a copy of the Canadian or Mexican customs entry showing the amount of duty paid to Canada or Mexico) and its supporting documents, certificate(s) of delivery, when necessary, or certificate(s) of manufacture and delivery, and a certification from the Canadian or Mexican importer as to the amount of duties paid.

(2) *Specific claims.* The following documentation, for the drawback claims specified below, must be submitted to Customs in order for a drawback claim to be processed under this subpart. Missing documentation or incorrect or incomplete information on required customs forms or supporting documentation will result in an incomplete drawback claim.

(i) *Manufacturing drawback claim.* The following shall be submitted in connection with a claim for direct identification manufacturing drawback or substitution manufacturing drawback:

(A) A completed Customs Form 331, to establish the manufacture of goods made with imported merchandise and, if applicable, the identity of substituted domestic, duty-paid or duty-free merchandise, and including the tariff classification number of the imported merchandise;

(B) Customs Form 7501 and copies of commercial invoices and the import entry number;

(C) Exporter's summary procedure, if applicable. The exporter's summary procedure must be amended for purposes of this subpart to include the Canadian or Mexican customs entry number and the amount of duty paid to Canada or Mexico;

(D) Proof of exportation and satisfactory evidence of the payment of duties in Canada or Mexico, as provided in paragraph (c) of this section;

(E) Waiver of right to drawback. If the person exporting to Canada or Mexico was not the importer or the manufacturer, written waivers executed by the importer or manufacturer and by any intervening person to whom the good was transferred shall be submitted in order for the claim to be considered complete; and

(F) An affidavit of the party claiming drawback stating that no other drawback claim has been made on the designated goods, that such party has not provided an exporter's Certificate of Origin pertaining to the exported goods to another party except as stated on the drawback claim, and that the party agrees to notify Customs if he subsequently provides such an exporter's Certificate of Origin to any person.

(ii) *Same condition drawback claim under 19 U.S.C. 1313(j)(1).* The following shall be submitted in connection with a drawback claim covering a good in the same condition:

(A) A completed Customs Form 7539J. In addition, the tariff classification number of the imported goods shall be recorded on the form;

(B) Customs Form 7501 and copies of commercial invoices. The form must show the entry number, date of entry, port of importation, date of importation, importing carrier, and importer of record or ultimate consignee name and Customs or taxpayer identification number. Explicit line item information shall be clearly noted on the Customs Form 7501 and commercial invoices so that the subject goods are easily discernible;

(C) Customs Form 7505, if applicable, to trace the movement of the imported goods after importation;

(D) The certificate of delivery portion of Customs Form 331, if applicable, for purposes of tracing the transfer of ownership of the imported goods from the importer to the claimant. This is required if the drawback claimant is not the original importer of the merchandise which is the subject of a same condition claim;

(E) Customs Form 7512, if applicable. This is required for merchandise which is examined in one region but exported through border points outside of that region. Such goods must travel in bond from the location where they were examined to the point of the border crossing (exportation). If examination is waived, in-bond transportation is not required;

(F) Notification of intent to export or waiver of prior notice;

(G) Proof of exportation. Either a certified Customs Form 7511 or an uncertified Customs Form 7511

supported by documentary evidence of exportation to Canada or Mexico such as a bill of lading, air waybill, freight waybill, export ocean bill of lading, Canadian customs manifest, cargo manifest, or certified copies thereof, issued by the exporting carrier and signed in ink. Supporting documentary evidence shall establish fully the time and fact of exportation, the identity of the exporter, and the identity and location of the ultimate consignee of the exported goods;

(H) Waiver of right to drawback. If the party exporting to Canada or Mexico was not the importer, a written waiver from the importer and from each intermediate person to whom the goods were transferred shall be required in order for the claim to be considered complete; and

(I) An affidavit of the party claiming drawback stating that no other drawback claim has been made on the designated goods.

(iii) *Nonconforming or improperly shipped goods drawback claim.* The following shall be submitted in the case of goods not conforming to sample or specifications or shipped without the consent of the consignee and subject to a drawback claim under 19 U.S.C. 1313(c):

(A) Customs Form 7539C, completed and submitted at the time the goods are returned to Customs custody;

(B) Customs Form 7501 and copies of commercial invoices which establish the fact of importation, the receipt of the imported goods and the identity of the party to whom drawback is payable (see § 181.48(c) of this part);

(C) Documentary evidence to support the claim that the goods did not conform to sample or specifications or were shipped without the consent of the consignee. In the case of nonconforming goods, such documentation may include a copy of a purchase order and any related documents such as a specification sheet, catalogue or advertising brochure from the supplier, the basis for which the order was placed, and copy of a letter or telex or credit memo from the supplier indicating acceptance of the returned merchandise. This documentation is necessary to establish that the goods are, in fact, being returned to the party from which they were procured or that they are being sent to the supplier's other customer directly;

(D) Customs Form 7512, if applicable; and

(E) Proof of exportation, as provided in paragraph (b)(2)(ii)(G) of this section.

(iv) *Meats cured with imported salt.* The provisions of paragraph (b)(2)(i) of this section relating to direct identification manufacturing drawback shall apply to claims for drawback on meats cured with imported salt filed under this subpart insofar as applicable to and not inconsistent with the provisions of this subpart, and the forms referred to in that paragraph shall be modified to show that the claim is being made for refund of duties paid on salt used in curing meats.

(v) *Jet aircraft engines.* The provisions of paragraph (b)(2)(i) of this section relating to direct identification manufacturing drawback shall apply to claims for drawback on foreign-built jet aircraft engines repaired or reconditioned in the United States filed under this subpart insofar as applicable to and not inconsistent with the provisions of this subpart and the provisions of subpart L of part 191 of this chapter.

(c) *Proof of exportation and evidence of duties paid in Canada or Mexico.* For purposes of this subpart, proof of exportation and satisfactory evidence of payment of duties in Canada or Mexico shall consist of one of the following types of documentation, provided that, for purposes of evidence of duties paid, such documentation includes the import entry number, the date of importation, the tariff classification number, the rate of duty and the amount of duties paid:

(1) In the case of Canada, the Canadian entry document, referred to as the Canada Customs Invoice or B–3, presented with either the K–84 Statement or the Detailed Coding Statement. A Canadian customs document that is not accompanied by a valid receipt is not adequate proof of exportation and payment of duty in Canada;

(2) In the case of Mexico, the Mexican entry document (the "pedimento");

(3) The final customs duty determination of Canada or Mexico, or a copy thereof, respecting the relevant entry; or

(4) An affidavit, from the person claiming drawback, which is based on information received from the importer of the good in Canada or Mexico.

§ 181.48 Person entitled to receive drawback.

(a) *Manufacturing drawback.* The person named as exporter on the notice of exportation or on the bill of lading, air waybill, freight waybill, Canadian or Mexican customs manifest, cargo manifest, or certified copies of these documents, shall be considered the exporter and entitled to manufacturing drawback, unless the manufacturer or producer shall reserve the right to claim drawback. The manufacturer or producer who reserves this right may claim drawback, and he shall receive payment upon production of satisfactory evidence that the reservation was made with the knowledge and consent of the exporter. Drawback also may be granted to the agent of the manufacturer, producer, or exporter, or to the person the manufacturer, producer, exporter, or agent directs in writing to receive the drawback of duties.

(b) *Nonconforming or improperly shipped goods drawback.* Only the importer of record or the actual owner of the merchandise or its agent may claim drawback under 19 U.S.C. 1313(c).

(c) *Same condition drawback.* The importer of record on the consumption entry is entitled to claim same condition drawback under 19 U.S.C. 1313(j)(1) unless he has in writing waived his right to claim drawback.

§ 181.49 Retention of records.

All records required to be kept by the exporter, importer, manufacturer or producer under this subpart with respect to manufacturing drawback claims, and all records kept by others which complement the records of the importer, exporter, manufacturer or producer (see § 191.5 of this chapter) shall be retained for at least three years after payment of such claims.

§ 181.50 Payment and liquidation of drawback claims.

(a) *General.* When the drawback claim has been fully completed by the filing of all required documents, and exportation of the articles has been established and the amount of duties paid to Canada or Mexico has been established, the entry will be liquidated to determine the proper amount of drawback due either in accordance with the limitation on drawback set forth in § 181.44 of this part or in accordance with the regular drawback calculation. The liquidation procedures of subpart G of part 191 of this chapter shall control for purposes of this subpart.

(b) *Liquidation final.* The liquidation of a drawback claim shall not become final until the liquidation of the import entry has become final either by operation of law (see 19 U.S.C. 1504) or by filing with Customs a written waiver of the right to protest under 19 U.S.C. 1514 and, except in the case of goods covered by § 181.45 of this part, until the liquidation of the Canadian or Mexican customs entry has become final.

(c) *Accelerated payment.* Accelerated drawback payment procedures shall apply as set forth in § 191.72 of this

chapter. However, a person who receives drawback of duties under this procedure shall repay the duties paid if a NAFTA drawback claim is adversely affected thereafter by administrative or court action.

§ 181.51 Prevention of improper payment of claims.

(a) *Double payment of claim.* The person entitled to drawback shall certify to Customs that he has not earlier received payment on the same import entry for the same designation of goods. If, notwithstanding such a certification, such an earlier payment was in fact made to the claimant, the claimant shall be required to repay any amount paid on the second claim.

(b) *Preparation of Certificate of Origin.* The drawback claimant shall, within 30 days after the filing of the drawback claim under this subpart, submit to Customs a written statement as to whether he has prepared, or has knowledge that another person has prepared, a Certificate of Origin provided for under § 181.11(a) of this part and pertaining to the goods which are covered by the claim. If, following such 30-day period, the claimant prepares, or otherwise learns of the existence of, any such Certificate of Origin, the claimant shall, within 30 calendar days thereafter, disclose that fact to Customs.

§ 181.52 Subsequent claims for preferential tariff treatment.

If a claim for a refund of duties is allowed by the Canadian or Mexican customs administration under Article 502(3) of the NAFTA (post-importation claim) or under any other circumstance after drawback has been granted under this subpart, the appropriate Customs officer shall reliquidate the drawback claim and obtain a refund of the amount paid in drawback in excess of the amount permitted to be paid under § 181.44 of this part.

§ 181.53 Waiver or reduction of duty under duty-deferral programs.

(a) *General*—(1) *Duty-deferral program defined.* For purposes of this section, a "duty-deferral program" means a measure which postpones duty payment upon arrival of a good in the United States, including a measure governing manipulation warehouses, manufacturing warehouses, smelting and refining warehouses, foreign trade zones, or temporary importations under bond under Chapter 98, HTSUS, until withdrawn or removed for exportation to Canada or Mexico.

(2) *Treatment as withdrawn for consumption.* Where a good imported into the United States pursuant to a duty-deferral program is subsequently exported to Canada or Mexico or is used as a material in the production of another good that is subsequently exported to Canada or Mexico, the exported good shall be treated, for purposes of this section, as if it had been entered or withdrawn for domestic consumption and thus subject to duty.

(3) *Adjustment to duties paid.* Customs shall waive or reduce the duties paid or owed under paragraph (a)(2) of this section by the person who exports the good to Canada or Mexico in accordance with paragraphs (b) through (f) of this section, provided that proof of exportation and satisfactory evidence of duties paid in Canada or Mexico (see § 181.47(c) of this part) are submitted within 60 days of the date of exportation.

(b) *Manipulation in warehouse.* Where a good subject to NAFTA drawback under this subpart is withdrawn from a bonded warehouse (19 U.S.C. 1562) after manipulation for exportation to Canada or Mexico, duty shall be assessed on the good in its condition and quantity, and at its weight, at the time of such withdrawal from the warehouse and with such additions to, or deductions from, the final appraised value as may be necessary by reason of its change in condition. Such duty shall be paid no later than 60 days after the date of exportation except that, upon presentation of proof of exportation and satisfactory evidence of the amount of any customs duties paid to Canada or Mexico on the exported good, the duty shall be waived or reduced in an amount that does not exceed the lesser of either the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

Example. Company B imports toys in bulk and makes a warehouse entry into a Class 8 warehouse, whereupon Company B repackages the toys for retail sale. Upon withdrawal of the goods from the warehouse, $200 in U.S. duty is assessed. Company B exports this merchandise to Mexico and pays $300 in duties. Thirty days after exportation from the United States, Company B submits to Customs proof of exportation and a copy of the Mexican consumption entry ("pedimento") as evidence of the payment of $300 to Mexico. Customs will waive the collection of the $200 assessment since $200 is a lesser amount than the total amount of duties paid to Mexico.

(c) *Bonded manufacturing warehouse.* Where a good is manufactured in a bonded warehouse (19 U.S.C. 1311) with imported materials and is then withdrawn for exportation to Canada or Mexico, duty shall be assessed on the materials in their condition and quantity, and at their weight, at the time of their importation into the United States. Such duty shall be paid no later than 60 days after the date of exportation except that, upon presentation of proof of exportation and satisfactory evidence of the amount of any customs duties paid to Canada or Mexico on the exported good, the duty shall be waived or reduced in an amount that does not exceed the lesser of either the total amount of duty payable on the materials under this section or the total amount of customs duties paid to Canada or Mexico.

Example. Company N imports tea into the United States and makes a Class 6 warehouse entry. Company N manufactures sweetened ice tea mix by combining the imported tea with refined cane sugar and other flavorings and packaging it in retail size canisters. Upon withdrawal of the ice tea mix from the warehouse for immediate exportation to Canada, U.S. duty is assessed on the basis of the unmanufactured tea in the amount of $900. Company N, however, does not pay the duties at this time. Canada assesses the equivalent of US$800 on the exported ice tea mix. Company N submits to Customs both proof of exportation to Canada and a Canadian K–84 Statement showing payment of $800 in duties to Canada. Company N will only be required to pay $100 in U.S. duties out of the original $900 bill.

(d) *Bonded smelting or refining warehouse.* For any qualifying imported metal-bearing materials (19 U.S.C. 1312), duty shall be assessed on the imported materials and the charges against the bond canceled no later than 60 days after the date of exportation of the treated materials to Canada or Mexico either from the bonded smelting or refining warehouse or from such other customs bonded warehouse after the transfer of the same quantity of material from a bonded smelting or refining warehouse. However, upon presentation of proof of exportation and satisfactory evidence of the amount of any customs duties paid to Canada or Mexico on the exported treated materials, the duty on the imported materials shall be waived or reduced in an amount that does not exceed the lesser of either the total amount of duty payable on the imported materials under this section or the total amount of customs duties paid to Canada or Mexico.

Example. Company Z imports 47 million pounds of electrolytic zinc which is entered into a bonded smelting and refining warehouse (Class 7) for processing. Thereafter, Company Z withdraws the merchandise and pays $90,000 in U.S. duty on the dutiable quantity of metal contained in the imported metal- bearing materials and Customs cancels the bond charges. Two

weeks later, Company Z secures a buyer, Company B, in Canada and exports the merchandise. Upon importation of the processed zinc to Canada, the equivalent of US$50,000 in duties are assessed against Company B. Company Z would like to claim a NAFTA refund under this section. Company Z must secure from Company B the necessary Canadian documentation to prove exportation and show that $50,000 was paid to Revenue Canada in order for Company Z to obtain a refund of that amount from Customs.

(e) *Foreign trade zone.* For a good that is manufactured or otherwise changed in condition in a foreign trade zone (19 U.S.C. 81c(a)) and then exported from the zone to Canada or Mexico, the duty assessed, as calculated under paragraph (e)(1) or (e)(2) of this section, shall be paid no later than 60 days after the date of exportation of the good to Canada or Mexico except that, upon presentation of proof of exportation and satisfactory evidence of the amount of any customs duties paid to Canada or Mexico on the exported good, the duty shall be waived or reduced in an amount that does not exceed the lesser of either the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

(1) *Nonprivileged foreign status.* In the case of a nonprivileged foreign status good, duty is assessed on the good in its condition and quantity, and at its weight, at the time of its exportation from the zone to Canada or Mexico.

Example. CMG imports $1,000,000 worth of auto parts from Korea and admits them into Foreign-Trade Subzone number 00, claiming nonprivileged foreign status. (If the auto parts had been regularly entered they would have been dutiable at 4 percent, or $40,000.) CMG manufactures subcompact automobiles. Automobiles are dutiable at 2.5 percent ($25,000) if entered for consumption in the United States. CMG withdraws the automobiles from the zone and sells them to XYZ who ships them to Mexico. XYZ enters the automobiles in Mexico, pays $20,000 in duty, and does not claim NAFTA preferential tariff treatment. Before the expiration of 60 days from exportation, CMG submits the required documentation showing exportation and payment of duty in Mexico and pays $5,000 in duty to Customs representing the difference between the $25,000 which would have been paid if the automobiles had been entered for consumption from the zone and the $20,000 paid to Mexico by XYZ.

(2) *Privileged foreign status.* In the case of a privileged foreign status good, duty is assessed on the good in its condition and quantity, and at its weight, at the time of its admission to the zone.

Example. O&G, Inc. admits Kuwaiti crude petroleum into its zone and requests, one month later, privileged foreign status on the crude before refining the crude into motor gasoline and kerosene. Upon entry of the refined goods from the zone by O&G, Inc., U.S. duty is assessed on the imported crude petroleum in the amount of $700 rather than on the refined goods (which would been assessed $1,200). O&G, Inc. then ships the refined goods to Canada. D&O is the consignee in Canada and pays the Canadian customs duty assessment of the equivalent of US$1,500 on the goods. D&O claims NAFTA preferential tariff treatment in Canada. O&G, Inc. potentially is entitled to a duty remission of the full $700 assessed in the United States. However, if D&O's NAFTA claim is approved and results in a refund of duty by Canada, O&G, Inc.'s actual duty remission or refund will be reduced by that amount of refund received by D&O in excess of $800.

(f) *Temporary importation under bond.* Where a good, regardless of its origin, was imported temporarily free of duty for repair, alteration or processing (subheading 9813.00.05, HTSUS) and is subsequently exported to Canada or Mexico, duty shall be assessed on the good on the basis of its condition at the time of its importation into the United States. Such duty shall be paid no later than 60 days after the date of exportation except that, upon presentation of proof of exportation and satisfactory evidence of the amount of any customs duties paid to Canada or Mexico on the exported good, the duty shall be waived or reduced in an amount that does not exceed the lesser of the total amount of duty payable on the good under this section or the total amount of customs duties paid to Canada or Mexico.

Example. Company A imports glassware under subheading 9813.00.05, HTSUS. The glassware is from France and would be dutiable under a regular consumption entry at $6,000. Company A alters the glassware by etching hotel logos on the glassware. Two weeks later, Company A sells the glassware to Company B, a Mexican company, and ships the glassware to Mexico. Company B enters the glassware and is assessed duties in the amount of $6,200 and claims NAFTA preferential tariff treatment. Company B provides a copy of the Mexican landing certificate to Company A showing that $6,200 was assessed but not yet paid to Mexico, and Customs sends a bill to Company A for the $6,000 in U.S. duty which Company A pays. If Mexico ultimately denies Company B's NAFTA claim and the Mexican duty payment becomes final, Company A, upon submission to Customs of evidence of the finality of the collection of $6,200 by Mexico, is entitled to a refund of the full $6,000 in U.S. duty.

(g) *Recordkeeping requirements.* If a person intends to claim a waiver or reduction of duty on goods under this section, that person shall maintain records concerning the value of all involved goods or materials at the time of their importation into the United States and concerning the value of the goods at the time of their exportation to Canada or Mexico. Failure to maintain adequate records will result in denial of the claim for waiver or reduction of duty.

(h) *Failure to timely provide evidence of duties paid or owed to Canada or Mexico.* If the person who exports the goods to Canada or Mexico fails to provide satisfactory evidence of duties paid or owed to Canada or Mexico within the 60-day period specified in this section, that person will be liable for payment of the full duties assessed under this section and without any waiver or reduction thereof.

(i) *Subsequent claims for preferential tariff treatment.* If a claim for a refund of duties is allowed by the Canadian or Mexican customs administration under Article 502(3) of the NAFTA or under any other circumstance after duties have been waived or reduced under this section, Customs shall reliquidate the NAFTA drawback claim and obtain a refund of the amount waived or reduced in excess of the amount permitted to be waived or reduced under this section.

§ 181.54 Verification of claim for drawback, waiver or reduction of duties.

The allowance of a claim for drawback, waiver or reduction of duties submitted under this subpart shall be subject to such verification, including verification with the Canadian or Mexican customs administration of any documentation obtained in Canada or Mexico and submitted in connection with the claim, as Customs may deem necessary.

Subpart F—Commercial Samples, Printed Advertising Materials, and Goods Returned After Repair or Alteration

§ 181.61 Applicability.

This subpart sets forth the rules which apply for purposes of duty-free entry of commercial samples of negligible value and printed advertising materials imported from Canada or Mexico, as provided for in Article 306 of the NAFTA, and for purposes of the re-entry of goods after repair or alteration in Canada or Mexico, as provided for in Article 307 of the NAFTA.

§ 181.62 Commercial samples of negligible value.

(a) *General.* Commercial samples of negligible value imported from Canada or Mexico may qualify for duty-free entry under subheading 9811.00.60, HTSUS. For purposes of this section, "commercial samples of negligible

value" means commercial samples which have a value, individually or in the aggregate as shipped, of not more than US$1, or the equivalent amount in the currency of Canada or Mexico, or which are so marked, torn, perforated, or otherwise treated that they are unsuitable for sale or for use except as commercial samples.

(b) *Qualification for duty-free entry.* Commercial samples of negligible value imported from Canada or Mexico will qualify for duty-free entry under subheading 9811.00.60, HTSUS, only if:

(1) The samples are imported solely for the purpose of soliciting orders for foreign goods;

(2) If valued over US$1, the samples are properly marked, torn, perforated or otherwise treated prior to arrival in the United States so that they are unsuitable for sale or for use except as commercial samples; and

(3) In the case of textiles and textile products valued over US$1, the samples meet the additional requirements set forth in paragraph (c) of this section.

(c) *Textile samples.* Textile commercial samples of negligible value imported from Canada or Mexico which qualify for duty-free entry under subheading 9811.00.60, HTSUS, are not subject to visa requirements or quota restraint levels. However, textile commercial samples valued over US$1 shall qualify for such duty-free entry only if the additional requirements set forth in paragraphs (c)(1) and (c)(2) of this section are met.

(1) *Statement on invoice or mail declaration.* The invoice, or the mail declaration in the case of a mail shipment, accompanying imported textile commercial samples shall contain the statement "MUTILATED SAMPLES—9811.00.60". If the invoice or mail declaration does not contain the required statement, or if the merchandise has not been properly marked, torn, perforated or otherwise treated prior to importation so as to be unsuitable for sale or for use other than as a sample as provided in paragraph (c)(2) of this section, the shipment will not qualify for duty-free entry under subheading 9811.00.60, HTSUS, and, if the samples are not goods originating in Canada or Mexico within the meaning of General Note 12, HTSUS, shall be denied entry unless a proper visa, visa waiver or exempt certification is presented. If a proper visa, visa waiver or exempt certification is presented, the merchandise may be entered under the appropriate tariff provision in HTSUS Chapters 1 through 97.

(2) *Standards for mutilation of textile samples.* Provided that the other requirements set forth in this section are met, compliance with the mutilation standards set forth in this paragraph shall be considered sufficient to qualify the imported samples for duty-free entry under subheading 9811.00.60, HTSUS. Variances from the specific mutilation standards set forth in this paragraph, such as in regard to the size or location of the cut, hole or marking, may be allowed at the discretion of the appropriate Customs officer at the port of entry only if the variance from the mutilation standard renders the article unsuitable for sale or for use except as a commercial sample. For purposes of this paragraph, an "indelible" marking is one that is incapable of being erased or obliterated.

(i) *Wearing apparel*—(A) *Cutting or tearing.* A section may be cut or torn from the main body of the garment. This cut shall be visible on the outside of the garment and may not be on a seam or border. The cut or tear shall be a minimum of 2 inches in length, unless a shorter cut or tear is required by the size of the garment.

(B) *Marking.* The garment may be marked with the word "SAMPLE" in indelible ink or paint. The size of the word "SAMPLE" shall be at least one inch in height and not less than 2 inches in length unless a smaller marking is required by the size of the garment. The word "SAMPLE" shall be placed in a prominent area of the garment which will be visible when worn and shall be in contrasting color to the garment.

(C) *Punching or cutting.* A hole or section, measuring at least 1 inch in diameter, may be punched or cut into the outside of the garment. The hole or section shall be punched or cut in a prominent area of the garment and in a location where it cannot be covered by a patch or emblem.

(ii) *Fabrics in continuous lengths or rolls*—(A) *Fabric not over 2 yards in length.* Fabric not exceeding 2 yards in length either may be marked with the word "SAMPLE" in indelible ink or paint on the face or front of the fabric and in contrasting color to the fabric or may be perforated with the word "SAMPLE" at intervals of one-half yard for the entire length of the fabric. In either case, the word "SAMPLE" shall be at least 1 inch in height and not less than 5 inches in length and shall be placed at a perpendicular angle across the fabric.

(B) *Fabric over 2 yards in length.* Fabric exceeding 2 yards in length, even if mutilated in accordance with paragraph (c)(2)(ii)(A) of this section, shall not be considered commercial samples eligible for duty-free entry under this section.

(iii) *Fabric swatches*—(A) *Cutting.* A section or hole, not less than 1 inch in diameter, may be cut in the main body of a fabric swatch.

(B) *Marking.* A fabric swatch may be marked with the word "SAMPLE" in indelible ink or paint in contrasting color to the swatch. The word "SAMPLE" shall be at least 1 inch in height and at least 2 inches in length.

(C) *Mutilation not required.* Fabric swatches 8 inches square or smaller need not be cut, marked or otherwise mutilated unless, in their condition as imported, they are suitable for use other than as a commercial sample.

(iv) *Footwear*—(A) *Drilling.* A hole at least one-quarter inch in diameter may be drilled in the sole of each article of footwear.

(B) *Marking or labeling.* Each article of footwear either may be marked with the word "SAMPLE" in indelible ink or paint in contrasting color to the footwear or may have a permanently attached label which reads "SAMPLE". The marking or label shall be placed on a readily visible part of the footwear.

(v) *Other articles.* For other textile articles, such as furnishings or luggage, a section or hole may be cut, punched or torn from the article or the word "SAMPLE" may be marked on the article in indelible ink or paint in contrasting color to the article. The hole, cut or marking shall appear on the outer surface of the article in a location which is visible when the article is in use and shall be of sufficient size to ensure, to the satisfaction of the appropriate Customs officer, that the article is unsuitable for sale or for use except as a commercial sample.

§ 181.63 Printed advertising materials.

Printed advertising materials imported from Canada or Mexico qualify for duty-free entry. For purposes of this section, "printed advertising materials" means those goods classified in Chapter 49, HTSUS, including brochures, pamphlets, leaflets, trade catalogues, yearbooks published by trade associations, tourist promotional materials and posters, which are used to promote, publicize, or advertise a good or service, are essentially intended to advertise a good or service, and are supplied free of charge.

§ 181.64 Goods re-entered after repair or alteration in Canada or Mexico.

(a) *General.* This section sets forth the rules which apply for purposes of obtaining duty-free or reduced-duty treatment on goods returned after repair or alteration in Canada or Mexico as provided for in subheadings 9802.00.40 and 9802.00.50, HTSUS. Goods returned

after having been repaired or altered in Mexico, whether or not pursuant to a warranty, and goods returned after having been repaired or altered in Canada pursuant to a warranty, are eligible for duty-free treatment, provided that the requirements of this section are met. Goods returned after having been repaired or altered in Canada other than pursuant to a warranty are subject to duty upon the value of the repairs or alterations using the applicable duty rate under the United States-Canada Free-Trade Agreement (see § 10.301 of this chapter), provided that the requirements of this section are met. For purposes of this section, "repairs or alterations" means restoration, addition, renovation, redyeing, cleaning, resterilizing, or other treatment which does not destroy the essential characteristics of, or create a new or commercially different good from, the good exported from the United States.

Example. Glass mugs produced in the United States are exported to Canada for etching and tempering operations, after which they are returned to the United States for sale. The foreign operations exceed the scope of an alteration because they are manufacturing processes which create commercially different products with distinct new characteristics.

(b) *Goods not eligible for duty-free or reduced-duty treatment after repair or alteration.* The duty-free or reduced-duty treatment referred to in paragraph (a) of this section shall not apply to goods which, in their condition as exported from the United States to Canada or Mexico, are incomplete for their intended use and for which the processing operation performed in Canada or Mexico constitutes an operation that is performed as a matter of course in the preparation or manufacture of finished goods.

Example. Unflanged metal wheel rims are exported to Canada for a flanging operation to strengthen them so as to conform to U.S. Army specifications for wheel rims; although the goods when exported from the United States are dedicated for use in the making of wheel rims, they cannot be used for that purpose until flanged. The flanging operation does not constitute a repair or alteration because that operation is necessary for the completion of the wheel rims.

(c) *Documentation*—(1) *Declarations required.* Except as otherwise provided in this section, the following declarations shall be filed in connection with the entry of goods which are returned from Canada or Mexico after having been exported for repairs or alterations and which are claimed to be duty free or subject to duty only on the value of the repairs or alterations performed abroad:

(i) A declaration from the person who performed such repairs or alterations, in substantially the following form:

I/We, _____, declare that the goods herein specified are the goods which, in the condition in which they were exported from the United States, were received by me (us) on _____, 19_____, from _____ (name and address of owner or exporter in the United States); that they were received by me (us) for the sole purpose of being repaired or altered; that only the repairs or alterations described below were performed by me (us); that such repairs or alterations were (were not) performed pursuant to a warranty; that the full cost or (when no charge is made) value of such repairs or alterations is correctly stated below; and that no substitution whatever has been made to replace any of the goods originally received by me (us) from the owner or exporter thereof mentioned above.

Marks and numbers	Description of goods and of repairs or alterations	Full cost or (when no charge is made) value of repairs or alterations (see Subchapter II, Chapter 98, HTSUS)	Total value of goods after repairs or alterations

Date

Address

Signature

Capacity

(ii) A declaration by the owner, importer, consignee, or agent having knowledge of the pertinent facts in substantially the following form:

I, _____, declare that the (above) (attached) declaration by the person who performed the repairs or alterations abroad is true and correct to the best of my knowledge and belief; that the goods were not previously imported in bond or admitted into a foreign trade zone or imported in similar status; that such goods were exported from the United States for repairs or alterations from _____ (port) on _____, 19_____; and that the goods entered in their repaired or altered condition are the same goods that were exported on the above date and that are identified in the (above) (attached) declaration.

Date

Address

Signature

Capacity

(2) *Additional documentation.* The district director may require such additional documentation as is deemed necessary to prove actual exportation of the goods from the United States for repairs or alterations, such as a foreign customs entry, a foreign customs invoice, a foreign landing certificate, bill of lading, or airway bill.

(3) *Waiver of declarations.* If the district director concerned is satisfied, because of the nature of the goods or production of other evidence, that the goods are imported under circumstances meeting the requirements of this section, he may waive submission of the declarations provided for in paragraph (c)(1) of this section.

(4) *Deposit of estimated duties.* For goods returned after having been repaired or altered in Canada other than pursuant to a warranty, the district director shall require a deposit of estimated duties based upon the full cost or value of the repairs or alterations. The cost or value of the repairs or alterations performed in Canada other than pursuant to a warranty, which is to be set forth in the invoice and entry papers as the basis for the assessment of duty for such goods, shall be limited to the cost or value of the repairs or alterations actually performed in Canada, which shall include all domestic and foreign articles furnished for the repairs or alterations but shall not include any of the expenses incurred in the United States whether by way of engineering costs, preparation of plans or specifications, furnishing of tools or equipment for doing the repairs or alterations in Canada, or otherwise.

Subpart G—Origin Verifications and Determinations

§ 181.71 Denial of preferential tariff treatment dependent on origin verification and determination.

Except where a Certificate of Origin either is not submitted when requested under § 181.22(b) of this part or is not

acceptable and a corrected Certificate is not submitted or accepted as provided in § 181.22(c) of this part, and except in the case of a pattern of conduct provided for in § 181.76(b) of this part, Customs shall deny or withhold preferential tariff treatment on an imported good, or shall deny a post-importation claim for a refund filed under subpart D of this part, only after initiation of an origin verification under § 181.72(a) of this part which results in a determination that the imported good does not qualify as an originating good or should not be accorded such treatment for any other reason as specifically provided for elsewhere in this part.

§ 181.72 Verification scope and method.

(a) *General.* Subject to paragraph (e) of this section, Customs may initiate a verification in order to determine whether a good imported into the United States qualifies as an originating good for purposes of preferential tariff treatment under the NAFTA as stated on the Certificate of Origin pertaining to the good. Such a verification:

(1) May also involve a verification of the origin of a material that is used in the production of a good that is the subject of a verification under this section; and

(2) Shall be conducted only by means of one or more of the following:

(i) A verification letter which requests information from a Canadian or Mexican exporter or producer, including a Canadian or Mexican producer of a material, and which identifies the good or material that is the subject of the verification. The verification letter may be sent:

(A) By certified or registered mail, or by any other method that produces a confirmation of receipt by the exporter or producer; or

(B) By any other method, regardless of whether it produces proof of receipt by the exporter or producer;

(ii) A written questionnaire sent to an exporter or a producer, including a producer of a material, in Canada or Mexico. The questionnaire may be sent:

(A) By certified or registered mail, or by any other method that produces a confirmation of receipt by the exporter or producer; or

(B) By any other method, regardless of whether it produces proof of receipt by the exporter or producer;

(iii) Visits to the premises of an exporter or a producer, including a producer of a material, in Canada or Mexico to review the types of records referred to in § 181.12 of this part and observe the facilities used in the production of the good or material; and

(iv) Any other method which results in information from a Canadian or Mexican exporter or producer, including a Canadian or Mexican producer of a material, that is relevant to the origin determination. The information so obtained may form a basis for a negative determination regarding a good (see § 181.75(b) of this part) only if the information is in writing and is signed by the exporter or producer. In connection with an origin verification initiated under this paragraph, Customs may verify the applicable rate of duty applied to an originating good in accordance with Annex 302.2 of the NAFTA and may determine whether a good is a qualifying good for purposes of Annex 703.2 of the NAFTA.

(b) *Applicable accounting principles.* Any verification of a regional value-content requirement undertaken pursuant to paragraph (a) of this section shall be conducted in accordance with the Generally Accepted Accounting Principles applied in the country from which the good was exported to the United States.

(c) *Inquiries to importer not precluded.* Nothing in paragraph (a) of this section shall preclude Customs from directing inquiries or requests to a U.S. importer for documents or other information regarding the imported good. If such an inquiry or request involves requesting the importer to obtain and provide written information from the exporter or producer of the good or from the producer of a material that is used in the production of the good, such information shall be requested by the importer and provided to the importer by the exporter or producer only on a voluntary basis, and a failure or refusal on the part of the importer to obtain and provide such information shall not be considered a failure of the exporter or producer to provide the information and shall not constitute a ground for denying preferential tariff treatment on the good.

(d) *Failure to respond to letter or questionnaire*—(1) *Nonresponse to initial letter or questionnaire.* If the exporter or producer, including a producer of a material, fails to respond to a verification letter or questionnaire sent under paragraph (a)(2)(i) or (a)(2)(ii) of this section within 30 calendar days from the date on which the letter or questionnaire was sent, or such longer period as may be specified in the letter or questionnaire, Customs shall send a follow-up verification letter or questionnaire to that exporter or producer. The follow-up letter or questionnaire:

(i) Except where the verification letter or questionnaire only involved the origin of a material used in the production of a good and was sent to the producer of the material, may include the written determination referred to in § 181.75 of this part, provided that the information specified in paragraph (b) of that section is also included; and

(ii) Shall be sent:

(A) By certified or registered mail, or by any other method that produces a confirmation of receipt by the exporter or producer, if so requested by the customs administration of Canada or Mexico from which the good was exported; or

(B) By any method, if no request under paragraph (d)(1)(ii)(A) has been made by the Canadian or Mexican customs administration.

(2) *Nonresponse to follow-up letter or questionnaire*—(i) *Producer of a material.* If a producer of a material fails to respond to a follow-up verification letter or questionnaire sent under paragraph (d)(1) of this section, Customs may consider the material to be non-originating for purposes of determining whether the good to which that material relates is an originating good.

(ii) *Exporter or producer of a good.* If the exporter or producer of a good fails to respond to a follow-up verification letter or questionnaire sent under paragraph (d)(1) of this section, Customs may deny preferential tariff treatment on the good as follows:

(A) If the follow-up letter or questionnaire included a written determination as provided for in paragraph (d)(1)(i) of this section and the exporter or producer fails to respond to the follow-up letter or questionnaire within 30 calendar days or such longer period as specified therein:

(*1*) From the date on which the follow-up letter or questionnaire and written determination were received by the exporter or producer, if sent pursuant to paragraph (d)(1)(ii)(A) of this section; or

(*2*) From the date on which the follow-up letter or questionnaire and written determination were either received by the exporter or producer or sent by Customs, if sent in accordance with paragraph (d)(1)(ii)(B) of this section; or

(B) Provided that the procedures set forth in §§ 181.75 and 181.76 of this part are followed, if the follow-up letter or questionnaire does not include a written determination as provided for in paragraph (d)(1)(i) of this section and the exporter or producer fails to respond to the follow-up letter or questionnaire within 30 calendar days or such longer

period as specified in the letter or questionnaire:

(*1*) From the date on which the follow-up letter or questionnaire was received by the exporter or producer, if sent pursuant to paragraph (d)(1)(ii)(A) of this section; or

(*2*) From the date on which the follow-up letter or questionnaire was either received by the exporter or producer or sent by Customs, if sent in accordance with paragraph (d)(1)(ii)(B) of this section.

(e) *Calculation of regional value content under net cost method*—(1) *General.* Where a Canadian or Mexican producer of a good elects to calculate the regional value content of a good under the net cost method as set forth in General Note 12, HTSUS, and in the appendix to this part, Customs may not, during the time period over which that net cost is calculated, conduct a verification under § 181.72(a) of this part with respect to the regional value content of that good.

(2) *Cost submission for motor vehicles.* Where, pursuant to General Note 12, HTSUS, and the appendix to this part, a Canadian or Mexican producer of a light duty vehicle or heavy duty vehicle, as defined in the appendix to this part, elects to average its regional value content calculation over its fiscal year, Customs may request, in writing, that the producer provide a cost submission reflecting the actual costs incurred in the production of the category of motor vehicles for which the election was made. Such a written request shall constitute a verification letter under paragraph (a)(2)(i) of this section, and the requested cost submission shall be submitted to Customs within 180 calendar days after the close of the producer's fiscal year or within 60 days from the date on which the request was made, whichever is later.

§ 181.73 Notification of verification visit.

(a) *Written notification required.* Prior to conducting a verification visit, including a follow-up to an earlier visit, in Canada or Mexico pursuant to § 181.72(a)(2)(iii) of this part, Customs shall give written notification of the intention to conduct the visit. Such notification shall be delivered:

(1) By certified or registered mail, or by any other method that produces a confirmation of receipt, to the address of the Canadian or Mexican exporter or producer whose premises are to be visited;

(2) To the customs administration of the country in which the visit is to occur; and

(3) If requested by the country in which the visit is to occur, to the embassy of that country located in the United States.

(b) *Contents of notification.* The notification referred to in paragraph (a) of this section shall include:

(1) The identity of the Customs office and officer issuing the notification;

(2) The name of the Canadian or Mexican exporter or producer of the good, or producer of the material, whose premises are to be visited;

(3) The date and place of the proposed verification visit;

(4) The object and scope of the proposed verification visit, including specific reference to the good or material that is the subject of the verification;

(5) The names and titles of the Customs officers performing the proposed verification visit;

(6) The legal authority for the proposed verification visit; and

(7) A request that the Canadian or Mexican exporter or producer of the good, or producer of the material, provide its written consent for the proposed verification visit.

§ 181.74 Verification visit procedures.

(a) *Written consent required.* Prior to conducting a verification visit in Canada or Mexico pursuant to § 181.72(a)(2)(iii) of this part, Customs shall obtain the written consent of the Canadian or Mexican exporter or producer of the good or producer of the material whose premises are to be visited.

(b) *Written consent procedures.* The written consent provided for in paragraph (a) of this section shall be delivered by certified or registered mail, or by any other method that generates a reliable receipt, to the Customs officer who gave the notification provided for in § 181.73 of this part.

(c) *Failure to provide written consent or to cooperate or to maintain records.* Except as otherwise provided in paragraph (d) of this section, where a Canadian or Mexican exporter or producer of a good, or a Canadian or Mexican producer of a material, has not given its written consent to a proposed verification visit within 30 calendar days of receipt of notification pursuant to § 181.73 of this part, Customs may deny preferential tariff treatment to that good, or for purposes of determining whether a good is an originating good may consider as non-originating that material, that would have been the subject of the visit, provided that, as regards the good, notice of intent to deny such treatment is given to that exporter or producer of the good and to the U.S. importer thereof prior to taking such action. A failure on the part of the Canadian or Mexican exporter or producer of a good, or on the part of the Canadian or Mexican producer of a material, to maintain records or provide access to such records or otherwise cooperate during the verification visit shall mean that the verification visit never took place and may be treated by Customs in the same manner as a failure to give written consent to a verification visit. However, in the case of a Canadian or Mexican producer of a good who is found during a verification visit to have not maintained records in accordance with the Generally Accepted Accounting Principles applied in the producer's country, Customs may deny preferential tariff treatment on the good based solely on a failure to so maintain those records only if the producer does not conform the records to those Principles within 60 calendar days after Customs informs the producer in writing of that failure.

(d) *Postponement of visit in Canada or Mexico.* Following receipt of the notification provided for in § 181.73 of this part, the Canadian or Mexican customs administration may, within 15 calendar days of receipt of the notification, postpone the proposed verification visit for a period not exceeding 60 calendar days from the date of such receipt by providing written notice of the postponement to the Customs officer who issued the notification of the verification visit, unless a longer period is requested and agreed to by Customs. Such a postponement shall not constitute a failure to provide written consent within the meaning of paragraph (c) of this section and shall not otherwise by itself constitute a valid basis upon which Customs may:

(1) Consider a material that is used in the production of a good to be a non-originating material; or

(2) Deny preferential tariff treatment to a good.

(e) *Verification visits within the United States.*—(1) *Notification and consent procedure.* When the Canadian or Mexican customs administration intends to conduct a verification visit in the United States, notification of such intent will be given, and consent will be required, as provided for under Article 506 of the NAFTA. For purposes of the required notification to Customs, such notification shall be sent to Project North Star Coordination Center, P.O. Box 400, Buffalo, New York 14225–0400.

(2) *Postponement of visit.* Following receipt of notification from the Canadian or Mexican customs administration of its intention to

conduct a verification visit in the United States, Customs may, within 15 calendar days of receipt of the notification, postpone the proposed verification visit for a period not exceeding 60 calendar days from the date of such receipt by providing written notice of the postponement to the Canadian or Mexican customs administration.

(3) *Designation of observers.* A U.S. exporter or producer, including a producer of a material, whose good or material is the subject of a verification visit by the Canadian or Mexican customs administration shall be allowed to designate two observers to be present during the visit, subject to the following conditions:

(i) The U.S. exporter or producer shall not be required to designate observers;

(ii) There shall be no restriction on the class of persons that may be designated as observers by the U.S. exporter or producer;

(iii) The observers to be present are designated in the written consent to the proposed visit or subsequent thereto;

(iv) The observers do not participate in the verification visit in a manner other than as passive observers;

(v) The presence of observers shall in no way affect the right to have legal counsel or other advisors present during the visit;

(vi) There shall be no obligation on the part of the United States government or on the part of the Canadian or Mexican government to designate observers from its staff, even when the U.S. exporter or producer fails to, or specifically declines to, designate observers; and

(vii) The failure of the U.S. exporter or producer to designate observers shall not result in the postponement of the visit.

§ 181.75 Issuance of origin determination.

(a) *General.* Except in the case of a pattern of conduct within the meaning of § 181.76(b) of this part, following receipt and analysis of the results of an origin verification initiated under § 181.72(a) of this part in regard to a good imported into the United States and prior to denying preferential tariff treatment on the import transaction which gave rise to the origin verification, Customs shall provide the exporter or producer whose good is the subject of the verification with a written determination of whether the good qualifies as an originating good. Subject to paragraph (b) of this section, the written origin determination shall be sent within 60 calendar days after conclusion of the origin verification process, unless circumstances require additional time, and shall set forth:

(1) A description of the good that was the subject of the verification together with the identifying numbers and dates of the export and import documents pertaining to the good;

(2) Subject to the provisions of § 181.131 of this part, a statement setting forth the findings of fact made in connection with the verification and upon which the determination is based; and

(3) With specific reference to the rules applicable to originating goods as set forth in General Note 12, HTSUS, and in the appendix to this part, the legal basis for the determination.

(b) *Negative origin determinations.* If Customs determines, as a result of an origin verification initiated under § 181.72(a) of this part, that the good which is the subject of the verification does not qualify as an originating good, the written determination required under paragraph (a) of this section:

(1) Shall be sent by certified or registered mail, or by any other method that produces a confirmation of receipt by the exporter or producer, if so requested by the customs administration of Canada or Mexico from which the good was exported; and

(2) Shall, in addition to the information specified in paragraph (a) of this section, set forth the following:

(i) A notice of intent to deny preferential tariff treatment on the good which is the subject of the determination;

(ii) The specific date after which preferential tariff treatment will be denied, as established in accordance with § 181.76(a)(1) of this part;

(iii) The period, established in accordance with § 181.76(a)(1) of this part, during which the exporter or producer of the good may provide written comments or additional information regarding the determination; and

(iv) A statement advising the exporter or producer of the right to file a protest under 19 U.S.C. 1514 and part 174 of this chapter within 90 days after notice of liquidation is provided pursuant to part 159 of this chapter.

§ 181.76 Application of origin determinations.

(a) *General.* Except as otherwise provided in this paragraph or elsewhere in this section, an origin determination shall become effective upon issuance of the determination under § 181.75 of this part. In the case of a negative origin determination issued under § 181.75(b) of this part:

(1) The date on which preferential tariff treatment may be denied shall be no earlier than 30 calendar days from the date on which:

(i) Receipt of the written determination by the exporter or producer is confirmed, if a request under § 181.75(b)(1) of this part has been made; or

(ii) The written determination is sent by Customs, if no request under § 181.75(b)(1) of this part has been made; and

(2) Before denying preferential tariff treatment, Customs shall take into account any comments or additional information provided by the exporter or producer during the period established in accordance with paragraph (a)(1) of this section.

(b) *Cases involving a pattern of conduct.* Where multiple origin verifications initiated under § 181.72(a) of this part indicate a pattern of conduct by an exporter or producer involving false or unsupported representations on Certificates of Origin that a good imported into the United States qualifies as an originating good, Customs may withhold preferential tariff treatment on identical goods exported or produced by such person until that person establishes compliance with the rules applicable to originating goods as set forth in General Note 12, HTSUS, and in this part. For purposes of this paragraph, a "pattern of conduct" means repeated instances of false or unsupported representations by an exporter or producer as established by Customs on the basis of not fewer than two origin verifications of two or more importations of the good that result in the issuance of not fewer than two written determinations issued to that exporter or producer pursuant to § 181.75 of this part which conclude, as a finding of fact, that Certificates of Origin completed and signed by that exporter or producer with respect to identical goods contain false or unsupported representations.

(c) *Differing determinations.* Where Customs determines, either as a result of an origin verification initiated under § 181.72(a) of this part or under any other circumstance, that a certain good imported into the United States does not qualify as an originating good based on a tariff classification or a value applied in the United States to one or more materials used in the production of the good, including a material used in the production of another material that is used in the production of the good, which differs from the tariff classification or value applied to the materials by the country from which the good was exported, the Customs determination shall not become effective until Customs provides written

notification thereof both to the U.S. importer of the good and to the person who completed and signed the Certificate of Origin upon which the claim for preferential tariff treatment for the good was based.

(d) *Applicability of a determination to prior importations.* Customs shall not apply a determination made under paragraph (c) of this section to an importation made before the effective date of the determination if, prior to notification of the determination, the customs administration of the country from which the good was exported either issued an advance ruling under Article 509 of the NAFTA or any other binding ruling on the tariff classification or on the value of such materials, or gave consistent treatment to the entry of the materials under the tariff classification or value at issue, on which a person is entitled to rely. For purposes of this paragraph, the person who received notification of the determination shall demonstrate to the satisfaction of Customs, in writing within 30 calendar days of receipt of the notification, that the conditions set forth herein have been met. For purposes of this paragraph:

(1) A "ruling" on which a person is entitled to rely in the case of Canada must be issued pursuant to section 43.1(1) of the Customs Act (Advance Rulings) or in accordance with Departmental Memorandum 11–11–1 (National Customs Rulings) and in the case of Mexico must be issued pursuant to Article 34 of the Codigo Fiscal de la Federacion and pursuant to Article 30 of the Ley Aduanera or the applicable provision of Mexican law related to advance rulings under Article 509 of the NAFTA; and

(2) "Consistent treatment" means the established application by the Canadian or Mexican customs administration that can be substantiated by the continued acceptance by the customs administration of the tariff classification or value of identical materials on importations of the materials into Canada or Mexico by the same importer over a period of not less than two years immediately prior to the date of signature of the Certificate of Origin for the good that is the subject of the determination referred to in paragraph (c) of this section, provided that with regard to those importations:

(i) The tariff classification or value of the materials was not the subject of a verification, review or appeal by that customs administration on the date of the determination under paragraph (c) of this section; and

(ii) The materials had not been accorded a different tariff classification or value by one or more district, regional or local offices of that customs administration on the date of the determination under paragraph (c) of this section.

(e) *Detrimental reliance.* If Customs denies preferential tariff treatment to a good pursuant to a determination made under paragraph (c) of this section, Customs shall postpone the effective date of the denial for a period not exceeding 90 calendar days where the U.S. importer of the good, or the person who completed and signed the Certificate of Origin upon which the claim for preferential tariff treatment for the good was based, demonstrates to the satisfaction of Customs that it has relied in good faith to its detriment on the tariff classification or value applied to such materials by the customs administration of the country from which the good was exported.

Subpart H—Penalties

§ 181.81 Applicability to NAFTA transactions.

(a) *General.* Except as otherwise provided in § 181.82 of this part, all criminal, civil or administrative penalties which may be imposed on U.S. importers, exporters and producers for violations of the Customs and related laws and regulations shall also apply to U.S. importers, exporters and producers for violations of the laws and regulations relating to the NAFTA.

(b) *False certification by U.S. exporter or producer.* Except as otherwise provided in § 181.82 of this part, a false certification by an exporter or a producer in the United States that a good to be exported to Canada or Mexico qualifies as an originating good shall have the same legal consequences as would apply to an importer in the United States for a contravention of the U.S. Customs laws and regulations regarding the making of a false statement or representation.

§ 181.82 Exceptions to application of penalties.

(a) *General.* A U.S. importer who makes a corrected declaration under § 181.21(b) of this part shall not be subject to civil or administrative penalties for having made an incorrect declaration, provided that the corrected declaration was voluntarily made. In addition, civil or administrative penalties provided for under the U.S. Customs laws and regulations shall not be imposed on an exporter or producer in the United States who voluntarily provides written notification pursuant to § 181.11(d) of this part with respect to the making of an incorrect certification.

(b) *"Voluntarily" defined.*

(1) *General.* For purposes of paragraph (a) of this section, the making of a corrected declaration or the providing of written notification of an incorrect certification will be deemed to have been done voluntarily if:

(i) Done before the commencement of a formal investigation;

(ii) Done before any of the events specified in § 162.74(g) of this chapter have occurred;

(iii) Done within 30 calendar days after either the U.S. importer with respect to a declaration that an imported good qualified as an originating good, or the U.S. exporter or producer with respect to a certification pertaining to a good exported to Canada or Mexico, had reason to believe that the declaration or certification was not correct;

(iv) Accompanied by a written statement setting forth the information specified in paragraph (b)(3) of this section; and

(v) In the case of a corrected declaration, accompanied or followed by a tender of any actual loss of duties in accordance with paragraph (b)(5) of this section.

(2) *Cases involving fraud.* Notwithstanding paragraph (b)(1) of this section, a person who acted by means of fraud in making an incorrect declaration or certification may not make a voluntary correction thereof. For purposes of this paragraph, the term "fraud" shall have the meaning set forth in paragraph (B)(3) of appendix B to part 171 of this chapter.

(3) *Written statement.* For purposes of paragraph (a) of this section, each corrected declaration or notification of an incorrect certification shall be accompanied by a written statement which:

(i) Identifies the class or kind of good to which the incorrect declaration or certification relates;

(ii) Identifies each import or export transaction affected by the incorrect declaration or certification with reference to each port of importation or exportation and the approximate date of each importation or exportation. A U.S. producer who provides written notification that certain information in a Certificate of Origin is incorrect and who is unable to identify the specific export transactions under this paragraph shall provide as much information concerning those transactions as the producer, by the exercise of good faith and due diligence, is able to obtain;

(iii) Specifies the nature of the incorrect statements or omissions

regarding the declaration or certification; and

(iv) Sets forth, to the best of the person's knowledge, the true and accurate information or data which should have been covered by or provided in the declaration or certification, and states that the person will provide any additional information or data which is unknown at the time of making the corrected declaration or certification within 30 calendar days or within any extension of that 30-day period as Customs may permit in order for the person to obtain the information or data.

(4) *Substantial compliance.* For purposes of this section, a person shall be deemed to have voluntarily corrected a declaration or certification even though that person provides corrected information in a manner which does not conform to the requirements of the written statement specified in paragraph (b)(3) of this section, provided that:

(i) Customs is satisfied that the information was provided before the commencement of a formal investigation; and

(ii) The information provided includes, orally or in writing, substantially the same information as that specified in paragraph (b)(3) of this section.

(5) *Tender of actual loss of duties.* A U.S. importer who makes a corrected declaration shall tender any actual loss of duties at the time of making the corrected declaration, or within 30 calendar days thereafter, or within any extension of that 30-day period as Customs may allow in order for the importer to obtain the information or data necessary to calculate the duties owed.

(6) *Applicability of prior disclosure provisions.* A person who fails to meet the requirements of this section and who otherwise qualifies for prior disclosure treatment under 19 U.S.C. 1592(c)(4) and the regulations issued thereunder shall not be denied prior disclosure treatment merely because the disclosure is not deemed to have been made voluntarily under this section.

Subpart I—Advance Ruling Procedures

§ 181.91 Applicability.

This subpart sets forth the rules which govern the issuance and application of advance rulings under Article 509 of the NAFTA and the procedures which apply for purposes of review of advance rulings under Article 510 of the NAFTA. Importers in the United States and exporters and producers located in Canada or Mexico may request and obtain an advance ruling on a NAFTA transaction only in accordance with the provisions of this subpart whenever the requested ruling involves a subject matter specified in § 181.92(b)(6) of this part. Accordingly, the provisions of this subpart shall apply in lieu of the administrative ruling provisions contained in subpart A of part 177 of this chapter except where the request for a ruling involves a subject matter not specified in § 181.92(b)(6).

§ 181.92 Definitions and general NAFTA advance ruling practice.

(a) *Definitions.* For purposes of this subpart:

(1) An "advance ruling" is a written statement issued by the Headquarters Office, the New York Seaport Area Office or by such other office as designated by the Commissioner of Customs that interprets and applies the provisions of NAFTA to a specific set of facts involving any subject matter specified in § 181.92(b)(6) of this part. An "advance ruling letter" is an advance ruling issued in response to a written request and set forth in a letter addressed to the person making the request or his designee. A "published advance ruling" is an advance ruling which has been published in full text in the **Customs Bulletin.**

(2) An "authorized agent" is a person expressly authorized by a principal to act on his or her behalf. An advance ruling requested by an attorney or other person acting as an agent must include a statement describing the authority under which the request is made. With the exception of attorneys whose authority to represent is known, any person appearing before Customs as an agent in connection with an advance ruling request may be required to present evidence of his or her authority to represent the principal. The foregoing requirements will not apply to an individual representing his or her full-time employer or to a bona-fide officer, director or other qualified representative of a corporation, association, or organized group.

(3) The term "Headquarters Office," means the Office of Regulations and Rulings at Headquarters, United States Customs Service, Washington, DC.

(4) An "information letter" is a written statement issued by the Headquarters Office, the New York Seaport Area Office or by such other office as designated by the Commissioner of Customs that does no more than call attention to a well-established interpretation of principles under the NAFTA, without applying it to a specific set of facts. If Customs believes that general information may be of some benefit to the person making the request, an information letter may be issued in response to a request for an advance ruling when:

(i) The request suggests that general information, rather than an advance ruling, is actually being sought;

(ii) The request is incomplete or otherwise fails to meet the requirements set forth in this subpart; or

(iii) The requested advance ruling cannot be issued for any other reason.

(5) A "NAFTA transaction" is an act or activity to which the NAFTA provisions apply. A "prospective" NAFTA transaction is one that is merely contemplated or is currently being undertaken but has not resulted in any arrival or in the filing of any entry or entry summary or other document or in any other act so as to bring the transaction, or any part of it, under the jurisdiction of any Customs office. A "current" NAFTA transaction is one which is presently under consideration by a field office (port, district, or region) of Customs. A "completed" NAFTA transaction is one which has been acted upon by a Customs field office and with respect to which that office has issued a determination which is final in nature, but is (or was) subject to appeal, petition, protest or other review as provided in the applicable Customs laws and regulations. An "ongoing" NAFTA transaction is a series of identical, recurring transactions, consisting of current and completed transactions where future transactions are contemplated.

(6) The term "New York Seaport Area Office," means the National Import Specialist Division, Office of the Area Director, New York Seaport, United States Customs Service, New York, New York.

(b) *General Advance Ruling Practice.* An advance ruling may be requested under the provisions of this subpart with respect to prospective, current and ongoing NAFTA transactions. An advance ruling will be based on the facts and circumstances presented by the requester.

(1) *Prospective NAFTA transactions.* It is in the interest of the sound administration of the NAFTA that persons engaging in any transaction affected by NAFTA fully understand the consequences of that transaction prior to its consummation. For this reason, Customs will give full and careful consideration to written requests from importers in the United States and exporters or producers in Canada or Mexico for advance rulings or information setting forth, with respect to a specifically described transaction, a

definitive interpretation of applicable law or other appropriate information.

(2) *Current or ongoing NAFTA transactions.* A question arising in connection with a NAFTA transaction already before a Customs field office by reason of arrival, entry or otherwise will be resolved by that office in accordance with the principles and precedents previously announced by the Headquarters Office. If such a question cannot be resolved on the basis of clearly established rules set forth in the NAFTA or the regulations thereunder, or in applicable Treasury Decisions, rulings, opinions, or court decisions published in the Customs Bulletin, that field office may, if it believes it appropriate, forward the question to the Headquarters Office for consideration.

(3) *Completed NAFTA transactions.* A question arising in connection with an entry of merchandise which has been liquidated, or in connection with any other completed NAFTA transaction, may not be the subject of an advance ruling request under this subpart.

(4) *Oral advice.* Customs will not issue an advance ruling in response to an oral request. Oral opinions or advice of Customs personnel are not binding on Customs. However, oral inquiries may be made to Customs offices regarding existing advance rulings, the scope of such advance rulings, the types of transactions with respect to which Customs will issue advance rulings, the scope of the advance rulings which may be issued, or the procedures to be followed in submitting advance ruling requests, as prescribed in this subpart.

(5) *Who may request an advance ruling.* An advance ruling may be requested by any of the following persons having a direct and demonstrable interest in the question or questions presented in the advance ruling request, or by the authorized agent of any such person:

(i) An importer in the United States;

(ii) An exporter or a producer of a good in Canada or Mexico; or

(iii) A Canadian or Mexican producer of a material that is used in the production of a good imported into the United States, but only with regard to that material and only in regard to a matter described in paragraphs (b)(6) (i) through (v) and (vii) of this section. For purposes of this paragraph, a "person" includes an individual, corporation, partnership, association, or other entity or group.

(6) *Subject matter of advance rulings.* Customs shall issue advance rulings under this subpart concerning the following:

(i) Whether materials imported from a country other than the United States, Canada or Mexico and used in the production of a good undergo an applicable change in tariff classification set forth in General Note 12, HTSUS, as a result of production occurring entirely in the United States, Canada and/or Mexico;

(ii) Whether a good satisfies a regional value-content requirement under the transaction value method or under the net cost method as provided for in General Note 12, HTSUS, and in this part;

(iii) For purposes of determining whether a good satisfies a regional value-content requirement under General Note 12, HTSUS, and under this part, the appropriate basis or method for value to be applied by an exporter or a producer in Canada or Mexico, in accordance with the principles set forth in the appendix to this part, for calculating the transaction value of the good or of the materials used in the production of the good;

(iv) For purposes of determining whether a good satisfies a regional value-content requirement under General Note 12, HTSUS, and under this part, the appropriate basis or method for reasonably allocating costs, in accordance with the allocation methods set forth in the appendix to this part, for calculating the net cost of the good or the value of an intermediate material;

(v) Whether a good qualifies as an originating good under General Note 12, HTSUS, and under the appendix to this part;

(vi) Whether a good that re-enters the United States after having been exported from the United States to Canada or Mexico for repair or alteration qualifies for duty-free treatment in accordance with § 181.64 of this part;

(vii) Whether the proposed or actual marking of a good satisfies country of origin marking requirements under part 134 of this chapter and under the Marking Rules;

(viii) Whether an originating good qualifies as a good of Canada or Mexico under Annex 300–B, Annex 302.2 and Chapter Seven of the NAFTA; and

(ix) Whether a good is a qualifying good under Chapter Seven of the NAFTA.

§ 181.93 Submission of advance ruling requests.

(a) *Form.* A request for an advance ruling should be written in the English language and in the form of a letter. For any subject matter specified in § 181.92(b)(6) (i), (v), (vi), (vii), (viii) or (ix) of this part, the request may be directed either to the Commissioner of Customs, Attention: Office of Regulations and Rulings, Washington, DC 20229, or to the Area Director of Customs, New York Seaport, 6 World Trade Center, New York, NY 10048. For any subject matter specified in § 181.92(b)(6) (ii), (iii) or (iv) of this part, the request must be directed to the Commissioner of Customs, Attention: Office of Regulations and Rulings, Washington, DC 20229.

(b) *Content*—(1) *General.* Each request for an advance ruling must contain a complete statement of all relevant facts relating to the NAFTA transaction. Such facts include: The names, addresses, and other identifying information of all interested parties (if known); the name of the port or place at which any good involved in the transaction will be imported or which will otherwise have jurisdiction with respect to the act or activity described in the transaction; and a description of the transaction itself, appropriate in detail to the subject matter of the requested advance ruling.

(2) *Description of transaction*—(i) *General.* The prospective Customs transaction to which the advance ruling request relates must be described in sufficient detail to permit proper application of the relevant NAFTA provisions.

(ii) *Tariff change rulings.* If the transaction involves the importation of a good or material for which a ruling is requested as to whether a change in tariff classification has occurred, the request must contain a complete description of the good or material, a complete description of all materials used in the production of the good or material, and a complete description of all processing operations employed in the production of the good or material. In addition, the request should set forth: the principal or chief use of the good or material in the United States and the commercial, common, or technical designation of the good or material; if the good or material is composed of two or more substances, the relative quantity (by both weight and by volume) and value of each substance; any applicable special invoicing requirements set forth in part 141 of this chapter (if known); and any other information which may assist in determining the appropriate tariff classification of the good or material. The advance ruling request should also note, whenever germane, the purchase price of the good or material, and its approximate selling price in the United States. Each individual request for an advance ruling must be limited to five merchandise items, all of which must be of the same class or kind. Only NAFTA tariff change rulings will be issued under this subpart. Tariff classification rulings which do not involve the application of

the NAFTA shall be issued under part 177 of this chapter.

(iii) *NAFTA rulings on regional value content.* NAFTA advance ruling requests, if involving the issue of whether a good satisfies a regional value content requirement under the transaction value method or under the net cost method as provided for in General Note 12, HTSUS, and in this part, must identify the method for which eligibility is sought. Where transaction value is the method identified, the information must be sufficient: to calculate the transaction value of the good, adjusted to an F.O.B. basis; to calculate the value of all non-originating materials used by the producer in the production of the good in accordance with the provisions of this part; and for any other circumstance to make any determination relevant to the application of the regional value content requirement to the good. With regard to the net cost method, the information must include: all costs relevant to determining the total cost of the good as defined in the appendix to this part; all such costs which must be subtracted from the total cost of the good as provided in the appendix to this part; the value of all materials as determined under the appendix to this part; the basis for any allocation of costs under the appendix to this part; and any other information relevant to determining the appropriate value of any cost under this part.

(3) *Samples.* Each request for an advance ruling should be accompanied by photographs, drawings, or other pictorial representations of the good and, whenever possible, by a sample of the good unless a precise description of the good is not essential to the advance ruling requested. Any good consisting of materials in chemical or physical combination for which a laboratory analysis has been prepared by or for the manufacturer should include a copy of that analysis, flow charts, CA number, and related information. A sample submitted in connection with a request for an advance ruling becomes a part of the Customs file in the matter and will be retained until the advance ruling is issued or the advance ruling request is otherwise disposed of. A sample should only be submitted with the understanding that all or a part of it may be damaged or consumed in the course of examination, testing, analysis, or other actions undertaken in connection with the advance ruling request.

(4) *Related documents.* If the question or questions presented in the advance ruling request directly relate to matters set forth in any invoice, contract, agreement, or other document, a copy of the document must be submitted with the request. (Original documents should not be submitted inasmuch as any documents or exhibits furnished with the advance ruling request become a part of the Customs file in the matter and cannot be returned.) The relevant facts reflected in any documents submitted, and an explanation of their bearing on the question or questions presented, must be expressly set forth in the advance ruling request.

(5) *Prior or current transactions.* Each request for an advance ruling must state whether, to the knowledge of the person submitting the request, the same transaction, or one identical to it, has ever been considered, or is currently being considered by any Customs office or whether, to the knowledge of the person submitting the request, the issues involved have ever been considered, or are currently being considered, by the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit, or any court of appeal therefrom. Where the transaction described in the advance ruling request is but one of a series of similar and related transactions, that fact must also be stated. If a prospective transaction becomes a current transaction, the office processing the ruling request shall be so notified.

(6) *Statement of position.* If the request for an advance ruling asks that a particular determination or conclusion be reached in the advance ruling letter, a statement must be included in the request setting forth the basis for that determination or conclusion, together with a citation of all relevant supporting authority.

(7) *Privileged or confidential information.* Information which is claimed to constitute trade secrets or privileged or confidential commercial or financial information regarding the business transactions of private parties the disclosure of which would cause substantial harm to the competitive position of the person making the request (or of another interested party) must be identified clearly, and the reasons such information should not be disclosed, including, where applicable, the reasons the disclosure of the information would prejudice the competitive position of the person making the request (or of another interested party), must be set forth. An advance ruling will not be issued until all trade secret, privilege or confidentiality issues are resolved (see § 181.99(a)(3) of this part).

(c) *Signing; instruction as to reply.* The request for an advance ruling must be signed by a person authorized to make the request, as described in § 181.92(b)(5) of this part. An advance ruling requested by a principal or authorized agent may direct that the advance ruling letter be addressed to the other.

(d) *Requests for immediate consideration.* Customs will normally process requests for advance rulings in the order they are received and as expeditiously as possible, as specified in § 181.99 of this part. However, a request that a particular matter be given consideration ahead of its regular order, if made in writing at the time the request is submitted, or subsequent thereto, and showing a clear need for such treatment, will be given consideration as the particular circumstances warrant and permit. Requests for special consideration made by telegram or electronic transmission will be treated in the same manner as requests made by letter, but advance rulings will not be issued by telegram or electronic transmission. A telegram or electronic transmission must be followed up with a signed original within 14 calendar days of the submission of the telegram or electronic transmission. In no event can any assurance be given that a particular request for an advance ruling will be acted upon by the time requested.

§ 181.94 Nonconforming requests for advance rulings.

A person submitting a request for an advance ruling that does not comply with all of the provisions of this subpart will be so notified in writing, and the requirements that have not been met will be pointed out. Such person will be given a period of thirty (30) calendar days from the date of the notice (or such longer period as the notice may provide) to supply any additional information that is requested or otherwise conform the advance ruling request to the requirements referred to in the notice. The Customs file with respect to advance ruling requests which are not brought into compliance with the provisions of this subpart within the period of time allowed will be administratively closed and the request removed from active consideration. A request for an advance ruling that is removed from active consideration by reason of failure to comply with the provisions of this subpart may be treated as withdrawn. A failure to comply with the provisions of this subpart will result in the rejection of the advance ruling request with the notice specifying the deficiencies.

§ 181.95 Oral discussion of issues.

(a) *General.* A person submitting a request for an advance ruling and

desiring an opportunity to orally discuss the issue or issues involved should indicate that desire in writing at the time the advance ruling request is filed. Such a discussion will only be scheduled when, in the opinion of the Customs personnel by whom the advance ruling request is under consideration, a conference will be helpful in deciding the issue or issues involved or when a determination or conclusion contrary to that advocated in the advance ruling request is contemplated. Conferences are scheduled for the purpose of affording the parties an opportunity to freely and openly discuss the matters set forth in the advance ruling request. Accordingly, the parties will not be bound by any argument or position advocated or agreed to, expressly or by implication, during the conference unless either party subsequently agrees to be so bound in writing. The conference will not conclude with the issuance of an advance ruling letter.

(b) *Time, place and number of conferences.* If a request for a conference is granted, the person making the request will be notified of the time and place of the conference. No more than one conference with respect to the matters set forth in an advance ruling request will be scheduled, unless, in the opinion of the Customs personnel by whom the advance ruling request is under consideration, additional conferences are necessary.

(c) *Representation.* A person whose request for a conference has been granted may be accompanied at that conference by counsel or other representatives, or may designate such persons to attend the conference in his or her place.

(d) *Additional information presented at conferences.* It will be the responsibility of the person submitting the request for an advance ruling to provide for inclusion in the Customs file in the matter a written record setting forth any and all additional information, documents, and exhibits introduced during the conference to the extent that person considers such material relevant to the consideration of the advance ruling request. Such information, documents and exhibits shall be given consideration only if received by Customs within 30 calendar days following the conference.

§ 181.96 Change in status of transaction.

Each person submitting a request for an advance ruling in connection with a NAFTA transaction must immediately advise Customs in writing of any change in the status of that transaction upon becoming aware of the change. In particular, Customs must be advised when any transaction described in the advance ruling request as prospective becomes current and under the jurisdiction of a Customs field office. In addition, any person engaged in a NAFTA transaction coming under the jurisdiction of a Customs field office who has previously requested a NAFTA advance ruling with respect to that transaction must advise the field office of that fact.

§ 181.97 Withdrawal of NAFTA advance ruling requests.

Any request for an advance ruling may be withdrawn by the person submitting it at any time before the issuance of an advance ruling letter or any other final disposition of the request. All correspondence, documents, and exhibits submitted in connection with the request will be retained in the Customs file and will not be returned. In addition, the Headquarters Office may forward, to Customs field offices which have or may have jurisdiction over the transaction to which the advance ruling request relates, its views in regard to the transaction or the issues involved therein, as well as appropriate information derived from materials in the Customs file.

§ 181.98 Situations in which no NAFTA advance ruling may be issued.

(a) *General.* No advance ruling letter will be issued in response to a request therefor which fails to comply with the provisions of this subpart. No advance ruling letter will be issued in regard to a completed transaction.

(b) *Pending matters.* Where a request for an advance ruling involves an issue that is under review in connection with an origin verification under subpart G of this part or that is the subject of an administrative review procedure provided for in subpart J of this part or in part 174 of this chapter, Customs may decline to issue the requested advance ruling. In addition, no NAFTA advance ruling letter will be issued with respect to any issue which is pending before the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit, or any court of appeal therefrom. Litigation before any other court will not preclude the issuance of an advance ruling letter, provided neither Customs nor any of its officers or agents is named as a defendant.

§ 181.99 Issuance of NAFTA advance rulings or other advice.

(a) *NAFTA advance ruling letters.*

(1) *General.* Except as otherwise provided in paragraph (a)(2) of this section, Customs will, within 120 calendar days of receipt of a request, including any required information supplemental thereto, issue an advance ruling letter in the English language setting forth the position of Customs and the reasons therefor with respect to a specifically described Customs transaction whenever a request for such an advance ruling is submitted in accordance with the provisions of this subpart and it is in the sound administration of the NAFTA provisions to do so. Otherwise, a request for an advance ruling will be answered by an information letter or, in those situations in which general information is likely to be of little or no value, by a letter stating that no advance ruling can be issued. In the course of evaluating the advance ruling request Customs may solicit supplemental information from the person requesting the advance ruling. The submission of supplemental information will extend the time for response. The time for response will also be extended if it is necessary to obtain information from other government agencies or in the form of a laboratory analysis.

(2) *Submission of NAFTA advance ruling letters to field offices.* Any importer engaging in a NAFTA transaction with respect to which an advance ruling letter has been issued under this subpart either must ensure that a copy of the advance ruling letter is attached to the documents filed with the appropriate Customs office in connection with that transaction or must otherwise indicate with the information filed for that transaction that an advance ruling has been received. Any person receiving an advance ruling stating Customs determination must set forth such determination in the documents or information filed in connection with any subsequent entry of that merchandise; failure to do so may result in a rejection of the entry and the imposition of such penalties as may be appropriate. An advance ruling received after the filing of such documents or information must immediately be brought to the attention of the appropriate Customs field office.

(3) *Disclosure of NAFTA advance ruling letters.* No part of the advance ruling letter, including names, addresses, or information relating to the business transactions of private parties, shall be deemed to constitute privileged or confidential commercial or financial information or trade secrets exempt from disclosure pursuant to the Freedom of Information Act, as amended (5 U.S.C. 552), and part 103 of this chapter, or shall be deemed to be

subject to the confidentiality principle set forth in § 181.121 of this part, unless, as provided in § 181.93(b)(7) of this part, the information claimed to be exempt from disclosure is clearly identified and a valid basis for nondisclosure is set forth. Before the issuance of the advance ruling letter, the person submitting the advance ruling request will be notified of any decision adverse to his request for nondisclosure and will, upon written request to Customs within 10 working days of the date of notification, be permitted to withdraw the advance ruling request. If in the opinion of Customs an impasse exists on the issue of confidentiality and the person who submitted the advance ruling request does not withdraw the request, Customs will decline to issue the advance ruling. All advance ruling letters issued by Customs will be available, upon written request, for inspection and copying by any person (with any portions determined to be exempt from disclosure deleted).

(4) *Penalties for misrepresented or omitted material facts or for noncompliance.* If Customs determines that an issued advance ruling was based on incorrect information, the person to whom the advance ruling was issued may be subject to appropriate penalties unless that person demonstrates that he used reasonable care and acted in good faith in presenting the facts and circumstances on which the advance ruling was based. In addition, Customs may apply such measures as the circumstances may warrant in a case where a person to whom an advance ruling was issued has failed to act in accordance with the terms and conditions of the advance ruling.

(b) *Other NAFTA advice and guidance.* The Headquarters Office may on its own initiative from time to time issue other external advice and guidance with respect to issues or transactions arising under the NAFTA which come to its attention. Such NAFTA advice and guidance, which represent the official position of Customs and which are likely to be of widespread interest and application, are published in the Customs Bulletin, as described in § 181.101 of this part. Nothing in this subpart shall preclude Customs from issuing advice and guidance to its field offices concerning the application of the NAFTA.

§ 181.100 Effect of NAFTA advance ruling letters; modification and revocation.

(a) *Effect of NAFTA advance ruling letters*—(1) *General.* An advance ruling letter issued by Customs under the provisions of this subpart represents the official position of Customs with respect to the particular transaction or issue described therein and is binding on all Customs personnel in accordance with the provisions of this subpart until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the advance ruling set forth in the advance ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances. An advance ruling letter is generally effective on the date it is issued or such later date as may be specified in the advance ruling and, commencing on its effective date, may be applied to entries for consumption and warehouse withdrawals for consumption which are unliquidated, or to other transactions with respect to which Customs has not taken final action on that date. See, however, paragraph (b) of this section (ruling letters which modify previous advance ruling letters) and § 181.101 of this part (advance ruling letters published in the Customs Bulletin).

(2) *Application of NAFTA rulings to transactions*—(i) *General.* Each NAFTA ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect. The application of an advance ruling letter by a Customs field office to the transaction to which it is purported to relate is subject to the verification of the facts incorporated in the advance ruling letter, a comparison of the transaction described therein to the actual transaction, and the satisfaction of any conditions on which the advance ruling was based, and if the facts are materially different or a condition has not been satisfied, the treatment specified in the advance ruling will not be applied to the actual transaction. If, in the opinion of any Customs field office by whom the transaction is under consideration or review, the advance ruling letter should be modified or revoked, the findings and recommendations of that office will be forwarded to the Headquarters Office for consideration, prior to any final disposition with respect to the transaction by that office. If the transaction described in the NAFTA advance ruling letter and the actual transaction are the same, and any and all conditions set forth in the advance ruling letter have been satisfied, the advance ruling will be applied to the transaction.

(ii) *Tariff change rulings.* Each advance ruling letter concerning whether a change in tariff classification has occurred will be applied only with respect to transactions involving either articles which are identical to the sample submitted with the advance ruling request and reflect the same processing or articles which conform to the description set forth in the advance ruling letter.

(iii) *Regional value content rulings.* Each advance ruling letter concerning the application of a regional content requirement will be applied only with respect to transactions involving the same merchandise and identical facts.

(3) *Reliance on NAFTA advance rulings by others.* An advance ruling letter is subject to modification or revocation without notice to any person other than the person to whom the letter was addressed. Accordingly, no other person may rely on the advance ruling letter or assume that the principles of that advance ruling will be applied in connection with any transaction other than the one described in the letter. However, any person eligible to request an advance ruling under § 181.92(b)(5) of this part may request information as to whether a previously-issued advance ruling letter has been modified or revoked by writing the Commissioner of Customs, Attention: Office of Regulations and Rulings, Washington, DC 20229, and either enclosing a copy of the advance ruling letter or furnishing other information sufficient to permit the advance ruling letter in question to be identified.

(b) *Modification or revocation of NAFTA advance ruling letters*—(1) *General.* Any NAFTA advance ruling letter may be modified or revoked:

(i) If the ruling letter reflects or is based on an error:

(A) Of fact;

(B) In the tariff classification of a good or material that is the subject of the ruling;

(C) In the application of a regional value-content requirement under General Note 12, HTSUS, and under this part;

(D) In the application of the rules for determining whether a good qualifies as a good of Canada or Mexico under Annex 300–B, Annex 302.2 or Chapter Seven of the NAFTA;

(E) In the application of the rules for determining whether a good is a qualifying good under Chapter Seven of the NAFTA; or

(F) In the application of the rules for determining whether a good qualifies for duty-free treatment under § 181.64 of this part when the good re-enters the United States after having been exported to Canada or Mexico for repair or alteration;

(ii) If the ruling letter is not in accordance with an interpretation agreed on by the United States, Canada and Mexico regarding Chapter Three or Chapter Four of the NAFTA;

(iii) If there is a change in the material facts or circumstances on which the ruling is based;

(iv) To conform to a modification of Chapter Three, Four, Five or Seven of the NAFTA, or of the Marking Rules, or of the regulations set forth in this part; or

(v) To conform to a judicial decision or change in domestic law.

A modification or revocation of a NAFTA advance ruling letter shall be effected by Customs Headquarters by giving written notice to the person to whom the advance ruling letter was addressed.

(2) *Application of modification or revocation of NAFTA advance ruling letters.* The modification or revocation of a NAFTA advance ruling letter will not be applied to entries or warehouse withdrawals for consumption which were made prior to the effective date of such modification or revocation, except where the person to whom the advance ruling was issued has not acted in accordance with its terms and conditions.

(3) *Effective dates.* Generally, a NAFTA letter modifying or revoking an earlier advance ruling will be effective on the date it is issued. However, Customs may, upon request or on its own initiative, delay the effective date of such a modification or revocation for a period of up to 90 calendar days from the date of issuance. Such a delay may be granted at the request of the party to whom the ruling letter was issued, provided such party can demonstrate to the satisfaction of Customs that it reasonably relied on the earlier advance ruling to its detriment. The evidence of reasonable reliance must cover the period from the date of the letter modifying or revoking the advance ruling back to the date of that advance ruling and must list all transactions claimed to be covered by the modified or revoked advance ruling by entry number (or other Customs assigned number), the quantity and value of merchandise covered by each such transaction (where applicable), the ports of entry, and the dates of final action by Customs. The evidence of reliance must include contracts, purchase orders, or other materials tending to establish that future transactions were arranged based on the earlier advance ruling. The request for delay must specifically identify the prior ruling on which reliance is claimed. All persons requesting a delay will be issued a separate letter setting forth the period, if any, of the delay to be provided. In appropriate circumstances, Customs may decide to make its decision, with respect to a delay, applicable to all persons, irrespective of demonstrated reliance; in this event, a notice announcing the delay will be published in the Customs Bulletin and individual ruling letters will not be issued.

§ 181.101 Publication of decisions.

Within 90 days after issuing any precedential decision relating to any NAFTA transaction, Customs shall publish the decision in the Customs Bulletin or otherwise make it available for public inspection. Disclosure is governed by 31 CFR part 1, part 103 of this chapter, and § 181.99(a)(3) of this part.

§ 181.102 Administrative and judicial review of advance rulings.

(a) *Administrative review.* Any person who received an advance ruling issued under this subpart, or an authorized agent of such person, may request administrative review, at Customs Headquarters, of that advance ruling, including any modification or revocation thereof, by letter addressed to the Director, Office of Regulations and Rulings, U.S. Customs Service, Washington, DC 20229. Such request shall be filed within 30 calendar days after issuance of the advance ruling and shall set forth the following information:

(1) The name and address of the person seeking review and the name and address of his authorized agent if the request is signed by such an agent;

(2) The Customs identification number or employer identification number in the case of a U.S. importer and authorized agent thereof, the employer number or importer/exporter number assigned by Revenue Canada in the case of a Canadian exporter or producer and authorized agent thereof, and the federal taxpayer registry number (RFC) in the case of a Mexican exporter or producer and authorized agent thereof;

(3) The number and date of the advance ruling at issue;

(4) The numbers and dates of any involved entries for consumption or warehouse withdrawals for consumption;

(5) The nature of, and justification for, the objection to the advance ruling set forth distinctly and specifically with respect to each aspect of the advance ruling for which administrative review is sought; and

(6) Whether an oral discussion of the issues, as provided in § 181.95 of this part, is desired.

Customs will normally issue a written decision within 120 days of receipt of the request for administrative review submitted under this paragraph. However, Customs will, upon a reasonable showing of business necessity, issue a written decision within 60 days of receipt of the request for administrative review. For purposes of this paragraph, the date of receipt of the request for administrative review shall be the date on which all information necessary to process the request, including any information provided after submission of the request in connection with a conference, is filed with Customs.

(b) *Judicial review.* Any person whose claims with regard to a request for administrative review of an advance ruling have been denied in whole or in part under this section may seek judicial review by filing a civil action in the United States Court of International Trade in accordance with 28 U.S.C. 2632 within 180 days after the date of mailing of notice of the denial.

Subpart J—Review and Appeal of Adverse Marking Decisions

§ 181.111 Applicability.

This subpart sets forth the circumstances and procedures under which exporters and producers of merchandise imported into the United States may obtain information about, and administrative and judicial review of, an adverse marking decision, as provided for in Article 510 of the NAFTA. This subpart does not apply to the review of advance rulings issued under Article 509 of the NAFTA (see subpart I of this part) or to the review of determinations that a good is not an originating good under General Note 12, HTSUS, and the appendix to this part (see part 174 of this chapter).

§ 181.112 Definitions.

For purposes of this subpart, the following words and phrases have the meanings indicated: (a) "Adverse marking decision" means a decision made by the district director which an exporter or producer of merchandise believes to be contrary to the provisions of Annex 311 of the NAFTA and which may be protested by the importer pursuant to section 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), and part 174 of this chapter. Notification of an adverse marking decision is generally given to an importer in the form of a Customs Form 4647 (Notice to Mark and/or Notice to Redeliver) and/or by

assessing marking duties on improperly marked merchandise. Examples of adverse marking decisions include determinations by the district director that: an imported article is not a good of a NAFTA country, as determined under the Marking Rules, and that it therefore cannot be marked "Canada" or "Mexico"; that a good of a NAFTA country is not marked in a manner which is sufficiently permanent; and that a good of a NAFTA country does not qualify for an exception from marking specified in Annex 311 of the NAFTA. Adverse marking decisions do not include: Decisions issued in response to requests for advance rulings under subpart I of this part or for internal advice under part 177 of this chapter; decisions on protests under part 174 of this chapter; and determinations that an article does not qualify as an originating good under General Note 12, HTSUS, and the appendix to this part.

(b) An "exporter" of merchandise is an exporter located in Canada or Mexico who must maintain records in that country relating to the transaction to which the adverse marking decision relates. The records must be sufficient to enable Customs to evaluate the merits of the exporter's claim(s) regarding the adverse marking decision.

(c) A "producer" of merchandise is a person who grows, mines, harvests, fishes, traps, hunts, manufactures, processes or assembles such merchandise in Canada or Mexico.

§ 181.113 Request for Basis of Adverse Marking Decision.

(a) *Request; form and filing.* The exporter or producer of the merchandise which is the subject of an adverse marking decision may request a statement concerning the basis for the decision by filing a typewritten request, in English, with the district director who issued the decision. The request should be on letterhead paper in the form of a letter and clearly designated as a "Request for Basis of Adverse Marking Decision" and shall be signed by the exporter, producer or his authorized agent. The provisions of § 174.3 of this chapter shall apply for purposes of signature by a person other than the principal.

(b) *Content.* The Request for Basis of Adverse Marking Decision letter shall set forth the following information:

(1) The name and address of the exporter or producer of the merchandise and the name and address of any authorized agent filing the request on behalf of such principal;

(2) A statement that the inquirer is the exporter or producer of the merchandise that was the subject of the adverse marking decision;

(3) In the case of a Canadian exporter or producer, the employer number assigned by Revenue Canada, Customs and Excise; in the case of a Mexican exporter or producer, the Federal taxpayer registry number (RFC); and the Customs identification number of an authorized agent filing the request on behalf of such principal;

(4) The number and date of each entry involved in the request;

(5) A specific description of the merchandise which is the subject of the adverse marking decision; and

(6) A complete statement of all relevant facts relating to the adverse marking decision and the transaction to which it relates, including the date of the decision.

§ 181.114 Customs response to request.

(a) *Time for response.* The district director will issue a written response to the requestor within 30 days of receipt of a request containing the information specified in § 181.113 of this part. If the request is incomplete, such that the transaction in question cannot be identified, the district director will notify the requestor in writing within 30 days of receipt of the request regarding what information is needed.

(b) *Content.* The response by the district director shall include the following:

(1) A statement concerning the basis for the adverse marking decision;

(2) A copy of the relevant Customs Form 4647 (Notice to Mark and/or Notice to Redeliver), if one was issued to the importer and is available. If the basis for the adverse marking decision is indicated on the Customs Form 4647, no statement under paragraph (b)(1) of this section is required;

(3) A statement as to whether the importer has filed a protest regarding the adverse marking decision and, if so, where the protest was filed and the protest number; and

(4) A statement concerning the exporter's or producer's right to either intervene in the importer's protest as provided in § 181.115 of this part or file a petition as provided in § 181.116 of this part.

§ 181.115 Intervention in importer's protest.

(a) *Conditional right to intervene.* An exporter or producer of merchandise does not have an independent right to protest an adverse marking decision. However, if an importer protests the adverse marking decision in accordance with § 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), and part 174 of this chapter, the exporter or producer of the merchandise which is the subject of the adverse marking decision may intervene in the importer's protest. Such intervention shall not affect any time limits applicable to the protest or delay action on the protest.

(b) *Form and filing of intervention.* In order to intervene in an importer's protest, as provided for in paragraph (a) of this section, the exporter or producer of the merchandise shall file, in triplicate, a typewritten statement of intervention, in English, with the district director or port director with whom the protest was filed. The statement should be on letterhead paper in the form of a letter and should be clearly designated "NAFTA Exporter or Producer Intervention in Protest". The statement shall be signed by the exporter, producer or his authorized agent. The provisions of § 174.3 of this chapter shall apply for purposes of signature by a person other than the principal.

(c) *Content.* The NAFTA Exporter or Producer Intervention in Protest letter shall include the following:

(1) The name and address of the exporter or producer of the merchandise and the name and address of any authorized agent filing the request on behalf of such principal;

(2) In the case of a Canadian exporter or producer, the employer number assigned by Revenue Canada, Customs and Excise; in the case of a Mexican exporter or producer, the Federal taxpayer registry number (RFC); and the Customs identification number of an authorized agent filing the request on behalf of such principal;

(3) The number and date of each entry involved in the adverse marking decision;

(4) A specific description of the merchandise which is the subject of the adverse marking decision;

(5) A complete statement of all relevant facts relating to the adverse marking decision and the transaction to which it relates, including the date of the decision;

(6) A detailed statement of position regarding why the exporter or producer believes the adverse marking decision is contrary to the provisions of Annex 311 of the NAFTA;

(7) A statement as to whether a Request for Basis of Adverse Marking Decision was filed under § 181.113 of this part, and if so, the date of such Request and of any Customs response thereto issued under § 181.114 of this part. Copies of the Request and the Customs response shall be submitted, if available;

(8) The number assigned to the importer's protest;

(9) A statement that the intervenor is the exporter or producer of the merchandise that was the subject of the adverse marking decision being protested by the importer and, if the intervenor is the exporter, a statement that it maintains sufficient records to enable Customs to evaluate the merits of its claim(s) regarding the adverse marking decision; and

(10) If the intervenor prefers that the principle of confidentiality set forth in § 181.121 of this part be applied to the information submitted under this section, a statement to that effect. If no such statement is included in the letter, the intervention and information submitted in connection therewith shall be subject to the same treatment as that provided in the case of requests by all interested parties for consolidation of protests as set forth in § 174.15(b)(1) of this chapter.

(d) *Effect of Intervention.* The rights of the intervenor under this section are subordinate to the importer's protest rights. Accordingly, intervention by an exporter or producer of merchandise will not affect the procedures under part 174 of this chapter, and the importer's elections concerning accelerated disposition and application for further review of the protest will govern how the protest is handled and how the intervention is considered. If the importer withdraws or settles the protest, the exporter or producer has no right to continue the intervention action.

(e) *Action by district director.* If final administrative action has already been taken with respect to the importer's protest at the time the intervention is filed, the district director shall so advise the exporter or producer and, if the importer has filed a civil action in the Court of International Trade as a result of a denial of the protest, the district director shall advise the exporter or producer of that filing and of the exporter's or producer's right to intervene in such judicial proceeding. If final administrative action has not been taken on the protest, the district director shall forward the intervention letter to the Customs office which has the importer's protest under review for consideration in connection with the protest.

(f) *Final disposition.* The intervenor shall be notified in writing of the final disposition of the protest. If the protest is denied in whole or in part, the intervenor shall be furnished a copy of the notice given to the importer under § 174.29.

§ 181.116 Petition regarding adverse marking decision.

(a) *Right to petition.* If the importer does not protest an adverse marking decision in accordance with § 514, Tariff Act of 1930, as amended (19 U.S.C. 1514), and part 174 of this chapter, the exporter or producer of the merchandise which was the subject of the adverse marking decision may file a petition with Customs requesting reconsideration of the decision. The petition may not be filed until after the importer's time to protest the adverse marking decision has expired (see § 174.12(e) of this chapter for the time limits for filing protests). If the importer filed a protest upon which final administrative action has been taken, the exporter or producer may file a petition under this section, provided that the exporter or producer was not given notice of the pending protest pursuant to § 181.114 of this part. If the importer filed a protest on which final administrative action has not been taken and notice of the pending protest was not provided to the exporter or producer under § 181.114 of this part, a petition filed under this section shall be treated by the district director as an intervention under § 181.115 of this part.

(b) *Form and filing of petition.* A petition under this section shall be typewritten, in English, and shall be filed, in triplicate, with the district director who issued the adverse marking decision. The petition under this subpart should be on letterhead paper in the form of a letter, clearly designated as a "Petition for NAFTA Review of Adverse Marking Decision" and shall be signed by the exporter, producer or his authorized agent. The provisions of § 174.3 of this chapter shall apply for purposes of signature by a person other than the principal.

(c) *Content.* The Petition for NAFTA Review of Adverse Marking Decision letter shall contain all the information specified § 181.115 of this part, except for the protest number. It shall also include a statement that petitioner was not notified by Customs in writing of a pending protest.

(d) *Review of petition*—(1) *Review by district director.* Within 60 days of the date of receipt of the petition, the district director shall determine if the petition is to be granted or denied, in whole or in part. If, after reviewing the petition, the district director agrees with all of the petitioner's claims and determines that the initial adverse marking decision was not correct, a written notice granting the petition shall be issued to the petitioner. A description of the merchandise, a brief summary of the issue(s) and the district director's findings shall be forwarded to the Director, Commercial Rulings Division, Customs Headquarters, for publication in the Customs Bulletin. If, after reviewing the petition, the district director determines that the initial adverse marking decision was correct in its entirety, a written notice shall be issued to the petitioner advising that the matter has been forwarded to the Director, Commercial Rulings Division, Customs Headquarters, for further review and decision. All relevant background information, including available samples, a description of the adverse marking decision and the reasons for the decision, and the district director's recommendation shall be furnished to Headquarters.

(2) *Review by Headquarters.* Within 120 days of the date the petition and background information are received at Customs Headquarters, the Director, Commercial Rulings Division, shall determine if the petition is to be granted or denied, in whole or in part, and the petitioner shall be notified in writing of the determination. If the petition is granted in whole or in part, a description of the merchandise, a brief summary of the issue(s) and the director's findings will be published in the Customs Bulletin.

(3) *Effect of granting the petition.* The decision on the petition, if contrary to the initial adverse marking decision, will be implemented with respect to merchandise entered or withdrawn from warehouse for consumption after 30 days from the date on which the notice of determination is published in the Customs Bulletin.

(f) *Pending litigation.* No decision on a petition will be issued under this section with respect to any issue which is pending before the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit, or any court of appeal therefrom. Litigation before any other court will not preclude the issuance of a decision on a petition under this section, provided neither Customs nor any of its officers or agents is named as a defendant.

(g) *Judicial review of denial of petition.*

Any person whose petition under this section has been denied, in whole or in part, may contest the denial by filing a civil action in the United States Court of International Trade within 30 days after the date of mailing of the notice of denial.

Subpart K—Confidentiality of Business Information

§ 181.121 Maintenance of confidentiality.

The district director or other Customs officer who has possession of confidential business information collected pursuant to this part shall, in accordance with part 103 of this chapter, maintain its confidentiality and protect it from any disclosure that could prejudice the competitive position of the persons providing the information.

§ 181.122 Disclosure to government authorities.

Nothing in § 181.121 of this part shall preclude the disclosure of confidential business information to governmental authorities in the United States responsible for the administration and enforcement of determinations of origin and of customs and revenue matters.

Subpart L—Rules of Origin

§ 181.131 Rules of origin.

The regulations implementing the rules of origin provisions of General Note 12, HTSUS, and Chapter Four of the NAFTA are contained in the appendix to this part.

Appendix—Rules of Origin Regulations

SECTION 1. CITATION

This Appendix may be cited as the *NAFTA Rules of Origin Regulations.*

PART I
SECTION 2. DEFINITIONS AND INTERPRETATION
Definitions

(1) For purposes of this Appendix,

"accessories, spare parts or tools that are delivered with a good and form part of the good's standard accessories, spare parts or tools" means goods that are delivered with a good, whether or not they are physically affixed to that good, and that are used for the transport, protection, maintenance or cleaning of the good, for instruction in the assembly, repair or use of that good, or as replacements for consumable or interchangeable parts of that good;

"adjusted to an F.O.B. basis" means, with respect to a good, adjusted by

(a) deducting

(i) the costs of transporting the good after it is shipped from the point of direct shipment,

(ii) the costs of unloading, loading, handling and insurance that are associated with that transportation, and

(iii) the cost of packing materials and containers,

where those costs are included in the transaction value of the good, and

(b) adding

(i) the costs of transporting the good from the place of production to the point of direct shipment,

(ii) the costs of loading, unloading, handling and insurance that are associated with that transportation, and

(iii) the costs of loading the good for shipment at the point of direct shipment,

where those costs are not included in the transaction value of the good;

"Agreement" means the *North American Free Trade Agreement;*

"applicable change in tariff classification" means, with respect to a non-originating material used in the production of a good, a change in tariff classification specified in a rule set out in Schedule I for the tariff provision under which the good is classified;

"automotive component" means a good that is referred to in column I of an item of Schedule V;

"automotive component assembly" means a good, other than a heavy-duty vehicle, that incorporates an automotive component;

"costs incurred in packing" means, with respect to a good or material, the value of the packing materials and containers in which the good or material is packed for shipment and the labor costs incurred in packing it for shipment, but does not include the costs of preparing and packaging it for retail sale;

"customs value" means

(a) in the case of Canada, value for duty as defined in the *Customs Act,* except that for purposes of determining that value the reference in section 55 of that Act to "in accordance with the regulations made under the *Currency Act*" shall be read as a reference to "in accordance with subsection 3(1) of these Regulations",

(b) in the case of Mexico, the *valor en aduana* as determined in accordance with the *Ley Aduanera,* converted, in the event such value is not expressed in Mexican currency, to Mexican currency at the rate of exchange determined in accordance with subsection 3(1) of these Regulations, and

(c) in the case of the United States, the value of imported merchandise as determined by the Customs Service in accordance with section 402 of the *Tariff Act of 1930,* converted, in the event such value is not expressed in United States currency, to United States currency at the rate of exchange determined in accordance with subsection 3(1) of these Regulations.

"days" means calendar days, and includes weekends and holidays;

"direct labor costs" means costs, including fringe benefits, that are associated with employees who are directly involved in the production of a good;

"direct material costs" means the value of materials, other than indirect materials and packing materials and containers, that are used in the production of a good;

"direct overhead" means costs, other than direct material costs and direct labor costs, that are directly associated with the production of a good;

"enterprise" means any entity constituted or organized under applicable laws, whether or not for profit and whether privately owned or governmentally owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;

"excluded costs" means sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs and non-allowable interest costs;

"fungible goods" means goods that are interchangeable for commercial purposes and the properties of which are essentially identical;
"fungible materials" means materials that are interchangeable for commercial purposes and the properties of which are essentially identical;
"Harmonized System" means the Harmonized Commodity Description and Coding System, including its General Rules of Interpretation, Section Notes and Chapter Notes, as set out in
(a) in the case of Canada, the *Customs Tariff*,
(b) in the case of Mexico, the *Tarifa de la Ley del Impuesto General de Importación*, and
(c) in the case of the United States, the *Harmonized Tariff Schedule of the United States*;
"heavy-duty vehicle" means a motor vehicle provided for in any of heading 8701, tariff items 8702.10.30 and 8702.10.30 (vehicles for the transport of 16 or more persons), subheadings 8704.10, 8704.22, 8704.23, 8704.32 and 8704.90 and heading 8705 and 8706;
"identical goods" means, with respect to a good, goods that
(a) are the same in all respects as that good, including physical characteristics, quality and reputation but excluding minor differences in appearance,
(b) were produced in the same country as that good, and
(c) were produced
(i) by the producer of that good, or
(ii) by another producer, where no goods that satisfy the requirements of paragraphs (a) and (b) were produced by the producer of that good;
"identical materials" means, with respect to a material, materials that
(a) are the same as that material in all respects, including physical characteristics, quality and reputation but excluding minor differences in appearance,
(b) were produced in the same country as that material, and
(c) were produced
(i) by the producer of that material, or
(ii) by another producer, where no materials that satisfy the requirements of paragraphs (a) and (b) were produced by the producer of that material;
"incorporated" means, with respect to the production of a good, a material that is physically incorporated into that good, and includes a material that is physically incorporated into another material before that material or any subsequently produced material is used in the production of the good;
"indirect material" means a good used in the production, testing or inspection of a good but not physically incorporated into the good, or a good used in the maintenance of buildings or the operation of equipment associated with the production of a good, and includes
(a) fuel and energy,
(b) tools, dies and molds,
(c) spare parts and materials used in the maintenance of equipment and buildings,
(d) lubricants, greases, compounding materials and other materials used in production or used to operate equipment and buildings,
(e) gloves, glasses, footwear, clothing, safety equipment and supplies,
(f) equipment, devices and supplies used for testing or inspecting the other goods,
(g) catalysts and solvents, and
(h) any other goods that are not incorporated into the good but the use of which in the production of the good can reasonably be demonstrated to be part of that production;
"interest costs" means all costs paid or payable by a person to whom credit is, or is to be advanced, for the advancement of credit or the obligation to advance credit;
"intermediate material" means a self-produced material that is used in the production of a good and is designated as an intermediate material under section 7(4);
"light-duty automotive good" means a light-duty vehicle or a good of a tariff provision listed in Schedule IV that is subject to a regional value-content requirement and is for use as original equipment in the production of a light-duty vehicle;
"light-duty vehicle" means a motor vehicle provided for in any of tariff items 8702.10.60 and 8702.10.60 (vehicles for the transport of 15 or fewer persons) and subheadings 8703.21 through 8703.90, 8704.21 and 8704.31;
"listed material" means a good that is referred to in column II of an item of Schedule V;
"location of the producer" means,
(a) where the warehouse or other receiving station at which a producer receives materials for use by the producer in the production of a good is located within a radius of 75 km (46.60 miles) from the place at which the producer produces the good, the location of that warehouse or other receiving station, and
(b) in any other case, the place at which the producer produces the good in which a material is to be used;
"material" means a good that is used in the production of another good, and includes a part or ingredient;
"motor vehicle assembler" means a producer of motor vehicles and any related person with whom, or joint venture in which, the producer participates with respect to the production of motor vehicles;
"month" means a calendar month;
"NAFTA country" means a Party to the Agreement;
"national" means a natural person who is a citizen or permanent resident of a NAFTA country, and includes
(a) with respect to Mexico, a national or citizen according to Articles 30 and 34, respectively, of the Mexican Constitution, and
(b) with respect to the United States, a "national of the United States" as defined in the *Immigration and Nationality Act* on the date of entry into force of the Agreement;
"net cost method" means the method of calculating the regional value content of a good that is set out in section 6(3);

"non-allowable interest costs" means interest costs incurred by a producer on the producer's debt obligations that are more than 700 basis points above the yield on debt obligations of comparable maturities issued by the federal government of the country in which the producer is located;
"non-originating good" means a good that does not qualify as originating under this Appendix;
"non-originating material" means a material that does not qualify as originating under this Appendix;
"original equipment" means a material that is incorporated into a motor vehicle before the first transfer of title or consignment of the motor vehicle to a person who is not a motor vehicle assembler, and that is

(a) a good of a tariff provision listed in Schedule IV, or

(b) an automotive component assembly, automotive component, sub-component or listed material;

"originating good" means a good that qualifies as originating under this Appendix;
"originating material" means a material that qualifies as originating under this Appendix;
"other costs," with respect to total cost, means all costs that are not product costs or period costs;
"packaging materials and containers" means materials and containers in which a good is packaged for retail sale;
"packing materials and containers" means materials and containers that are used to protect a good during transportation, but does not include packaging materials and containers;
"payments" means, with respect to royalties and sales promotion, marketing and after-sales service costs, the costs expensed on the books of a producer, whether or not an actual payment is made;
"period costs" means costs, other than product costs, that are expensed in the period in which they are incurred;
"person" means a natural person or an enterprise;
"person of a NAFTA country" means a national, or an enterprise constituted or organized under the laws of a NAFTA country;
"point of direct shipment" means the location from which a producer of a good normally ships that good to the buyer of the good;
"producer" means a person who grows, mines, harvests, fishes, traps, hunts, manufactures, processes or assembles a good;
"product costs" means costs that are associated with the production of a good, and includes the value of materials, direct labor costs and direct overhead;
"production" means growing, mining, harvesting, fishing, trapping, hunting, manufacturing, processing or assembling a good;
"related person" means a person related to another person on the basis that

(a) they are officers or directors of one another's businesses,

(b) they are legally recognized partners in business,

(c) they are employer and employee,

(d) any person directly or indirectly owns, controls or holds 25 percent or more of the outstanding voting stock or shares of each of them,

(e) one of them directly or indirectly controls the other,

(f) both of them are directly or indirectly controlled by a third person, or

(g) they are members of the same family (members of the same family are natural or adopted children, brothers, sisters, parents, grandparents, or spouses);

"reusable scrap or by-product" means waste and spoilage that is generated by the producer of a good and that is used in the production of a good or sold by that producer;
"right to use," for purposes of the definition of royalties, includes the right to sell or distribute a good;
"royalties" means payments of any kind, including payments under technical assistance agreements or similar agreements, made as consideration for the use of, or right to use, any copyright, literary, artistic, or scientific work, patent, trademark, design, model, plan, secret formula or process, excluding those payments under technical assistance agreements or similar agreements that can be related to specific services such as

(a) personnel training, without regard to where performed, and

(b) if performed in the territory of one or more of the NAFTA countries, engineering, tooling, die-setting, software design and similar computer services, or other services;

"sales promotion, marketing and after-sales service costs" means the following costs related to sales promotion, marketing and after-sales service:

(a) sales and marketing promotion; media advertising; advertising and market research; promotional and demonstration materials; exhibits; sales conferences, trade shows and conventions; banners; marketing displays; free samples; sales, marketing and after-sales service literature (product brochures, catalogs, technical literature, price lists, service manuals, sales aid information); establishment and protection of logos and trademarks; sponsorships; wholesale and retail restocking charges; entertainment;

(b) sales and marketing incentives; consumer, retailer or wholesaler rebates; merchandise incentives;

(c) salaries and wages, sales commissions, bonuses, benefits (for example, medical, insurance, pension), travelling and living expenses, membership and professional fees, for sales promotion, marketing and after-sales service personnel;

(d) recruiting and training of sales promotion, marketing and after-sales service personnel, and after-sales training of customers' employees, where such costs are identified separately for sales promotion, marketing and after-sales service of goods on the financial statements or cost accounts of the producer;

(e) product liability insurance;

(f) office supplies for sales promotion, marketing and after-sales service of goods, where such costs are identified separately for sales promotion, marketing and after-sales service of goods on the financial statements or cost accounts of the producer;

(g) telephone, mail and other communications, where such costs are identified separately for sales promotion, marketing and after-sales service of goods on the financial statements or cost accounts of the producer;

(h) rent and depreciation of sales promotion, marketing and after-sales service offices and distribution centers;

(i) property insurance premiums, taxes, cost of utilities, and repair and maintenance of sales promotion, marketing and after-sales service offices and distribution centers, where such costs are identified separately for sales promotion, marketing and after-sales service of goods on the financial statements or cost accounts of the producer; and

(j) payments by the producer to other persons for warranty repairs;

"self-produced material" means a material that is produced by the producer of a good and used in the production of that good;

"shipping and packing costs" means the costs incurred in packing a good for shipment and shipping the good from the point of direct shipment to the buyer, excluding the costs of preparing and packaging the good for retail sale;

"similar goods" means, with respect to a good, goods that

(a) although not alike in all respects to that good, have similar characteristics and component materials, that enable the goods to perform the same functions and to be commercially interchangeable with that good,

(b) were produced in the same country as that good, and

(c) were produced

(i) by the producer of that good, or

(ii) by another producer, where no goods that satisfy the requirements of paragraphs (a) and (b) were produced by the producer of that good;

"similar materials" means, with respect to a material, materials that

(a) although not alike in all respects to that material, have similar characteristics and component materials, that enable the materials to perform the same functions and to be commercially interchangeable with that material,

(b) were produced in the same country as that material, and

(c) were produced

(i) by the producer of that material, or

(ii) by another producer, where no materials that satisfy the requirements of paragraphs (a) and (b) were produced by the producer of that material;

"subject to a regional value-content requirement" means, with respect to a good, that the provisions of this Appendix that are applied to determine whether the good is an originating good include a regional value-content requirement;

"sub-component" means a good that comprises a listed material and one or more other materials or listed materials;

"tariff provision" means a heading, subheading or tariff item;

"territory" means, with respect to

(a) Canada, the territory to which its customs laws apply, including any areas beyond the territorial seas of Canada within which, in accordance with international law and its domestic law, Canada may exercise rights with respect to the seabed and subsoil and their natural resources,

(b) Mexico,

(i) the states of the Federation and the Federal District,

(ii) the islands, including the reefs and keys, in adjacent seas,

(iii) the islands of Guadalupe and Revillagigedo situated in the Pacific Ocean,

(iv) the continental shelf and the submarine shelf of such islands, keys and reefs,

(v) the waters of the territorial seas, in accordance with international law, and its interior maritime waters,

(vi) the space located above the national territory, in accordance with international law, and

(vii) any areas beyond the territorial seas of Mexico within which, in accordance with international law, including the *United Nations Convention on the Law of the Sea*, and its domestic law, Mexico may exercise rights with respect to the seabed and subsoil and their natural resources, and

(c) the United States,

(i) the customs territory of the United States, which includes the 50 states, the District of Columbia and Puerto Rico,

(ii) the foreign trade zones located in the United States and Puerto Rico, and

(iii) any areas beyond the territorial seas of the United States within which, in accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural resources;

"total cost" means the total of all product costs, period costs and other costs incurred in the territory of one or more of the NAFTA countries;

"transaction value method" means the method of calculating the regional value content of a good that is set out in subsection 6(2);

"used" means used or consumed in the production of a good;

"verification of origin" means a verification of origin of goods under

(a) in the case of Canada, paragraph 42.1(1)(a) or subsection 42.2(2) of the *Customs Act*,

(b) in the case of Mexico, Article 506 of the Agreement, and

(c) in the case of the United States, section 509 of the *Tariff Act of 1930, as amended*.

Interpretation: "similar"

(2) For purposes of the definitions of "similar goods" and "similar materials," the quality of the goods or materials, their reputation and the existence of a trademark are among the factors to be considered for purposes of determining whether goods or materials are similar.

Interpretation: terms used to refer to HTSUS; use of term "books"

(3 For purposes of this Appendix,

(a) "chapter," unless otherwise indicated, refers to a chapter of the Harmonized System;

(b) "heading" refers to any four-digit number, or the first four digits of any number, set out in the column "Heading/Subheading" in the Harmonized System;

(c) "subheading" refers to any six-digit number, or the first six digits of any number, set out in the column "Heading/Subheading" in the Harmonized System;
(d) "tariff item" refers to any eight-digit number set out in the column "Heading/Subheading" in the Harmonized System;
(e) any reference to a tariff item in Chapter Four of the Agreement or this Appendix that includes letters shall be reflected as the appropriate eight-digit number in the Harmonized System as implemented in each NAFTA country; and
(f) "books" refers to,
(i) with respect to the books of a person who is located in a NAFTA country,
(A) books and other documents that support the recording of revenues, expenses, costs, assets and liabilities and that are maintained in accordance with Generally Accepted Accounting Principles set out in the publications listed in Schedule VI with respect to the territory of the NAFTA country in which the person is located, and
(B) financial statements, including note disclosures, that are prepared in accordance with Generally Accepted Accounting Principles set out in the publications listed in Schedule VI with respect to the territory of the NAFTA country in which the person is located, and
(ii) with respect to the books of a person who is located outside the territories of the NAFTA countries,
(A) books and other documents that support the recording of revenues, expenses, costs, assets and liabilities and that are maintained in accordance with generally accepted accounting principles applied in that location or, where there are no such principles, in accordance with the International Accounting Standards, and
(B) financial statements, including note disclosures, that are prepared in accordance with generally accepted accounting principles applied in that location or, where there are no such principles, in accordance with the International Accounting Standards.

Use of Examples to illustrate the application of a provision

(4) Where an example, referred to as an "Example," is set out in this Appendix, the example is for purposes of illustrating the application of a provision, and where there is any inconsistency between the example and the provision, the provision prevails to the extent of the inconsistency.
(5) Except as otherwise provided, references in this Appendix to domestic laws of the NAFTA countries apply to those laws as they may be amended or superseded.

SECTION 3. CURRENCY CONVERSION

(1) Where the value of a good or a material is expressed in a currency other than the currency of the country in which the producer of the good is located, that value shall be converted to the currency of the country in which that producer is located on the basis of
(a) in the case of the sale of that good or the purchase of that material, the rate of exchange used by the producer for purposes of recording that sale or purchase, as the case may be, and
(b) in the case of a material that is acquired by the producer other than by a purchase,
(i) where the producer used a rate of exchange for purposes of recording another transaction in that other currency that occurred within 30 days of the date on which the producer acquired the material, that rate, and
(ii) in any other case,
(A) with respect to a producer located in Canada, the rate of exchange referred to in section 5 of the *Currency Exchange for Customs Valuation Regulations* for the date on which the material was shipped directly to the producer,
(B) with respect to a producer located in Mexico, the rate of exchange published by the *Banco de Mexico* in the *Diario Oficial de la Federacion*, under the title *"TIPO de cambio para solventar obligaciones denominadas en moneda extranjera pagaderas en la Republica Mexicana"*, for the date on which the material was shipped directly to the producer, and
(C) with respect to a producer located in the United States, the rate of exchange referred to in 31 U.S.C. 5151 for the date on which the material was shipped directly to the producer.
(2) Where a producer of a good has a statement referred to in section 9, 10 or 14 that includes information in a currency other than the currency of the country in which that producer is located, the currency shall be converted to the currency of the country in which the producer is located on the basis of
(a) if the material was purchased by the producer in the same currency as the currency in which the information in the statement is provided, the rate of exchange used by the producer for purposes of recording the purchase,
(b) if the material was purchased by the producer in a currency other than the currency in which the information in the statement is provided,
(i) where the producer used a rate of exchange for purposes of recording a transaction in that other currency that occurred within 30 days of the date on which the producer acquired the material, that rate, and
(ii) in any other case,
(A) with respect to a producer located in Canada, the rate of exchange referred to in section 5 of the *Currency Exchange for Customs Valuation Regulations* for the date on which the material was shipped directly to the producer,
(B) with respect to a producer located in Mexico, the rate of exchange published by the *Banco de Mexico in the Diario Oficial de la Federacion*, under the title *"TIPO de cambio para solventar obligaciones denominadas en moneda extranjera pagaderas en la Republica Mexicana"*, for the date on which the material was shipped directly to the producer, and
(C) with respect to a producer located in the United States, the rate of exchange referred to in 31 U.S.C. 5151 for the date on which the material was shipped directly to the producer; and
(c) if the material was acquired by the producer other than by a purchase,

(i) where the producer used a rate of exchange for purposes of recording a transaction in that other currency that occurred within 30 days of the date on which the producer acquired the material, that rate, and
(ii) in any other case,
(A) with respect to a producer located in Canada, the rate of exchange referred to in section 5 of the *Currency Exchange for Customs Valuation Regulations* for the date on which the material was shipped directly to the producer,
(B) with respect to a producer located in Mexico, the rate of exchange published by the *Banco de Mexico* in the *Diario Oficial de la Federacion*, under the title *"TIPO de cambio para solventar obligaciones denominadas en moneda extranjera pagaderas en la Republica Mexicana"*, for the date on which the material was shipped directly to the producer, and
(C) with respect to a producer located in the United States, the rate of exchange referred to in 31 U.S.C. 5151 for the date on which the material was shipped directly to the producer.

PART II
SECTION 4. ORIGINATING GOODS

Identification of goods which are "wholly obtained or produced"

(1) A good originates in the territory of a NAFTA country where the good is
(a) a mineral good extracted in the territory of one or more of the NAFTA countries;
(b) a vegetable or other good harvested in the territory of one or more of the NAFTA countries;
(c) a live animal born and raised in the territory of one or more of the NAFTA countries;
(d) a good obtained from hunting, trapping or fishing in the territory of one or more of the NAFTA countries;
(e) fish, shellfish or other marine life taken from the sea by a vessel registered or recorded with a NAFTA country and flying its flag;
(f) a good produced on board a factory ship from a good referred to in paragraph (e), where the factory ship is registered or recorded with the same NAFTA country as the vessel that took that good and flies that country's flag;
(g) a good taken by a NAFTA country or a person of a NAFTA country from or beneath the seabed outside the territorial waters of that country, where a NAFTA country has the right to exploit that seabed;
(h) a good taken from outer space, where the good is obtained by a NAFTA country or a person of a NAFTA country and is not processed outside the territories of the NAFTA countries;
(i) waste and scrap derived from
(i) production in the territory of one or more of the NAFTA countries, or
(ii) used goods collected in the territory of one or more of the NAFTA countries, where those goods are fit only for the recovery of raw materials; or
(j) a good produced in the territory of one or more of the NAFTA countries exclusively from a good referred to in any of paragraphs (a) through (i), or from the derivatives of such a good, at any stage of production.

Goods made from non-originating materials: change in tariff classification requirement; regional value-content requirement

(2) A good originates in the territory of a NAFTA country where
(a) each of the non-originating materials used in the production of the good undergoes the applicable change in tariff classification as a result of production that occurs entirely in the territory of one or more of the NAFTA countries, where the applicable rule in Schedule I for the tariff provision under which the good is classified specifies only a change in tariff classification, and the good satisfies all other applicable requirements of this Appendix;
(b) each of the non-originating materials used in the production of the good undergoes the applicable change in tariff classification as a result of production that occurs entirely in the territory of one or more of the NAFTA countries and the good satisfies the applicable regional value-content requirement, where the applicable rule in Schedule I for the tariff provision under which the good is classified specifies both a change in tariff classification and a regional value-content requirement, and the good satisfies all other applicable requirements of this Appendix; or
(c) the good satisfies the applicable regional value-content requirement, where the applicable rule in Schedule I for the tariff provision under which the good is classified specifies only a regional value-content requirement, and the good satisfies all other applicable requirements of this Appendix.

Goods made exclusively from originating materials

(3) A good originates in the territory of a NAFTA country where the good is produced entirely in the territory of one or more of the NAFTA countries exclusively from originating materials.

Exceptions to the change in tariff classification requirement

(4) A good originates in the territory of a NAFTA country where
(a) except in the case of a good provided for in any of Chapters 61 through 63,
(i) the good is produced entirely in the territory of one or more of the NAFTA countries,
(ii) one or more of the non-originating materials used in the production of the good do not undergo an applicable change in tariff classification because the materials were imported together, whether or not with originating materials, into the territory of a NAFTA country as an unassembled or disassembled good, and were classified as an assembled good pursuant to Rule 2(a) of the General Rules for the Interpretation of the Harmonized System,
(iii) the regional value content of the good, calculated in accordance with section 6, is not less than 60 percent where the transaction value method is used, or is not less than 50 percent where the net cost method is used, and
(iv) the good satisfies all other applicable requirements of this Appendix, including any applicable, higher regional value-content requirement provided for in section 13 or Schedule I; or
(b) except in the case of a good provided for in any of Chapters 61 through 63,
(i) the good is produced entirely in the territory of one or more of the NAFTA countries,

(ii) one or more of the non-originating materials used in the production of the good do not undergo an applicable change in tariff classification because

(A) those materials are provided for under the Harmonized System as parts of the good, and

(B) the heading for the good provides for both the good and its parts and is not further subdivided into subheadings, or the subheading for the good provides for both the good and its parts,

(iii) the non-originating materials that do not undergo a change in tariff classification in the circumstances described in subparagraph (ii) and the good are not both classified as parts of goods under the heading or subheading referred to in subparagraph (ii)(B),

(iv) each of the non-originating materials that is used in the production of the good and is not referred to in subparagraph (iii) undergoes an applicable change in tariff classification or satisfies any other applicable requirement set out in Schedule I,

(v) the regional value content of the good, calculated in accordance with section 6, is not less than 60 percent where the transaction value method is used, or is not less than 50 percent where the net cost method is used, and

(vi) the good satisfies all other applicable requirements of this Appendix, including any applicable, higher regional value-content requirement provided for in section 13 or Schedule I.

Interpretation: heading or subheading which provides for both a good and parts of the good

(5) For purposes of subsection (4)(b),

(a) the determination of whether a heading or subheading provides for a good and its parts shall be made on the basis of the nomenclature of the heading or subheading and the relevant Section or Chapter Notes, in accordance with the General Rules for the Interpretation of the Harmonized System; and

(b) where, in accordance with the Harmonized System, a heading includes parts of goods by application of a Section Note or Chapter Note of the Harmonized System and the subheadings under that heading do not include a subheading designated "Parts", a subheading designated "Other" under that heading shall be considered to cover only the goods and parts of the goods that are themselves classified under that subheading.

(6) For purposes of subsection (2), where Schedule I sets out two or more alternative rules for the tariff provision under which a good is classified, if the good satisfies the requirements of one of those rules, it need not satisfy the requirements of another of the rules in order to qualify as an originating good.

Special rule for certain goods

(7) A good originates in the territory of a NAFTA country if the good is referred to in Section B of Table 308.1.1 of Annex 308.1 to Chapter Three of the Agreement and is imported from the territory of a NAFTA country at a time when the NAFTA countries' most-favored-nation rate of duty for that good is in accordance with paragraph 1 of Section A of that Annex.

SECTION 5. DE MINIMIS

De minimis rule for non-originating materials that do not undergo a required tariff change

(1) Except as otherwise provided in subsection (4), a good shall be considered to originate in the territory of a NAFTA country where the value of all non-originating materials that are used in the production of the good and that do not undergo an applicable change in tariff classification as a result of production occurring entirely in the territory of one or more of the NAFTA countries is not more than seven percent

(a) of the transaction value of the good determined in accordance with Schedule II with respect to the transaction in which the producer of the good sold the good, adjusted to an F.O.B. basis, or

(b) of the total cost of the good, where there is no transaction value for the good under section 2(1) of Schedule III or the transaction value of the good is unacceptable under section 2(2) of that Schedule,

provided that,

(c) if, under the rule in which the applicable change in tariff classification is specified, the good is also subject to a regional value-content requirement, the value of those non-originating materials shall be taken into account in calculating the regional value content of the good in accordance with the method set out for that good, and

(d) the good satisfies all other applicable requirements of this Appendix.

(2) For purposes of subsection (1), where

(a) Schedule I sets out two or more alternative rules for the tariff provision under which the good is classified, and

(b) the good, in accordance with subsection (1), is considered to originate under one of those rules,

the good is not required to satisfy the requirements specified in any alternative rule referred to in paragraph (a).

(3) For purposes of subsection (1), in the case of a good that is provided for in heading 2402, the percentage shall be nine percent instead of seven percent.

Exceptions

(4) Subsections (1) and (2) do not apply to

(a) a non-originating material provided for in Chapter 4 or tariff items 1901.90.31, 1901.90.41 and 1901.90.81 (dairy preparations containing over 10 percent by weight of milk solids) that is used in the production of a good provided for in Chapter 4;

(b) a non-originating material provided for in Chapter 4 or tariff items 1901.90.31, 1901.90.41 and 1901.90.81 (dairy preparations containing over 10 percent by weight of milk solids) that is used in the production of a good provided for in any of tariff items 1901.10.10 (infant preparations containing over 10 percent by weight of milk solids), 1901.20.10 (mixes and doughs, containing over 25 percent by weight of butterfat, not put up for retail sale), 1901.90.31, 1901.90.41 and 1901.90.81 (dairy preparations containing over 10 percent by weight of milk solids), heading 2105 and tariff items 2106.90.05, 2106.90.13, 2106.90.41, 2106.90.51 and 2106.90.61 (preparations containing over 10 percent by weight of milk solids), 2202.90.10 and 2202.90.20 (beverages containing milk) and 2309.90.31 (animal feeds containing over 10 percent by weight of milk solids);

(c) a non-originating material provided for in any of heading 0805 and subheadings 2009.11 through 2009.30 that is used in the production of a good provided for in any of subheadings 2009.11 through 2009.30 and tariff items 2106.90.16 and 2106.90.17 (concentrated fruit or vegetable juice of any single fruit or vegetable, fortified with minerals or vitamins) and 2202.90.30, 2202.90.35 and 2202.90.36 (fruit or vegetable juice of any single fruit or vegetable, fortified with minerals or vitamins);
(d) a non-originating material provided for in Chapter 9 that is used in the production of a good provided for in tariff item 2101.10.21 (instant coffee, not flavored);
(e) a non-originating material provided for in Chapter 15 that is used in the production of a good provided for in any of headings 1501 through 1508, 1512, 1514 and 1515;
(f) a non-originating material provided for in heading 1701 that is used in the production of a good provided for in any of headings 1701 through 1703;
(g) a non-originating material provided for in Chapter 17 or heading 1805 that is used in the production of a good provided for in subheading 1806.10;
(h) a non-originating material provided for in any of headings 2203 through 2208 that is used in the production of a good provided for in any of headings 2207 through 2208;
(i) a non-originating material that is used in the production of a good provided for in any of tariff item 7321.11.30 (gas stove or range), subheadings 8415.10, 8415.81 through 8415.83, 8418.10 through 8418.21, 8418.29 through 8418.40, 8421.12, 8422.11, 8450.11 through 8450.20 and 8451.21 through 8451.29, Mexican tariff item 8479.82.03 (trash compactors) or Canadian or U.S. tariff item 8479.89.55 (trash compactors), and tariff item 8516.60.40 (electric stove or range);
(j) a printed circuit assembly that is a non-originating material used in the production of a good, where the applicable change in tariff classification for the good places restrictions on the use of that non-originating material, such as by prohibiting, or limiting the quantity of, that non-originating material;
(k) a non-originating material that is a single juice ingredient provided for in heading 2009 that is used in the production of a good provided for in any of subheading 2009.90 and tariff items 2106.90.18 (concentrated mixtures of fruit or vegetable juice, fortified with minerals or vitamins) and 2202.90.37 (mixtures of fruit or vegetable juices, fortified with minerals or vitamins);
(l) a non-originating material that is used in the production of a good provided for in any of Chapters 1 through 27, unless the non-originating material is of a different subheading than the good for which origin is being determined under this section; or
(m) a non-originating material that is used in the production of a good provided for in any of Chapters 50 through 63.

De minimis rule for regional value-content requirement

(5) A good that is subject to a regional value-content requirement shall be considered to originate in the territory of a NAFTA country and shall not be required to satisfy that requirement where
(a) the value of all non-originating materials used in the production of the good is not more than seven percent
(i) of the transaction value of the good determined in accordance with Schedule II with respect to the transaction in which the producer of the good sold the good, adjusted to an F.O.B. basis, or
(ii) of the total cost of the good, where there is no transaction value for the good under section 2(1) of Schedule III or the transaction value of the good is unacceptable under section 2(2) of that Schedule; and
(b) the good satisfies all other applicable requirements of this Appendix.

De minimis rule for textile goods

(6) A good provided for in any of Chapters 50 to 63, that does not originate in the territory of a NAFTA country because certain fibers or yarns that are used in the production of the component of the good that determines the tariff classification of the good do not undergo an applicable change in tariff classification as a result of production occurring entirely in the territory of one or more of the NAFTA countries, shall be considered to originate in the territory of a NAFTA country if
(a) the total weight of all those fibers or yarns is not more than seven percent of the total weight of that component, and
(b) the good satisfies all other applicable requirements of this Appendix.
(7) For purposes of subsection (6),
(a) the component of a good that determines the tariff classification of that good shall be identified in accordance with the first of the following General Rules for the Interpretation of the Harmonized System under which the identification can be determined, namely, Rule 3(b), Rule 3(c) and Rule 4; and
(b) where the component of the good that determines the tariff classification of the good is a blend of two or more yarns or fibers, all yarns and fibers used in the production of the component shall be taken into account in determining the weight of fibers and yarns in that component.

Calculation of "total cost" for de minimis rules: choice of methods

(8) For purposes of subsection (1)(b) and subsection (5)(a)(ii), the total cost of a good shall be, at the choice of the producer of the good,
(a) the total cost incurred with respect to all goods produced by the producer, calculated on the basis of the costs that are recorded on the books of the producer, that can be reasonably allocated to that good in accordance with Schedule VII; or
(b) the aggregate of each cost, calculated on the basis of the costs that are recorded on the books of the producer, that forms part of the total cost incurred with respect to that good that can be reasonably allocated to that good in accordance with Schedule VII.

Examples illustrating de minimis rules

(9) Each of the following examples is an "Example" as referred to in section 2(4).

Example 1: section 5(1)

Producer A, located in a NAFTA country, uses originating materials and non-originating materials in the production of copper anodes provided for in heading 7402. The rule set out in Schedule I for heading 7402 specifies a change in tariff classification from any other chapter. There is no applicable regional value-content requirement for this heading. Therefore, in order for the copper anode to qualify as an originating good under the rule set out in Schedule I, Producer A may not use in the production of the copper anode any non-originating material provided for in Chapter 74.

All of the materials used in the production of the copper anode are originating materials, with the exception of a small amount of copper scrap provided for in heading 7404, that is in the same chapter as the copper anode. Under section 5(1), if the value of the non-originating copper scrap does not exceed seven percent of the transaction value of the copper anode or the total cost of the copper anode, whichever is applicable, the copper anode would be considered an originating good.

Example 2: section 5(2)

Producer A, located in a NAFTA country, uses originating materials and non-originating materials in the production of ceiling fans provided for in subheading 8414.51. There are two alternative rules set out in Schedule I for subheading 8414.51, one of which specifies a change in tariff classification from any other heading. The other rule specifies both a change in tariff classification from the subheading under which parts of the ceiling fans are classified and a regional value-content requirement. Therefore, in order for the ceiling fan to qualify as an originating good under the first of the alternative rules, all of the materials that are classified under the subheading for parts of ceiling fans and used in the production of the completed ceiling fan must be originating materials.

In this case, all of the non-originating materials used in the production of the ceiling fan satisfy the change in tariff classification set out in the rule that specifies a change in tariff classification from any other heading, with the exception of one non-originating material that is classified under the subheading for parts of ceiling fans. Under section 5(1), if the value of the non-originating material that does not satisfy the change in tariff classification specified in the first rule does not exceed seven percent of the transaction value of the ceiling fan or the total cost of the ceiling fan, whichever is applicable, the ceiling fan would be considered an originating good. Therefore, under section 5(2), the ceiling fan would not be required to satisfy the alternative rule that specifies both a change in tariff classification and a regional value-content requirement.

Example 3: section 5(2)

Producer A, located in a NAFTA country, uses originating materials and non-originating materials in the production of plastic bags provided for in subheading 3923.29. The rule set out in Schedule I for subheading 3923.29 specifies both a change in tariff classification from any other heading, except from subheadings 3920.20 or 3920.71, under which certain plastic materials are classified, and a regional value-content requirement. Therefore, with respect to that part of the rule that specifies a change in tariff classification, in order for the plastic bag to qualify as an originating good, any plastic materials that are classified under subheading 3920.20 or 3920.71 and that are used in the production of the plastic bag must be originating materials.

In this case, all of the non-originating materials used in the production of the plastic bag satisfy the specified change in tariff classification, with the exception of a small amount of plastic materials classified under subheading 3920.71. Section 5(1) provides that the plastic bag can be considered an originating good if the value of the non-originating plastic materials that do not satisfy the specified change in tariff classification does not exceed seven percent of the transaction value of the plastic bag or the total cost of the plastic bag, whichever is applicable. In this case, the value of those non-originating materials that do not satisfy the specified change in tariff classification does not exceed the seven percent limit.

However, the rule set out in Schedule I for subheading 3923.29 specifies both a change in tariff classification and a regional value-content requirement. Therefore, under section 5(1)(c), in order to be considered an originating good, the plastic bag must also, except as otherwise provided in section 5(5), satisfy the regional value-content requirement specified in that rule. As provided in section 5(1)(c), the value of the non-originating materials that do not satisfy the specified change in tariff classification, together with the value of all other non-originating materials used in the production of the plastic bag, will be taken into account in calculating the regional value content of the plastic bag.

Example 4: section 5(5)

Producer A, located in a NAFTA country, primarily uses originating materials in the production of shoes provided for in heading 6405. The rule set out in Schedule I for heading 6405 specifies both a change in tariff classification from any subheading other than subheadings 6401.10 through 6406.10 and a regional value-content requirement.

With the exception of a small amount of materials provided for in Chapter 39, all of the materials used in the production of the shoes are originating materials.

Under section 5(5), if the value of all of the non-originating materials used in the production of the shoes does not exceed seven percent of the transaction value of the shoes or the total cost of the shoes, whichever is applicable, the shoes are not required to satisfy the regional value-content requirement specified in the rule set out in Schedule I in order to be considered originating goods.

Example 5: section 5(5)

Producer A, located in a NAFTA country, produces barbers' chairs provided for in subheading 9402.10. The rule set out in Schedule I for goods provided for in heading 9402 specifies a change in tariff classification from any other chapter. All of the materials used in the production of these chairs are originating materials, with the exception of a small quantity of non-originating materials that are classified as parts of barbers' chairs. These parts undergo no change in tariff classification because subheading 9402.10 provides for both barbers' chairs and their parts.

Although Producer A's barbers' chairs do not qualify as originating goods under the rule set out in Schedule I, section 4(4)(b) provides, among other things, that, where there is no change in tariff classification from the non-originating materials to the goods because the subheading under which the goods are classified provides for both the goods and their parts, the goods shall qualify as originating goods if they satisfy a specified regional value-content requirement.

However, under section 5(5), if the value of the non-originating materials does not exceed seven percent of the transaction value of the barbers' chairs or the total cost of the barbers' chairs, whichever is applicable, the barbers' chairs will be considered originating goods and are not required to satisfy the regional value-content requirement set out in section 4(4)(b)(v).

Example 6: sections 5(6) and (7)

Producer A, located in a NAFTA country, produces women's dresses provided for in subheading 6204.41 from fine wool fabric of heading 5112. This fine wool fabric, also produced by Producer A, is the component of the dress that determines its tariff classification under subheading 6204.41.

The rule set out in Schedule I for subheading 6204.41, under which the dress is classified, specifies both a change in tariff classification from any other chapter, except from those headings and chapters under which certain yarns and fabrics, including combed wool yarn and wool fabric, are classified, and a requirement that the good be cut and sewn or otherwise assembled in the territory of one or more of the NAFTA countries.

Therefore, with respect to that part of the rule that specifies a change in tariff classification, in order for the dress to qualify as an originating good, the combed wool yarn and the fine wool fabric made therefrom that are used by Producer A in the production of the dress must be originating materials.

At one point Producer A uses a small quantity of non-originating combed wool yarn in the production of the fine wool fabric. Under section 5(6), if the total weight of the non-originating combed wool yarn does not exceed seven percent of the total weight of all the yarn used in the production of the component of the dress that determines its tariff classification, that is the wool fabric, the dress would be considered an originating good.

PART III
SECTION 6. REGIONAL VALUE CONTENT

(1) Except as otherwise provided in subsection (6), the regional value content of a good shall be calculated, at the choice of the exporter or producer of the good, on the basis of either the transaction value method or the net cost method.

Transaction Value Method

(2) The transaction value method for calculating the regional value content of a good is as follows:

$$RVC = \frac{TV - VNM}{TV} \times 100$$

where

RVC is the regional value content of the good, expressed as a percentage;

TV is the transaction value of the good, determined in accordance with Schedule II with respect to the transaction in which the producer of the good sold the good, adjusted to an F.O.B. basis; and

VNM is the value of non-originating materials used by the producer in the production of the good, determined in accordance with section 7.

Net Cost Method

(3) The net cost method for calculating the regional value content of a good is as follows:

$$RCV = \frac{NC - VNM}{NC} \times 100$$

where

RVC is the regional value content of the good, expressed as a percentage;

NC is the net cost of the good, calculated in accordance with subsection (11); and

VNM is the value of non-originating materials used by the producer in the production of the good, determined, except as otherwise provided in sections 9 and 10, in accordance with section 7.

VNM does not include value of non-originating materials used in originating material

(4) Except as otherwise provided in section 9 and section 10(1)(d), for purposes of calculating the regional value content of a good under subsection (2) or (3), the value of non-originating materials used by a producer in the production of the good shall not include

(a) the value of any non-originating materials used by another producer in the production of originating materials that are subsequently acquired and used by the producer of the good in the production of that good; or

(b) the value of any non-originating materials used by the producer in the production of a self-produced material that is an originating material and is designated as an intermediate material.

(5) For purposes of subsection (4),

(a) in the case of any self-produced material that is not designated as an intermediate material, only the value of any non-originating materials used in the production of the self-produced material shall be included in the value of non-originating materials used in the production of the good; and

(b) where a self-produced material that is designated as an intermediate material and is an originating material is used by the producer of the good with non-originating materials (whether or not those non-originating materials are produced by that producer) in the production of the good, the value of those non-originating materials shall be included in the value of non-originating materials.

Net Cost Method required in certain circumstances

(6) The regional value content of a good shall be calculated only on the basis of the net cost method where

(a) there is no transaction value for the good under section 2(1) of Schedule III;

(b) the transaction value of the good is unacceptable under section 2(2) of Schedule III;

(c) the good is sold by the producer to a related person and the volume, by units of quantity, of sales by that producer of identical goods or similar goods, or any combination thereof, to related persons during the six month period immediately preceding the month in which the goods are sold exceeds 85 percent of the producer's total sales of identical goods or similar goods, or any combination thereof, during that period;

(d) the good is

(i) a motor vehicle provided for in any of headings 8701 and 8702, subheadings 8703.21 through 8703.90 and headings 8704, 8705 and 8706,

(ii) a good provided for in a tariff provision listed in Schedule IV or an automotive component assembly, automotive component, sub-component or listed material, and is for use in a motor vehicle referred to in subparagraph (i), either as original equipment or as an after-market part,

(iii) a good provided for in any of subheadings 6401.10 through 6406.10, or

(iv) a good provided for in tariff item 8469.10.40 (word processing machines);

(e) the exporter or producer chooses to accumulate with respect to the good in accordance with section 14; or

(f) the good is an intermediate material and is subject to a regional value-content requirement.

Option to change from TVM to NCM for calculation of regional value content

(7) If the exporter or producer of a good calculates the regional value content of the good on the basis of the transaction value method and the customs administration of a NAFTA country subsequently notifies that exporter or producer in writing, during the course of a verification of origin, that

(a) the transaction value of the good, as determined by the exporter or producer, is required to be adjusted under section 4 of Schedule II or is unacceptable under section 2(2) of Schedule III, there is no transaction value for the good under section 2(1) of Schedule III or the transaction value method may not be used because of the application of subsection (6)(c), or

(b) the value of any non-originating material used in the production of the good, as determined by the exporter or producer, is required to be adjusted under section 5 of Schedule VIII or is unacceptable under section 2(3) of Schedule VIII, or there is no transaction value for the material under section 2(2) of Schedule VIII or the transaction value method may not be used to calculate the regional value content of the material because of the application of subsection (6)(c),

the exporter or producer may choose that the regional value content of the good be calculated on the basis of the net cost method, in which case the calculation must be made within 60 days after the producer receives the notification, or such longer period as that customs administration specifies.

Change from NCM to TVM not permitted

(8) If the exporter or producer of a good chooses that the regional value content of the good be calculated on the basis of the net cost method and the customs administration of a NAFTA country subsequently notifies that exporter or producer in writing, during the course of a verification of origin, that the good does not satisfy the applicable regional value-content requirement, the exporter or producer of the good may not recalculate the regional value content on the basis of the transaction value method.

(9) Nothing in subsection (7) shall be construed as preventing any review and appeal under Article 510 of the Agreement, as implemented in each NAFTA country, of an adjustment to or a rejection of

(a) the transaction value of the good; or

(b) the value of any material used in the production of the good.

Application of Schedule IX for determining value of "identical" non-originating materials under TVM

(10) For purposes of the transaction value method, where non-originating materials that are the same as one another in all respects, including physical characteristics, quality and reputation but excluding minor differences in appearance, are used in the production of a good, the value of those non-originating materials may, at the choice of the producer of the good, be determined in accordance with one of the methods set out in Schedule IX.

Options for calculating the net cost of a good

(11) For purposes of subsection (3), the net cost of a good may be calculated, at the choice of the producer of the good, by

(a) calculating the total cost incurred with respect to all goods produced by that producer, subtracting any excluded costs that are included in that total cost, and reasonably allocating, in accordance with Schedule VII, the remainder to the good;

(b) calculating the total cost incurred with respect to all goods produced by that producer, reasonably allocating, in accordance with Schedule VII, that total cost to the good, and subtracting any excluded costs that are included in the amount allocated to that good; or

(c) reasonably allocating, in accordance with Schedule VII, each cost that forms part of the total cost incurred with respect to the good so that the aggregate of those costs does not include any excluded costs.

Calculation of total cost

(12) For purposes of subsection (11),

(a) total cost consists of all product costs, period costs and other costs that are recorded, except as otherwise provided in paragraphs (b)(i) and (ii), on the books of the producer without regard to the location of the persons to whom payments with respect to those costs are made;

(b) in calculating total cost,

(i) the value of materials, other than intermediate materials, indirect materials and packing materials and containers, shall be the value determined in accordance with section 7(1),

(ii) the value of intermediate materials shall be determined in accordance with section 7(9),

(iii) the value of indirect materials and the value of packing materials and containers shall be the costs that are recorded on the books of the producer for those materials, and

(iv) product costs, period costs and other costs, other than costs referred to in subparagraphs (i) through (iii), shall be the costs thereof that are recorded on the books of the producer for those costs;

(c) total cost does not include profits that are earned by the producer of the good, regardless of whether they are retained by the producer or paid out to other persons as dividends, or taxes paid on those profits, including capital gains taxes;

(d) gains related to currency conversion that are related to the production of the goods shall be deducted from total cost, and losses related to currency conversion that are related to the production of the goods shall be included in total cost; and

(e) the value of materials with respect to which production is accumulated under section 14 shall be determined in accordance with that section.

Calculation of net cost; excluded costs

(13) For purposes of calculating net cost under subsection (11),

(a) excluded costs shall be the excluded costs that are recorded on the books of the producer of the good;

(b) excluded costs that are included in the value of a material that is used in the production of the good shall not be subtracted from or otherwise excluded from the total cost; and

(c) excluded costs do not include any amount paid for research and development services performed in the territory of a NAFTA country.

Non-allowable interest; determination under Schedule XI

(14) For purposes of calculating non-allowable interest costs, the determination of whether interest costs incurred by a producer are more than 700 basis points above the yield on debt obligations of comparable maturities issued by the federal government of the country in which the producer is located shall be made in accordance with Schedule XI.

Use of "averaging" over a period to calculate RVC under NCM; period cannot be changed

(15) For purposes of the net cost method, except where a producer chooses to calculate the regional value content of a good under section 11(1), (3) or (6), 12(1) or 13(4), the regional value content of the good may, where the producer of the goods chooses to do so, be calculated by

(a) calculating the sum of the net costs incurred and the sum of the values of non-originating materials used by the producer of the good with respect to the good and identical goods or similar goods, or any combination thereof, produced in a single plant by the producer over

(i) a month,

(ii) any three month or six month period that falls within the producer's fiscal year, or

(iii) the producer's fiscal year; and

(b) using the sums referred to in paragraph (a) as the net cost and the value of non-originating materials, respectively.

(16) The calculation made under subsection (15) shall apply with respect to all units of the good produced during the period chosen by the producer under subsection (15)(a).

(17) A choice made under subsection (15) may not be rescinded or modified with respect to the goods or the period with respect to which the choice is made.

Obligation to perform self-analysis and give notification of changed circumstance if RVC calculated on basis of estimated costs

(18) Except as otherwise provided in sections 11(10), 12(7) and 13(10), where the producer of a good has calculated the regional value content of the good under the net cost method on the basis of estimated costs, including standard costs, budgeted forecasts or other similar estimating procedures, before or during the period chosen in subsection (14)(a), the producer shall conduct an analysis at the end of the producer's fiscal year of the actual costs incurred over the period with respect to the production of the good and, if the good does not satisfy the regional value-content requirement on the basis of the actual costs during that period, immediately inform any person to whom the producer has provided a Certificate of Origin for the good, or a written statement that the good is an originating good, that the good is a non-originating good.

Option to treat any material as non-originating

(19) For purposes of calculating the regional value content of a good, the producer of that good may choose to treat any material used in the production of that good as a non-originating material.

Examples of Calculation of RVC under TVM and NCM

(20) Each of the following examples is an "Example" as referred to in section 2(4).

Example 1: example of point of direct shipment (with respect to adjusted to an F.O.B. basis)

A producer has only one factory, at which the producer manufactures finished office chairs. Because the factory is located close to transportation facilities, all units of the finished good are stored in a factory warehouse 200 meters from the end of the production line. Goods are shipped worldwide from this warehouse. The point of direct shipment is the warehouse.

Example 2: examples of point of direct shipment (with respect to adjusted to an F.O.B. basis)

A producer has six factories, all located within the territory of one of the NAFTA countries, at which the producer produces garden tools of various types. These tools are shipped worldwide, and orders usually consist of bulk orders of various types of tools. Because different tools are manufactured at different factories, the producer decided to consolidate storage and shipping facilities and ships all finished products to a large warehouse located near the seaport, from which all orders are shipped. The distance from the factories to the warehouse varies from 3 km to 130 km. The point of direct shipment for each of the goods is the warehouse.

Example 3: examples of point of direct shipment (with respect to adjusted to an F.O.B. basis)

A producer has only one factory, located near the center of one of the NAFTA countries, at which the producer manufactures finished office chairs. The office chairs are shipped from that factory to three warehouses leased by the producer, one on the west coast, one near the factory and one on the east coast. The office chairs are shipped to buyers from these warehouses, the shipping location depending on the shipping distance from the buyer. Buyers closest to the west coast warehouse are normally supplied by the west coast warehouse, buyers closest to the east coast are normally supplied by the warehouse located on the east coast and buyers closest to the warehouse near the factory are normally supplied by that warehouse. In this case, the point of direct shipment is the location of the warehouse from which the office chairs are normally shipped to customers in the location in which the buyer is located.

Example 4: section 6(3), net cost method

A producer located in NAFTA country A sells Good A that is subject to a regional value-content requirement to a buyer located in NAFTA country B. The producer of Good A chooses that the regional value content of that good be calculated using the net cost method. All applicable requirements of this Appendix, other than the regional value-content requirement, have been met. The applicable regional value-content requirement is 50 percent.

In order to calculate the regional value-content of Good A, the producer first calculates the net cost of Good A. Under section 6(11)(a), the net cost is the total cost of Good A (the aggregate of the product costs, period costs and other costs) per unit, minus the excluded costs (the aggregate of the sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs and non-allowable interest costs) per unit. The producer uses the following figures to calculate the net cost:

Product costs:	
Value of originating materials	$30.00
Value of non-originating materials	40.00
Other product costs	20.00
Period costs	10.00
Other costs	0.00
Total cost of Good A, per unit	$100.00
Excluded costs:	
Sales promotion, marketing and after-sales service cost	$5.00
Royalties	2.50
Shipping and packing costs	3.00
Non-allowable interest costs	1.50
Total excluded costs	12.00
The net cost is the total cost of Good A, per unit, minus the excluded costs.	
Total cost of Good A, per unit:	$100.00
Excluded costs	−12.00
Net cost of Good A, per unit	$88.00

The value for net cost ($88) and the value of non-originating materials ($40) are needed in order to calculate the regional value content. The producer calculates the regional value content of Good A under the net cost method in the following manner:

$$RVC = \frac{NC - VNM}{NC} \times 100$$

$$= \frac{88 - 40}{88} \times 100$$

$$= 54.5\%$$

Therefore, under the net cost method, Good A qualifies as an originating good, with a regional value-content of 54.5 percent.

Example 5: section 6(6)(c), net cost method required for certain sales to related persons

On January 15, 1994, a producer located in NAFTA country A sells 1,000 units of Good A to a related person, located in NAFTA country B. During the six month period beginning on July 1, 1993 and ending on December 31, 1993, the producer sold 90,000 units of identical goods and similar goods to related persons from various countries, including that buyer. The producer's total sales of those identical goods and similar goods to all persons from all countries during that six month period were 100,000 units.

The total quantity of identical goods and similar goods sold by the producer to related persons during that six month period was 90 percent of the producer's total sales of those identical goods and similar goods to all persons. Under section 6(6)(c), the producer must use the net cost method to calculate the regional value content of Good A sold in January 1994, because the 85 percent limit was exceeded.

Example 6: section 6(11)(a)

A producer in a NAFTA country produces Good A and Good B during the producer's fiscal year.

The producer uses the following figures, which are recorded on the producer's books and represent all of the costs incurred with respect to both Good A and Good B, to calculate the net cost of those goods:

Product costs:	
Value of originating materials	$2,000
Value of non-originating materials	1,000
Other product costs	2,400
Period costs: (including $1,200 in excluded costs)	3,200
Other costs	400
Total cost of Good A and Good B	$9,000
The net cost is the total cost of Good A and Good B, minus the excluded costs incurred with respect to those goods.	
Total cost of Good A and Good B	$9,000
Excluded costs	−1,200
Net cost of Good A and Good B	$7,800

The net cost must then be reasonably allocated, in accordance with Schedule VII, to Good A and Good B.

Example 7: section 6(11)(b)

A producer located in a NAFTA country produces Good A and Good B during the producer's fiscal year. In order to calculate the regional value content of Good A and Good B, the producer uses the following figures that are recorded on the producer's books and incurred with respect to those goods:

Product costs:	
Value of originating materials	$2,000
Value of non-originating materials	1,000
Other product costs	2,400
Period costs: (including $1,200 in excluded costs)	3,200
Other costs	400
Total cost of Good A and Good B	$9,000

Under section 6(11)(b), the total cost of Good A and Good B is then reasonably allocated, in accordance with Schedule VII, to those goods. The costs are allocated in the following manner:

	Allocated to Good A	Allocated to Good B
Total cost ($9,000 for both Good A and Good B)	$5,220	$3,780

The excluded costs ($1,200) that are included in total cost allocated to Good A and Good B, in accordance with Schedule VII, are subtracted from that amount.

		Excluded Cost Allocated to Good A	Excluded Cost Allocated to Good B
Total Excluded costs:			
Sales promotion, marketing and after-sale service costs	500	290	210
Royalties	200	116	84
Shipping and packing costs	500	290	210
Net cost (total cost minus excluded costs)		$4,524	$3,276

The net cost of Good A is thus $4,524, and the net cost of Good B is $3,276.

Example 8: section 6(11)(c)

A producer located in a NAFTA country produces Good C and Good D. The following costs are recorded on the producer's books for the months of January, February and March, and each cost that forms part of the total cost are reasonably allocated, in accordance with Schedule VII, to Good C and Good D.

	Total cost: Good C and Good D (in thousands of dollars)	Allocated to Good C (in thousands of dollars)	Allocated to Good D (in thousands of dollars)
Product costs:			
Value of originating materials	100	0	100
Value of non-originating materials	900	800	100
Other product costs	500	300	200
Period costs (including $420 in excluded costs)	5,679	3,036	2,643
Minus Excluded Costs	420	300	120
Other costs	0	0	0
Total cost (aggregate of product costs, period costs and other costs)	6,759	3,836	2,923

Example 9: section 6(12)(a)

Producer A, located in a NAFTA country, produces Good A that is subject to a regional value-content requirement. The producer chooses that the regional value content of that good be calculated using the net cost method. Producer A buys Material X from Producer B, located in a NAFTA country. Material X is a non-originating material and is used in the production of Good A. Producer A provides Producer B, at no charge, with tools to be used in the production of Material X. The cost of the tools that is recorded on the books of Producer A has been expensed in the current year. Pursuant to section 5(1)(b)(ii) of Schedule VIII, the value of the tools is included in the value of Material X. Therefore, the cost of the tools that is recorded on the books of Producer A and that has been expensed in the current year cannot be included as a separate cost in the net cost of Good A because it has already been included in the value of Material X.

Example 10: section 6(12)(d)

Producer A, located in a NAFTA country, produces Good A that is subject to a regional value-content requirement. The producer chooses that the regional value content of that good be calculated using the net cost method and averages the calculation over the producer's fiscal year under section 6(15). Producer A determines that during that fiscal year Producer A incurred a gain on foreign currency conversion of $10,000 and a loss on foreign currency conversion of $8,000, resulting in a net gain of $2,000. Producer A also determines that $7,000 of the gain on foreign currency conversion and $6,000 of the loss on foreign currency conversion is related to the purchase of non-originating materials used in the production of Good A, and $3,000 of the gain on foreign currency conversion and $2,000 of the loss on foreign currency conversion is not related to the production of Good A. The producer determines that the total cost of Good A is $45,000 before deducting the $1,000 net gain on foreign currency conversion related to the production of Good A. The total cost of Good A is therefore $44,000. That $1,000 net gain is not included in the value of non-originating materials under section 7(1).

Example 11: section 6(12)(d)

Given the same facts as in example 10, except that Producer A determines that $6,000 of the gain on foreign currency conversion and $7,000 of the loss on foreign currency conversion is related to the purchase of non-originating materials used in the production of Good A. The total cost of Good A is $45,000, which includes the $1,000 net loss on foreign currency conversion related to the production of Good A. That $1,000 net loss is not included in the value of non-originating materials under section 7(1).

PART IV

SECTION 7. MATERIALS

Valuation of materials used in the production of a good other than certain automotive goods

(1) Except as otherwise provided for non-originating materials used in the production of a good referred to in section 9(1) or 10(1), and except in the case of indirect materials, intermediate materials, packing materials and containers and self-produced packaging materials and containers, for purposes of calculating the regional value content of a good, the value of a material that is used in the production of the good shall be

(a) except as otherwise provided in subsection (2), where the material is imported by the producer of the good into the territory of the NAFTA country in which the good is produced, the customs value of the material with respect to that importation, or

(b) where the material is acquired by the producer of the good from another person located in the territory of the NAFTA country in which the good is produced

(i) the transaction value, determined in accordance with section 2(1) of Schedule VIII, with respect to the transaction in which the producer acquired the material, or

(ii) the value determined in accordance with sections 6 through 11 of Schedule VIII, where, with respect to the transaction in which the producer acquired the material, there is no transaction value under section 2(2) of that Schedule or the transaction value is unacceptable under section 2(3) of that Schedule,

and shall include the following costs if they are not included under paragraph (a) or (b):

(c) the costs of freight, insurance and packing and all other costs incurred in transporting the material to the location of the producer,

(d) duties and taxes paid or payable with respect to the material in the territory of one or more of the NAFTA countries, other than duties and taxes that are waived, refunded, refundable or otherwise recoverable, including credit against duty or tax paid or payable,

(e) customs brokerage fees, including the cost of in-house customs brokerage services, incurred with respect to the material in the territory of one or more of the NAFTA countries, and

(f) the cost of waste and spoilage resulting from the use of the material in the production of the good, minus the value of any reusable scrap or by-product.

Customs administration may use Schedule VIII if customs value not correctly determined

(2) For purposes of subsection (1)(a), where the customs administration of the NAFTA country into which the good is imported determines during the course of a verification of origin of the good that the customs value of the material referred to in that paragraph was not correctly determined, it may, for purposes of determining whether the good is an originating good, require that the value of that material be determined in accordance with Schedule VIII with respect to the importation of that material and, where the costs referred to in subsections (1)(c) through (f) are not included in that value, that those costs be added to that value.

Costs recorded on books

(3) For purposes of subsection (1), the costs referred to in subsections (1)(c) through (f) shall be the costs referred to in those paragraphs that are recorded on the books of the producer of the good.

Designation of self-produced material as an intermediate material; limitation on designations; designation is optional

(4) Except for purposes of determining the value of non-originating materials used in the production of a light-duty automotive good and except in the case of an automotive component assembly, automotive component or sub-component for use as original equipment in the production of a heavy-duty vehicle, for purposes of calculating the regional value content of a good the producer of the good may designate as an intermediate material any self-produced material that is used in the production of the good, provided that where an intermediate material is subject to a regional value-content requirement, no other self-produced material that is subject to a regional value-content requirement and is incorporated into that intermediate material is also designated by the producer as an intermediate material.

(5) For purposes of subsection (4),

(a) in order to qualify as an originating material, a self-produced material that is designated as an intermediate material must qualify as an originating material under these Regulations;

(b) the designation of a self-produced material as an intermediate material shall be made solely at the choice of the producer of that self-produced material; and

(c) except as otherwise provided in section 14(3), the proviso set out in subsection (4) does not apply with respect to an intermediate material used by another producer in the production of a material that is subsequently acquired and used in the production of a good by the producer referred to in subsection (4).

Valuation of an intermediate material

(6) The value of an intermediate material shall be, at the choice of the producer of the good,

(a) the total cost incurred with respect to all goods produced by the producer, calculated on the basis of the costs that are recorded on the books of the producer, that can be reasonably allocated to that intermediate material in accordance with Schedule VII; or

(b) the aggregate of each cost, calculated on the basis of the costs that are recorded on the books of the producer, that forms part of the total cost incurred with respect to that intermediate material that can be reasonably allocated to that intermediate material in accordance with Schedule VII.

Rescission of a designation during course of verification; option to designate another intermediate material

(7) Where a producer of a good designates a self-produced material as an intermediate material under subsection (4) and the customs administration of a NAFTA country into which the good is imported determines during a verification of origin of the good that the intermediate material is a non-originating material and notifies the producer of this in writing before the written determination of whether the good qualifies as an originating good, the producer may rescind the designation, and the regional value content of the good shall be calculated as though the self-produced material were not so designated.

(8) A producer of a good who rescinds a designation under subsection (7)

(a) shall retain any rights of review and appeal under Article 510 of the Agreement, as implemented in each NAFTA country, with respect to the determination of the origin of the intermediate material as though the producer did not rescind the designation; and

(b) may, not later than 30 days after the customs administration referred to in subsection (7) notifies the producer in writing that the self-produced material referred to in paragraph (a) is a non-originating material, designate as an intermediate material another self-produced material that is incorporated into the good, subject to the proviso set out in subsection (4).

(9) Where a producer of a good designates another self-produced material as an intermediate material under subsection (8)(b) and the customs administration referred to in subsection (7) determines during the verification of origin of the good that that self-produced material is a non-originating material,

(a) the producer may rescind the designation, and the regional value content of the good shall be calculated as though the self-produced material were not so designated;

(b) the producer shall retain any rights of review and appeal under Article 510 of the Agreement, as implemented in each NAFTA country, with respect to the determination of the origin of the intermediate material as though the producer did not rescind the designation; and

(c) the producer may not designate another self-produced material that is incorporated into the good as an intermediate material.

Indirect Materials; deemed originating; value as recorded on books of producer

(10) For purposes of determining whether a good is an originating good, an indirect material that is used in the production of the good

(a) shall be considered to be an originating material, regardless of where that indirect material is produced; and

(b) if the good is subject to a regional value-content requirement, for purposes of calculating the net cost under the net cost method, the value of the indirect material shall be the costs of that material that are recorded on the books of the producer of the good.

Packaging Materials and Containers; deemed to be originating for tariff change rules

(11) Packaging materials and containers, if classified under the Harmonized System with the good that is packaged therein, shall be disregarded for purposes of

(a) determining whether all of the non-originating materials used in the production of the good undergo an applicable change in tariff classification; and

(b) determining under section 5(1) the value of non-originating materials that do not undergo an applicable change in tariff classification.

Actual originating status considered for RVC requirement; valuation of packaging

(12) Where packaging materials and containers are classified under the Harmonized System with the good that is packaged therein and that good is subject to a regional value-content requirement,

(a) the value of those packaging materials and containers shall be taken into account as originating materials or non-originating materials, as the case may be, for purposes of calculating the regional value content of the good; and

(b) except as otherwise provided in sections 4 (6) and (7) of Schedule II, the value of those packaging materials and containers shall be

(i) where the packaging materials and containers are acquired by the producer of the good from another person, their value as determined in accordance with subsection (1), or

(ii) where the packaging materials and containers are produced by the producer of the good, at the choice of the producer,

(A) the total cost incurred with respect to all goods produced by the producer of the good, calculated on the basis of the costs that are recorded on the books of the producer, that can be reasonably allocated to those packaging materials and containers in accordance with Schedule VII, or

(B) the aggregate of each cost, calculated on the basis of the costs that are recorded on the books of the producer, that forms part of the total cost incurred with respect to those packaging materials and containers that can be reasonably allocated to those packaging materials in accordance with Schedule VII.

Packing materials and containers; disregarded for tariff change rule and for RVC requirement; value as recorded on books

(13) For purposes of determining whether a good is an originating good, packing materials and containers in which the good is packed

(a) shall be disregarded for purposes of determining whether

(i) the non-originating materials used in the production of the good undergo an applicable change in tariff classification, and

(ii) the good satisfies a regional value-content requirement; and

(b) if the good is subject to a regional value-content requirement, the value of the packing materials and containers shall be the costs thereof that are recorded on the books of the producer of the good.

Fungible materials; fungible commingled goods; inventory management methods for determining whether originating

(14) For purposes of determining whether a good is an originating good,

(a) where originating materials and non-originating materials that are fungible materials are used in the production of the good, the determination of whether the materials are originating materials may, at the choice of the producer of the good or the person from whom the producer acquired the materials, be made on the basis of any of the applicable inventory management methods set out in Schedule X; and

(b) where originating goods and non-originating goods that are fungible goods are physically combined or mixed in inventory and prior to exportation do not undergo production or any other operation in the territory of the NAFTA country in which they were physically combined or mixed in inventory, other than unloading, reloading or any other operation necessary to preserve the goods in good condition or to transport the goods for exportation to the territory of another NAFTA country, the determination of whether the good is an originating good may, at the choice of the exporter of the good or the person from whom the exporter acquired the good, be made on the basis of any of the applicable inventory management methods set out in Schedule X.

Accessories, spare parts and tools; deemed originating for tariff change rule; actual origin applicable for RVC requirement

(15) Accessories, spare parts or tools that are delivered with a good and form part of the good's standard accessories, spare parts or tools, are originating materials if the good is an originating good, and shall be disregarded for purposes of determining whether all the non-originating materials used in the production of the good undergo an applicable change in tariff classification or determining under section 5(1) the value of non-originating materials that do not undergo an applicable change in tariff classification, provided that

(a) the accessories, spare parts or tools are not invoiced separately from the good; and

(b) the quantities and value of the accessories, spare parts or tools are customary for the good, within the industry that produces the good.

(16) Where a good is subject to a regional value-content requirement, the value of accessories, spare parts and tools that are delivered with that good and form part of the good's standard accessories, spare parts or tools shall be taken into account as originating materials or non-originating materials, as the case may be, in calculating the regional value content of the good.

Examples illustrating the provisions on materials

(17) Each of the following examples is an "Example" as referred to in section 2(4).

Example 1: section 7(5), Value of Intermediate Materials

A producer located in a NAFTA country produces Good B, which is subject to a regional value-content requirement under section 4(2)(b). The producer also produces Material A, which is used in the production of Good B. Both originating materials and non-originating materials are used in the production of Material A. Material A is subject to a change in tariff classification requirement under section 4(2)(a). The costs to produce Material A are the following:

Product costs:	
Value of originating materials	$1.00
Value of non-originating materials	7.50
Other product costs	1.50
Period costs (including $0.30 in royalties)	0.50
Other costs:	0.10
Total cost of Material A:	$10.60

The producer designates Material A as an intermediate material and determines that, because all of the non-originating materials that are used in the production of Material A undergo an applicable change in tariff classification set out in Schedule I, Material A would, under paragraph 4(2)(a) qualify as an originating material. The cost of the non-originating materials used in the production of Material A is therefore not included in the value of non-originating materials that are used in the production of Good B for the purpose of determining the regional value content of Good B. Because Material A has been designated as an intermediate material, the total cost of Material A, which is $10.60, is treated as the cost of originating materials for the purpose of calculating the regional value content of Good B. The total cost of Good B is determined in accordance with the following figures:

Product costs:	
Value of originating materials	
—intermediate materials	$10.60
—other materials	3.00
Value of non-originating materials	5.50
Other product costs	6.50
Period costs	2.50
Other costs	0.10
Total cost Good of B	$28.20

Example 2: section 7(5), Effects of the Designation of Self-produced Materials on Net Cost

The ability to designate intermediate materials helps to put the vertically integrated producer who is self-producing materials that are used in the production of a good on par with a producer who is purchasing materials and valuing those materials in accordance with subsection 7(1). The following situations demonstrate how this is achieved:

Situation 1:

A producer located in a NAFTA country produces Good B, which is subject to a regional value-content requirement of 50 percent under the net cost method. Good B satisfies all other applicable requirements of these Regulations. The producer purchases Material A, which is used in the production of Good B, from a supplier located in a NAFTA country. The value of Material A determined in accordance with subsection 7(1) is $11.00. Material A is an originating material. All other materials used in the production of Good B are non-originating materials. The net cost of Good B is determined as follows:

Product costs:	
Value of originating materials (Material A)	$11.00
Value of non-originating materials	5.50
Other product costs	6.50
Period costs: (including $0.20 in excluded costs)	0.50
Other costs	0.10
Total cost of Good B	$23.60
Excluded costs: (included in period costs)	0.20
Net cost of Good B	$23.40

The regional value content of Good B is calculated as follows:

$$RVC = \frac{NC - VNM}{NC} \times 100$$

$$= \frac{\$23.40 - \$5.50}{\$23.40} \times 100$$

$$= 76.5\%$$

The regional value content of Good B is 76.5 percent, and Good B, therefore, qualifies as an originating good.

Situation 2

A producer located in a NAFTA country produces Good B, which is subject to a regional value-content requirement of 50 percent under the net cost method. Good B satisfies all other applicable requirements of these Regulations. The producer self-produces Material A which is used in the production of Good B. The costs to produce Material A are the following:

Product costs:	
Value of originating materials	$1.00
Value of non-originating materials	7.50
Other product costs	1.50
Period costs: (including $0.20 in excluded costs)	0.50

Other costs	0.10
Total cost of Material A	$10.60

Additional costs to produce Good B are the following:

Product costs:	
Value of originating materials	$0.00
Value of non-originating materials	5.50
Other product costs	6.50
Period costs: (including $0.20 in excluded costs)	0.50
Other costs	0.10
Total additional costs	$12.60

The producer does not designate Material A as an intermediate material under subsection 7(4). The net cost of Good B is calculated as follows:

	Costs of Material A (not designated as an intermediate material	Additional Costs to Produce Good B	Total
Product costs:			
Value of originating materials	$1.00	$0.00	$1.00
Value of non-originating materials	7.50	5.50	13.00
Other product costs	1.50	6.50	8.00
Period costs (including $0.20 in excluded costs)	0.50	0.50	1.00
Other costs	0.10	0.10	0.20
Total cost of Good B	$10.60	$12.60	$23.20
Excluded costs (in period costs)	0.20	0.20	0.40
Net cost of Good B (total cost minus excluded costs)			$22.80

The regional value content of Good B is calculated as follows:

$$RVC = \frac{NC - VNM}{NC} \times 100$$

$$= \frac{\$22.80 - \$13.00}{\$22.80} \times 100$$

$$= 42.9\%$$

The regional value content of Good B is 42.9 percent, and Good B, therefore, does not qualify as an originating good.

Situation 3

A producer located in a NAFTA country produces Good B, which is subject to a regional value-content requirement of 50 percent under the net cost method. Good B satisfies all other applicable requirements of these Regulations. The producer self-produces Material A, which is used in the production of Good B. The costs to produce Material A are the following:

Product costs:	
Value of originating materials	$1.00
Value of non-originating materials	7.50
Other product costs	1.50
Period costs: (including $0.20 in excluded costs)	0.50
Other costs	0.10
Total cost of Material A	$10.60

Additional costs to produce Good B are the following:

Product costs:	
Value of originating materials	$0.00
Value of non-originating materials	5.50
Other product costs	6.50
Period costs: (including $0.20 in excluded costs)	0.50
Other costs	0.10
Total additional costs:	$12.60

The producer designates Material A as an intermediate material under subsection 7(4). Material A qualifies as an originating material under paragraph 4(2)(a). Therefore, the value of non-originating materials used in the production of Material A is not included in the value of non-originating materials for the purposes of calculating the regional value content of Good B. The net cost of Good B is calculated as follows:

	Costs of Material A (designated as an intermediate material)	Additional Costs to Produce Good B	Total
Product costs:			
Value of originating materials	$10.60	$0.00	$10.60
Value of non-originating materials	.....	5.50	5.50
Other product costs	.....	6.50	6.50
Period costs (including $0.20 in excluded costs)	.....	0.50	0.50
Other costs	.....	0.10	0.10
Total cost of Good B	$10.60	$12.60	$23.20
Excluded costs (in period costs)	.....	.20	0.20
Net cost of Good B (total cost minus excluded costs)	.....	.....	$23.00

The regional value content of Good B is calculated as follows:

$$RVC = \frac{NC - VNM}{NC} \times 100$$

$$= \frac{\$23.00 - \$5.50}{\$23.00} \times 100$$

$$= 76.1\%$$

The regional value content of Good B is 76.1 percent, and Good B, therefore, qualifies as an originating good.

Example 3: Originating Materials Acquired from a Producer Who Produced Them Using Intermediate Materials

Producer A, located in NAFTA country A, produces switches. In order for the switches to qualify as originating goods, Producer A designates subassemblies of the switches as intermediate materials. The subassemblies are subject to a regional value-content requirement. They satisfy that requirement, and qualify as originating materials. The switches are also subject to a regional value-content requirement, and, with the subassemblies designated as intermediate materials, are determined to have a regional value content of 65 percent.

Producer A sells the switches to Producer B, located in NAFTA country B, who uses them to produce switch assemblies that are used in the production of Good B. The switch assemblies are subject to a regional value-content requirement. Producers A and B are not accumulating their production within the meaning of section 14. Producer B is therefore able, under section 7(4), to designate the switch assemblies as intermediate materials.

If Producers A and B were accumulating their production within the meaning of section 14, Producer B would be unable to designate the switch assemblies as intermediate materials, because the production of both producers would be considered to be the production of one producer.

Example 4: Single Producer and Successive Designations of Materials Subject to a Regional Value-Content Requirement as Intermediate Materials

Producer A, located in NAFTA country, produces Material X and uses Material X in the production of Good B. Material X qualifies as an originating material because it satisfies the applicable regional value-content requirement. Producer A designates Material A as an intermediate material.

Producer A uses Material X in the production of Material Y, which is also used in the production of Good B. Material Y is also subject to a regional value-content requirement. Under the proviso set out in section 7(4), Producer A cannot designate Material Y as an intermediate material, even if Material Y satisfies the applicable regional value-content requirement, because Material X was already designated by Producer A as an intermediate material.

Example 5: Single Producer and Multiple Designations of Materials as Intermediate Materials

Producer X, who is located in NAFTA country X, uses non-originating materials in the production of self-produced materials A, B, and C. None of the self-produced materials are used in the production of any of the other self-produced materials.

Producer X uses the self-produced materials in the production of Good O, which is exported to NAFTA country Y. Materials A, B and C qualify as originating materials because they satisfy the applicable regional value-content requirements.

Because none of the self-produced materials are used in the production of any of the other self-produced materials, then even though each self-produced material is subject to a regional value-content requirement, Producer X may, under section 7(4), designate all of the self-produced materials as intermediate materials. The proviso set out in section 7(4) only applies where self-produced materials are used in the production of other self-produced materials and both are subject to a regional value-content requirement.

Example 6: section 7(15)

The following are examples of accessories, spare parts or tools that are delivered with a good and form part of the good's standard accessories, spare parts or tools:

(a) consumables that must be replaced at regular intervals, such as dust collectors for an air-conditioning system,
(b) a carrying case for equipment,
(c) a dust cover for a machine,
(d) an operational manual for a vehicle,
(e) brackets to attach equipment to a wall,
(f) a bicycle tool kit or a car jack,
(g) a set of wrenches to change the bit on a chuck,
(h) a brush or other tool to clean out a machine, and
(i) electrical cords and power bars for use with electronic goods.

PART V
AUTOMOTIVE GOODS
SECTION 8. DEFINITIONS AND INTERPRETATION

For purposes of this Part,

"after-market parts" means goods that are not for use as original equipment in the production of light-duty vehicles or heavy-duty vehicles and that are

(a) goods provided for in a tariff provision listed in Schedule IV, or

(b) automotive component assemblies, automotive components, sub-components or listed materials;

"class of motor vehicles" means any one of the following categories of motor vehicles:

(a) motor vehicles provided for in any of subheading 8701.20, tariff items 8702.10.30 and 8702.90.30 (vehicles for the transport of 16 or more persons), subheadings 8704.10, 8704.22, 8704.23, 8704.32 and 8704.90 and headings 8705 and 8706,

(b) motor vehicles provided for in any of subheadings 8701.10 and 8701.30 through 8701.90,

(c) motor vehicles provided for in any of tariff items 8702.10.60 and 8702.90.60 (vehicles for the transport of 15 or fewer persons) and subheadings 8704.21 and 8704.31, and

(d) motor vehicles provided for in any of subheadings 8703.21 through 8703.90;

"complete motor vehicle assembly process" means the production of a motor vehicle from separate constituent parts, which parts include the following:

(a) a structural frame or unibody,

(b) body panels,

(c) an engine, a transmission and a drive train,

(d) brake components,

(e) steering and suspension components,

(f) seating and internal trim,

(g) bumpers and external trim,

(h) wheels, and

(i) electrical and lighting components;

"first prototype" means the first motor vehicle that

(a) is produced using tooling and processes intended for the production of motor vehicles to be offered for sale, and

(b) follows the complete motor vehicle assembly process in a manner not specifically designed for testing purposes;

"floor pan of a motor vehicle" means a component, comprising a single part or two or more parts joined together, with or without additional stiffening members, that forms the base of a motor vehicle, beginning at the firewall or bulkhead of the motor vehicle and ending

(a) where there is a luggage floor panel in the motor vehicle, at the place where that luggage floor panel begins, and

(b) where there is no luggage floor panel in the motor vehicle, at the place where the passenger compartment of the motor vehicle ends;

"heavy-duty automotive good" means a heavy-duty vehicle or a heavy-duty component;

"heavy-duty component" means an automotive component or automotive component assembly that is for use as original equipment in the production of a heavy-duty vehicle;

"marque" means a trade name used by a marketing division of a motor vehicle assembler that is separate from any other marketing division of that motor vehicle assembler;

"model line" means a group of motor vehicles having the same platform or model name;

"model name" means the word, group of words, letter, number or similar designation assigned to a motor vehicle by a marketing division of a motor vehicle assembler

(a) to differentiate the motor vehicle from other motor vehicles that use the same platform design,

(b) to associate the motor vehicle with other motor vehicles that use different platform designs, or

(c) to denote a platform design;

"new building" means a new construction to house a complete motor vehicle assembly process, where that construction includes the pouring or construction of a new foundation and floor, the erection of a new frame and roof, and the installation of new plumbing and electrical and other utilities;

"plant" means a building, or buildings in close proximity but not necessarily contiguous, machinery, apparatus and fixtures that are under the control of a producer and are used in the production of any of the following:

(a) light-duty vehicles and heavy-duty vehicles,

(b) goods of a tariff provision listed in Schedule IV, and

(c) automotive component assemblies, automotive components, sub-components and listed materials;

"platform" means the primary load-bearing structural assembly of a motor vehicle that determines the basic size of the motor vehicle, and is the structural base that supports the driveline and links the suspension components of the motor vehicle for various types of frames, such as the body-on-frame or space-frame, and monocoques;

"received in the territory of a NAFTA country" means, with respect to section 9(2), the location at which a traced material arrives in the territory of a NAFTA country and is documented for any customs purpose, which, in the case of a traced material imported into

(a) Canada,

(i) where the traced material is imported on a vessel, as defined in section 2 of the *Reporting of Imported Goods Regulations*, is the location at which the traced material is last unloaded from the vessel and reported, under section 12 of the *Customs Act*, to a customs office, including reported for transportation under bond by a conveyance other than that vessel, and

(ii) in any other case, is the location at which the traced material is reported, under section 12 of the *Customs Act*, to a customs office, including reported for transportation under bond,

(b) Mexico,

(i) where the traced material is imported on a vessel, the location at which the traced material is last unloaded from a vessel and reported for any customs purpose, and

(ii) in any other case, the location at which the traced material is reported for any customs purpose, and

(c) the United States, is the location at which the traced material is entered for any customs purpose, including entered for consumption, entered for warehouse or entered for transportation under bond, or admitted into a foreign trade zone;

"refit" means a closure of a plant for a period of at least three consecutive months that is for purposes of plant conversion or retooling;

"size category", with respect to a light-duty vehicle, means that the total of the interior volume for passengers and the interior volume for luggage is

(a) 85 cubic feet (2.38 m^3) or less,

(b) more than 85 cubic feet (2.38 m^3) but less than 100 cubic feet (2.80 m^3),

(c) 100 cubic feet (2.80 m^3) or more but not more than 110 cubic feet (3.08 m^3),

(d) more than 110 cubic feet (3.08 m^3) but less than 120 cubic feet (3.36 m^3), or

(e) 120 cubic feet (3.36 m^3) or more;

"traced material" means a material, produced outside the territories of the NAFTA countries, that is imported from outside the territories of the NAFTA countries and is, when imported, of a tariff provision listed in Schedule IV;

"underbody" means the floor pan of a motor vehicle.

SECTION 9. LIGHT-DUTY AUTOMOTIVE GOODS

VNM determined by tracing of certain non-originating materials

(1) For purposes of calculating the regional value content of a light-duty automotive good under the net cost method, the value of non-originating materials used by the producer in the production of the good shall be the sum of the values of the non-originating materials that are traced materials and are incorporated into the good.

Valuation of traced materials for VNM in the RVC

(2) Except as otherwise provided in subsections (3) and (6) through (8), the value of each of the traced materials that is incorporated into a good shall be

(a) where the producer imports the traced material from outside the territories of the NAFTA countries and has or takes title to it at the time of importation, the sum of

(i) the customs value of the traced material,

(ii) where not included in that customs value, any freight, insurance, packing and other costs that were incurred in transporting the traced material to the first place at which it was received in the territory of a NAFTA country, and

(iii) where not included in that customs value, the costs referred to in subsection (4);

(b) where the producer imports the traced material from outside the territories of the NAFTA countries and does not have or take title to it at the time of importation, the sum of

(i) the customs value of the traced material,

(ii) where not included in that customs value, any freight, insurance, packing and other costs that were incurred in transporting the traced material to the place at which it was when the producer takes title in the territory of a NAFTA country, and

(iii) where not included in that customs value, the costs referred to in subsection (4);

(c) where a person other than the producer imports the traced material from outside the territories of the NAFTA countries and that person has or takes title to the material at the time of importation, if the producer has a statement that

(i) is signed by the person from whom the producer acquired the traced material, whether in the form in which it was imported into the territory of a NAFTA country or incorporated into another material, and

(ii) states

(A) the customs value of the traced material,

(B) where not included in that customs value, any freight, insurance, packing and other costs that were incurred in transporting the traced material to the first place at which it was received in the territory of a NAFTA country, and

(C) where not included in that customs value, the costs referred to in subsection (4),

the sum of the customs value of the traced material, the freight, insurance, packing and other costs referred to in subparagraph (ii)(B) and the costs referred to in subparagraph (ii)(C);

(d) where a person other than the producer imports the traced material from outside the territories of the NAFTA countries and that person does not have or take title to the material at the time of importation, if the producer has a statement that

(i) is signed by the person from whom the producer acquired the traced material, whether in the form in which it was imported into the territory of a NAFTA country or incorporated into another material, and

(ii) states

(A) the customs value of the traced material,

(B) where not included in that customs value, any freight, insurance, packing and other costs that were incurred in transporting the traced material to the place at which it was located when the first person in the territory of a NAFTA country takes title, and

(C) where not included in that customs value, the costs referred to in subsection (4),

the sum of the customs value of the traced material, the freight, insurance, packing and other costs referred to in subparagraph (ii)(B) and the costs referred to in subparagraph (ii)(C);

(e) where a person other than the producer imports the traced material from outside the territories of the NAFTA countries and the producer acquires the traced material or a material that incorporates the traced material from a person in the territory of a NAFTA country who has title to it, if the producer has a statement that

(i) is signed by the person from whom the producer acquired the traced material or the material that incorporates it, and

(ii) states the value of the traced material or a material that incorporates the traced material, determined in accordance with subsection (5), with respect to a transaction that occurs after the customs value of the traced material was determined,

the value of the traced material or the material that incorporates the traced material, determined in accordance with subsection (5), with respect to the transaction referred to in that statement;

(f) where a person other than the producer imports the traced material from outside the territories of the NAFTA countries, and the producer acquires a material that incorporates that traced material and the acquired material was produced in the territory of a NAFTA country and is subject to a regional value-content requirement, if the producer has a statement that

(i) is signed by the person from whom the producer acquired that material, and

(ii) states that the acquired material is an originating material but does not state any value with respect to the traced material,

an amount equal to VM × (1 − RVCR)

where

VM is the value of the acquired material, determined in accordance with subsection (2), with respect to the transaction in which the producer acquired that material, and

RVCR is the regional value-content requirement for the acquired material, expressed as a decimal;

(g) where a person other than the producer imports the traced material from outside the territories of the NAFTA countries and the producer acquires a material that

(i) incorporates that traced material,

(ii) was produced in the territory of a NAFTA country, and

(iii) with respect to which an amount was determined in accordance with paragraph (f),

if the producer of the good has a statement signed by the person from whom the producer acquired that material that states that amount, the amount as determined in accordance with paragraph (f); and

(h) where a person other than the producer imports the traced material from outside the territories of the NAFTA countries and the producer does not have a statement described in any of paragraphs (c) through (g), the value of the traced material or any material that incorporates it, determined in accordance with subsection (5) with respect to the transaction in which the producer acquires the traced material or any material that incorporates it.

Customs administration may use Schedule VIII if customs value is not correctly determined

(3) For purposes of subsections (2) (a) through (d), where the customs administration of the NAFTA country into the territory of which the good is imported determines during the course of a verification of origin of the good that the customs value of the traced material referred to in those paragraphs was not correctly determined, it may, for purposes of determining whether the good is an originating good, require that the value of the material be determined in accordance with Schedule VIII with respect to the importation for which that customs value was determined and, where the costs referred to in subsection (4) are not included in that value, that those costs be added to that value.

Additional costs included in traced value if not already included in value

(4) The costs referred to in subsections (2) (a) through (d) and subsection (3) are the following:

(a) duties and taxes paid or payable with respect to the material in the territory of one or more of the NAFTA countries, other than duties and taxes that are waived, refunded, refundable or otherwise recoverable, including credit against duty or tax paid or payable; and

(b) customs brokerage fees, including the cost of in-house customs brokerage services, incurred with respect to the material in the territory of one or more of the NAFTA countries.

Value of traced material determined under Schedule VIII if value is not customs value

(5) For purposes of subsections (2)(e), (f) and (h) and subsections (6) and (7), the value of a material

(a) shall be the transaction value of the material, determined in accordance with section 2(1) of Schedule VIII with respect to the transaction referred to in that paragraph or subsection, or

(b) shall be determined in accordance with sections 6 through 11 of Schedule VIII, where, with respect to the transaction referred to in that paragraph or subsection, there is no transaction value for the material under section 2(2) of that Schedule, or the transaction value of the material is unacceptable under section 2(3) of that Schedule, and, where not included under paragraph (a) or (b), shall include taxes, other than duties paid on an importation of a material from a NAFTA country, paid or payable with respect to the material in the territory of one or more of the NAFTA countries, other than taxes that are waived, refunded, refundable or otherwise recoverable, including credit against tax paid or payable.

(6) Where it is determined, during the course of a verification of origin of a light-duty automotive good with respect to which the producer of that good has a statement referred to in subsection (2)(f), that the acquired material referred to in that statement is not an originating material, the value of the acquired material shall, for purposes of subsection (2), be determined in accordance with subsection (5) with respect to the transaction in which that producer acquired it.

Effect on value of traced material if value on a statement cannot be verified

(7) Where any person who has information with respect to a statement referred to in any of subsections (2)(c) through (h) does not allow a customs administration to verify that information during a verification of origin, the value of the material with respect to which that person did not allow the customs administration to verify the information may be determined by that customs administration in accordance with subsection (5) with respect to the transaction in which that person sells, or otherwise transfers to another person, that material or a material that incorporates that material.

Use of value of VNM as determined under section 12(3) for traced material incorporated into another material

(8) Where a traced material is incorporated into a material produced in the territory of a NAFTA country and that material is incorporated into a light-duty automotive good, the statement referred to in subsection (2)(c), (d) or (e) may state the value of non-originating materials, determined in accordance with section 12(3), with respect to the material that incorporates the traced material.

Interpretations and clarifications for provisions applicable to tracing rules for light-duty automotive goods

(9) For purposes of this section,

(a) where a producer, in accordance with section 7(4), designates as an intermediate material any self-produced material used in the production of a light-duty automotive good,

(i) the designation applies solely to the calculation of the net cost of that good, and

(ii) the value of a traced material that is incorporated into that good shall be determined as though the designation had not been made;

(b) the value of a material not listed in Schedule IV, when imported from outside the territories of the NAFTA countries,

(i) shall not be included in the value of non-originating materials that are used in the production of a light-duty automotive good, and

(ii) shall be included in calculating the net cost of a light-duty automotive good that incorporates that material;

(c) except as otherwise provided in section 12(6), this section does not apply with respect to after-market parts;

(d) the costs referred to in subsections (2)(a)(ii) and (b)(ii), subsections (2)(c)(ii)(B) and (d)(ii)(B) and subsections (4) and (5) shall be the costs referred to in those paragraphs that are recorded on the books of the producer of the light-duty automotive good; and

(e) for purposes of calculating the regional value content of a light-duty automotive good, the producer of that good may choose to treat any material used in the production of that good as a non-originating material, and the value of that material shall be determined in accordance with subsection (5) with respect to the transaction in which the producer acquired it.

Examples of application of tracing for light-duty automotive goods

(10) Each of the following examples is an "Example" as referred to in section 2(4).

Example 1

Nuts and bolts provided for in heading 7318 are imported from outside the territories of the NAFTA countries and are used in the territory of a NAFTA country in the production of a light-duty automotive good referred to in section 9(1). Heading 7318 is not listed in Schedule IV so the nuts and bolts are not traced materials.

Because the nuts and bolts are not traced materials the value, under section 9(1), of the nuts and bolts is not included in the value of non-originating materials used in the light-duty automotive good even though the nuts and bolts are imported from outside the territories of the NAFTA countries.

The value, under section 9(9)(b), of the nuts and bolts is included in the net cost of the light-duty automotive good for the purposes of calculating, under section 9(1), regional value content of the motor vehicle.

Example 2:

A rear view mirror provided for in subheading 7009.10 is imported from outside the territories of the NAFTA countries and is used in the territory of a NAFTA country as original equipment in the production of a light-duty vehicle.

Subheading 7009.10 is listed in Schedule IV. The rear view mirror is a traced material. For purposes of calculating, under section 9(1), regional value content of the light-duty vehicle, the value of the mirror is included in the value of non-originating materials in accordance with sections 9(2) through (9).

Example 3:

Glass provided for in heading 7005 is imported from outside the territories of the NAFTA countries and is used in the territory of NAFTA country A in the production of a rear view mirror. The rear view mirror is a non-originating good because it fails to satisfy the applicable change in tariff classification.

That rear view mirror is exported to NAFTA country B where it is used as original equipment in the production of a light-duty vehicle. Even though the rear view mirror is a non-originating material and is provided for in a tariff item listed in Schedule IV, it is not a traced material because it was not imported from outside the territories of the NAFTA countries.

For purposes of calculating, under section 9(1), the regional value content of a light-duty vehicle in which the rear view mirror is incorporated, the value of the rear view mirror, under section 9(1), is not included in the value of non-originating materials used in the production of the light-duty vehicle.

Even though the glass provided for in heading 7005 that was used in the production of the rear view mirror and incorporated into the light-duty vehicle was imported from outside the territories of the NAFTA countries, the glass is not a traced material because heading 7005 is not listed in Schedule IV. For purposes of calculating, under section 9(1), the regional value content of the light-duty vehicle that incorporates the glass, the value of the glass is not included in the value of non-originating materials used in the production of the light-duty vehicle. The value of the rear view mirror would be included in the net cost of the light-duty vehicle, but the value of the imported glass would not be separately included in the value of non-originating materials of the light-duty vehicle.

Example 4:

An electric motor provided for in subheading 8501.10 is imported from outside the territories of the NAFTA countries and is used in the territory of a NAFTA country in the production of a seat frame provided for in subheading 9401.90. The seat frame, with the electric motor attached, is sold to a producer of seats provided for in subheading 9401.20. The seat producer sells the seat to a producer of light-duty vehicles. The seat is to be used as original equipment in the production of that light-duty vehicle.

Subheadings 8501.10 and 9401.20 are listed in Schedule IV; subheading 9401.90 is not. The electric motor is a traced material; the seat is not a traced material because it was not imported from outside the territories of the NAFTA countries.

The seat is a light-duty automotive good referred to in section 9(1). For purposes of calculating, under section 9(1), the regional value content of the seat, the value of traced materials incorporated into it is included in the value of non-originating materials used in the production of the seat. The value of the electric motor is included in that value. (However, the value of the motor would not be included separately in the net cost of the seat because the value of the motor is included as part of the cost of the seat frame.)

For purposes of calculating, under section 9(1), the regional value content of the light-duty vehicle, the value of the electric motor is included in the value of non-originating materials used in the production of the light-duty vehicle, even if the seat is an originating material.

Example 5:

Cast blocks, cast heads and connecting rod assemblies provided for in heading 8409 are imported from outside the territories of the NAFTA countries by an engine producer, who has title to them at the time of importation, and are used by the producer in the territory of NAFTA country A in the production of an engine provided for in heading 8407. After the regional value content of the engine is calculated, the engine is an originating good. It is not a traced material because it was not imported from outside the territories of the NAFTA countries. The engine is exported to NAFTA country B, to be used as original equipment by a producer of light-duty vehicles.

For purposes of calculating, under section 9(1), the regional value content of the light-duty vehicle that incorporates the engine, because heading 8409 is listed in Schedule IV and because the cast blocks, cast heads and connecting rod assemblies were imported into the territory of a NAFTA country and are incorporated into the light-duty vehicle, the value of those materials, which are traced materials, is included in the value of non-originating materials used in the production of the light-duty vehicle, even though the engine is an originating material.

The producer of the light-duty vehicle did not import the traced materials. However, because that producer has a statement referred to in section 9(2)(c) and that statement states the value of non-originating materials of the traced materials in accordance with section 12(2), the producer of the light-duty vehicle may, in accordance with section 9(8), use that value as the value of non-originating materials of the light-duty vehicle with respect to that engine.

Example 6:

Aluminum ingots provided for in subheading 7601.10 and piston assemblies provided for in heading 8409 are imported from outside the territories of the NAFTA countries by an engine producer and are used by that producer in the territory of NAFTA country A in the production of an engine provided for in heading 8407. The aluminum ingots are used by the producer to produce an engine block; the piston assembly is then incorporated into the engine block and the producer designates, in accordance with section 7(4), a short block provided for in heading 8409 as an intermediate material. The engine that incorporates the short block is exported to NAFTA country B and used as original equipment in the production of a light-duty vehicle. The piston assemblies provided for in heading 8409 are traced materials; neither the engine nor the short block are traced materials because they were not imported from outside the territories of the NAFTA countries.

For purposes of calculating, under section 9(1), the regional value content of the engine, the value of the piston assemblies is included, under section 9(9)(a)(ii), in the value of non-originating materials, even if the intermediate material is an originating material. However, the value of the aluminum ingots is not included in the value of non-originating materials because subheading 7601.10 is not listed in Schedule IV. The value of the aluminum ingots does not need to be included separately in the net cost of the engine because that value is included in the value of the intermediate material, and the total cost of the intermediate material is included in the net cost of the engine.

For purposes of calculating, under section 9(1), the regional value content of the light-duty vehicle that incorporates the engine (and the piston assemblies), the value of the piston assemblies incorporated into that light-duty vehicle is included in the value of non-originating materials of the light-duty vehicle.

Example 7:

An engine provided for in heading 8407 is imported from outside the territories of the NAFTA countries. The producer of the engine, located in the country from which the engine is imported, used in the production of the engine a piston assembly provided for in heading 8409 that was produced in a NAFTA country and is an originating good. The engine is used in the territory of a NAFTA country as original equipment in the production of a light-duty vehicle. The engine is a traced material.

For purposes of calculating, under section 9(1), the regional value content of a light-duty vehicle that incorporates that engine, the value of the engine is included in the value of non-originating materials of that light-duty vehicle. The value of the piston assembly which was, before its exportation to outside the territories of the NAFTA countries, an originating good, shall not be deducted from the value of non-originating materials used in the production of the light-duty vehicle. Under section 18 (transshipment), the piston assembly is no longer considered to be an originating good because it was used in the production of a good outside the territories of the NAFTA countries.

Example 8:

A wholesaler, located in City A in the territory of a NAFTA country, imports from outside the territories of the NAFTA countries rubber hoses provided for in heading 4009, which is listed in Schedule IV. The wholesaler takes title to the goods at the wholesaler's place of business in City A. The customs value of the imported goods is $500. All freight, taxes and duties associated with the good to the wholesaler's place of business total $100; the cost of the freight, included in that $100, from the place where it was received in the territory of a NAFTA country to the location of the wholesaler's place of business in City A is $25. The wholesaler sells the rubber hoses for $650 to a producer of light-duty vehicles who uses the goods in the territory of a NAFTA country as original equipment in the production of a light-duty vehicle. The light-duty vehicle producer pays $50 to have the goods shipped from the location of the wholesaler's place of business in City A to the location at which the light-duty vehicle is produced.

The rubber hoses are traced materials and they are incorporated into a light-duty automotive good. For purposes of calculating, under section 9(1), the regional value content of the light-duty vehicle,

(1) if the wholesaler takes title to the goods before the first place at which they were received in the territory of a NAFTA country, then the value of non-originating materials, where the light-duty vehicle producer has a statement referred to in section 9(2)(c), would not include the cost of freight from the place where they were received in the territory of a NAFTA country to the location of the wholesaler's place of business: in this situation, the value of non-originating materials would be $575;

(2) if the producer has a statement referred to in section 9(2)(d) that states the customs value of the traced material and, where not included in that price, the cost of taxes, duties, fees and transporting the goods to the place where title is taken, the light-duty vehicle producer may use those values as the value of non-originating materials with respect to the goods: in this situation, the value of non-originating materials would be $600; or

(3) if the wholesaler is unwilling to provide the light-duty vehicle producer with such a statement, the value of non-originating materials with respect to the traced materials will be the value of the materials with respect to the transaction in which the producer acquired them, as provided for in section 9(2)(h), in this instance $650; the costs of transporting the goods from the location of the wholesaler's place of business to the location of the producer will be included in the net cost of the goods, but not in the value of non-originating materials.

Example 9:

A wholesaler, located in City A in the territory of a NAFTA country, imports from outside the territories of the NAFTA countries rubber hose provided for in heading 4009, which is listed in Schedule IV. The wholesaler sells the good to a producer located in the territory of the NAFTA country who uses the hose to produce a power steering hose assembly, also provided for in heading 4009. The power steering hose assembly is then sold to a producer of light-duty vehicles who uses that good in the production of a light-duty vehicle. The rubber hose is a traced material; the power steering hose assembly is not a traced material because it was not imported from outside the territories of the NAFTA countries.

The wholesaler who imported the rubber hose from outside the territories of the NAFTA countries has title to it at the time of importation. The customs value of the good is $3, including freight and insurance and all other costs incurred in transporting the good to the first place at which it was received in the territory of the NAFTA country. Duties and fees and all other costs referred to in section 9(4), paid by the wholesaler with respect to the good, total an additional $1. The wholesaler sells the good to the producer of the power steering hose assemblies for $5, not including freight to the location of that producer. The power steering hose producer pays $2 to have the good delivered to the location of production. The value of the power steering hose assembly sold to the light-duty vehicle producer is $10, including freight for delivery of the goods to the location of the light-duty vehicle producer.

For purposes of calculating, under section 9(1), the regional value content of the light-duty vehicle:

(1) if the motor vehicle producer has a statement referred to in section 9(2)(c) from the producer of the power steering hose assembly that states the customs value of the imported rubber hose incorporated in the power steering hose assembly, and the value of the duties, fees and other costs referred to in section 9(4), the producer may use those values as the value of non-originating materials with respect to that traced good: in this situation, that value would be the customs value of $3 and the cost of duties and fees of $1, provided that the wholesaler has provided the producer of the power steering hose assembly with the information regarding the customs value of the imported good and the other costs;

(2) if the light-duty vehicle producer has a statement from the producer of the power steering hose assembly that states the value of the imported hose, with respect to the transaction in which the power steering hose assembly producer acquires the imported hose from the wholesaler, the light-duty vehicle producer may include that value as the value of non-originating materials, in accordance with section 9(2)(e): in this situation, that value is $5; and the $2 cost of transporting the good from the location of the wholesaler to the location of the producer, because that cost is separately identified, would not be included in the value of non-originating materials of the light-duty vehicle;

(3) if the light-duty vehicle producer has a statement referred to in section 9(2)(f) signed by the producer of the power steering hose assembly, the light-duty vehicle producer may use the formula set out in section 9(2)(f)(ii) to calculate the value of non-originating materials with respect to that acquired material: in this situation, assuming the regional value-content requirement were 50 percent, the value of non-originating materials would be $5; and because the cost of transportation from the location of the producer of the power steering hose assembly to the location of the light-duty vehicle producer is included in the purchase price and not separately identified, it may not be deducted from the purchase price, because the formula referred to in section 9(2)(f)(ii) does not allow for the deduction of transportation costs that would otherwise not be non-originating; or

(4) if the light-duty vehicle producer does not have a statement referred to in any of sections 9(2)(c) through (g) from the producer of the power steering hose assembly, the light-duty vehicle producer includes in the value of non-originating materials of the vehicles the value, determined in accordance with section 9(2)(h), of the power steering hose assembly: in this situation, that amount would be $10, the cost to the producer of acquiring that material.

Example 10:

A producer of light-duty vehicles located in City C in the territory of a NAFTA country imports from outside the territories of the NAFTA countries rubber hose provided for in heading 4009, which is listed in Schedule IV, and uses that good as original equipment in the production of a light-duty vehicle.

The rubber hose arrives at City A in the NAFTA country, but the producer of the light-duty vehicle does not have title to the good; it is transported under bond to City B, and on its arrival in City B, the producer of the light-duty vehicle takes title to it and the good is received in the territory of a NAFTA country. The good is then transported to the location of the light-duty vehicle producer in City C.

The customs value of the imported good is $4, the transportation and other costs referred to in subparagraph 9(2)(b)(ii) to City A are $3 and to City B are $2, and the cost of duties, taxes and other fees referred to in section 9(4) is $1. The cost of transporting the good from City B to the location of the producer in City C is $1. The rubber hose is traced material.

For purposes of calculating, under section 9(1), the regional value content of the light-duty vehicle, the value, under section 9(2)(b), of non-originating materials of that vehicle is the customs value of the traced material and, where not included in that value, the cost of taxes, duties, fees and the cost of transporting the traced material to the place where title is taken. In this situation, the value of non-originating materials would be the customs value of the traced material, $4, the cost of duties taxes and other fees, $1, the cost of transporting the material to City A, $3, and the cost of transporting that material from City A to City B, $2, for a total of $10. The $1 cost of transporting the good from City B to the location of the producer in City C would not be included in the value of non-originating materials of the light-duty vehicle because a person of a NAFTA country has taken title to the traced material.

Example 11:

A radiator provided for in subheading 8708.91 is imported from outside the territories of the NAFTA countries by a producer of light-duty vehicles and is used in the territory of a NAFTA country as original equipment in the production of a light-duty vehicle.

The radiator is transported by ship from outside the territories of the NAFTA countries and arrives in the territory of the NAFTA country at City A. The radiator is not, however, unloaded at City A and although the radiator is physically present in the territory of the NAFTA country, it has not been received in the territory of a NAFTA country.

The ship sails in territorial waters from City A to City B and the radiator is unloaded there. The light-duty vehicle producer files, from City C in the same country, the entry for the radiator; the radiator enters the territory of the NAFTA country at City B.

Subheading 8708.91 is listed in Schedule IV. The radiator is a traced material.

For purposes of calculating, under section 9(1), the regional value content of the light-duty vehicle, the value of the radiator is included in the value of non-originating materials of the light-duty vehicle. The costs of any freight, insurance, packing and other costs incurred in transporting the radiator to City B are included in the value of non-originating materials of the light-duty vehicle, including the cost of transporting the radiator from City A to City B. The costs of any freight, insurance, packing and other costs that were incurred in transporting the radiator from City B to the location of the producer are not included in the value of non-originating materials of the light-duty vehicle.

SECTION 10. HEAVY-DUTY AUTOMOTIVE GOODS

Determining VNM for the calculation of the RVC for heavy-duty automotive goods

(1) Except as otherwise provided in subsections (3) through (8) and section 12(4), for purposes of calculating the regional value content of a heavy-duty automotive good under the net cost method, the value of non-originating materials used by the producer of the good in the production of the good shall be the sum of

(a) for each listed material that is a non-originating material, is a self-produced material and is used by the producer in the production of the good, at the choice of the producer, either

(i) the total cost that can be reasonably allocated to that listed material in accordance with Schedule VII, or

(ii) the sum of

(A) the customs value of each non-originating material imported by the producer and used in the production of the listed material, and, where not included in that customs value, the costs referred to in subsections (2) (c) through (f), and

(B) the value of each non-originating material that is not imported by the producer of the listed material and is used in the production of the listed material, determined in accordance with subsection (2) with respect to the transaction in which the producer of the listed material acquired it;

(b) for each listed material that is a non-originating material, is produced in the territory of a NAFTA country and is acquired and used by the producer in the production of the good, at the choice of the producer, either

(i) the value of that non-originating listed material, determined in accordance with subsection (2), with respect to the transaction in which the producer acquired the listed material, or

(ii) where the producer of the good has a statement described in clause (A) or (B) with respect to each material that is a non-originating material used in the production of that listed material, the sum of

(A) the customs value of each non-originating material imported by the producer of the listed material and used in the production of that listed material, and, where not included in that customs value, the costs referred to in subsections (2) (c) through (f), if the producer of the good has a statement signed by the producer of the listed material that states the customs value of that non-originating material and the costs referred to in subsections (2) (c) through (f) that the producer of the listed material incurred with respect to the non-originating material, and

(B) the value of each non-originating material that is not imported by the producer of the listed material, and is acquired and used in the production of the listed material, determined in accordance with subsection (2) with respect to the transaction in which the producer of the listed material acquired that non-originating material, if the producer of the good has a statement signed by the producer of the listed material that states the value of the acquired material, determined in accordance with subsection (2) with respect to the transaction in which the producer of the listed material acquired the non-originating material;

(c) for each listed material, automotive component assembly, automotive component or sub-component that is imported from outside the territories of the NAFTA countries, and is used by the producer in the production of the good,

(i) where it is imported by the producer, the customs value of that non-originating listed material, automotive component assembly, automotive component or sub-component, and, where not included in that customs value, the costs referred to in subsections (2) (c) through (f), and

(ii) where it is not imported by the producer, the value of that non-originating listed material, automotive component assembly, automotive component or sub-component, determined in accordance with subsection (2) with respect to the transaction in which the producer acquired it;

(d) for each automotive component assembly, automotive component or sub-component that is an originating material and is acquired and used by the producer in the production of the good, at the choice of the producer,

(i) the sum of

(A) the value of each non-originating listed material used in the production of the originating material, determined under paragraphs (a) and (b),

(B) the value of each non-originating material incorporated into the originating material, determined under paragraph (c),

(C) the value of each non-originating listed material used in the production of a material referred to in paragraph (e) that is used in the production of the originating material, determined under paragraphs (a) and (b), and

(D) where the value of a non-originating listed material referred to in clause (C), and used in the production of a non-originating automotive component assembly, automotive component or sub-component that is used in the production of the originating material, is not included under clause (C), the value of that automotive component assembly, automotive component or sub-component, determined under paragraph (e)(ii),

if the producer has a statement, signed by the person from whom the originating material was acquired, that states the sum of the values, as determined by the producer of the originating material under paragraphs (a), (b), (c) and (e) of each non-originating material referred to in any of clauses (A) through (D) that is incorporated into that originating material;

(ii) an amount equal to the number resulting from applying the following formula:

$$VM \times (1 - RVCR)$$

where

VM is the value of the acquired material, determined in accordance with subsection (2), with respect to the transaction in which the producer of the good acquired that material; and

RVCR is the regional value-content requirement for the acquired material, expressed as a decimal,

if the material is subject to a regional value-content requirement and the producer has a statement, signed by the person from whom the producer acquired that material, that states that the acquired material is an originating material but does not state the value of non-originating materials with respect to that acquired material; or

(iii) the value of that automotive component assembly, automotive component or sub-component determined in accordance with subsection (2) with respect to the transaction in which the producer acquired the material;

(e) for each automotive component assembly, automotive component or sub-component that is a non-originating material produced in the territory of a NAFTA country and that is acquired by the producer and used by the producer in the production of the good, at the choice of the producer, either

(i) the sum of the values of the non-originating materials incorporated into that non-originating material that is acquired by the producer, determined under paragraphs (a), (b), (c), (d) and (f), if the producer has a statement, signed by the person from whom the non-originating material was acquired, that states the sum of the values of the non-originating materials incorporated into that non-originating material, determined by the producer of the non-originating material in accordance with paragraphs (a), (b), (c), (d) and (f), or

(ii) the value of that non-originating automotive component assembly, automotive component or sub-component, determined in accordance with subsection (2) with respect to the transaction in which the producer acquired the material; and

(f) for each non-originating material that is not referred to in paragraph (a), (b), (c) or (e) and that is used by the producer in the production of the good,

(i) where it is imported by the producer, the customs value of that non-originating material, and, where not included in that customs value, the costs referred to in subsections (2) (c) through (f), and

(ii) where it is not imported by the producer, the value of that non-originating material, determined in accordance with subsection (2) with respect to the transaction in which the producer acquired the material.

Application of Schedule VIII to determine VNM; additional costs to be included

(2) For purposes of subsection (1)(a)(ii)(B), subsection (1)(b)(i), subsection (1)(b)(ii)(B), subsections (1)(c)(ii), (1)(d) (ii) and (iii), (1)(e)(ii) and subsection (1)(f)(ii), the value of a material

(a) shall be the transaction value of the material, determined in accordance with section 2(1) of Schedule VIII with respect to the transaction referred to in that clause, subparagraph or paragraph, or

(b) where, with respect to the transaction referred to in that clause, subparagraph, or paragraph, there is no transaction value for the material under section 2(2) of Schedule VIII or the transaction value of the material is unacceptable under section 2(3) of that Schedule, shall be determined in accordance with sections 6 through 11 of that Schedule,

and shall include the following costs where they are not included under paragraph (a) or (b):

(c) the costs of freight, insurance and packing, and all other costs incurred in transporting the material to the location of the producer,

(d) duties and taxes paid or payable with respect to the material in the territory of one or more of the NAFTA countries, other than duties and taxes that are waived, refunded, refundable or otherwise recoverable, including credit against duty or tax paid or payable;

(e) customs brokerage fees, including the cost of in-house customs brokerage and customs clearance services, incurred with respect to the material in the territory of one or more of the NAFTA countries, and

(f) the cost of waste and spoilage resulting from the use of the material in the production of the good, minus the value of any reusable scrap or by-product.

Customs administration determines customs value to be incorrect

(3) For purposes of subsections (1)(a)(ii)(A) and (b)(ii)(A) and subsections (1)(c)(i) and (1)(f)(i), where the customs administration of the NAFTA country into the territory of which the good is imported determines, during the course of a verification of origin of the good, that the customs value of an imported material referred to in those clauses was not correctly determined, it may, for the purposes of determining whether the good is an originating good, require that the value of the material be determined in accordance with Schedule VIII with respect to the importation for which that customs value was determined and, where the costs referred to in subsections (2) (c) through (f) are not included in that value, that those costs be added to the value of the material.

Option to use section 9 tracing rules in certain circumstances

(4) For purposes of calculating the regional value content of a heavy-duty component, where

(a) a heavy-duty component is produced in the same plant as an automotive component assembly or automotive component that is of the same heading or subheading as that heavy-duty component and is for use as original equipment in a light-duty vehicle, and

(b) it is not reasonable for the producer to know which of the production will constitute a heavy-duty component for use in heavy-duty vehicle,

the value of the non-originating materials used in the production of the heavy-duty component in that plant may, at the choice of the producer, be determined in the manner set out in section 9.

(5) For purposes of calculating the regional value content of a heavy-duty vehicle, where a producer of such a vehicle acquires, for use by that producer in the production of the vehicle, a heavy-duty component with respect to which the value of non-originating materials has been determined in accordance with subsection (4), the value of the non-originating materials used by the producer with respect to that heavy-duty component is the value of non-originating materials determined under that subsection.

(6) Where it is determined, during the course of a verification of origin of a heavy-duty automotive good with respect to which the producer of that good has a statement referred to in subsection (1)(d)(ii) that the acquired material referred to in that statement is not an originating material, the value of the acquired material shall, for purposes of subsection (1), be determined in accordance with subsection (2) with respect to the transaction in which that producer acquired it.

Effect on value of traced material if value on a statement cannot be verified

(7) Where any person who has information with respect to a statement referred to in subsection (1)(b)(ii), (d)(i) or (e)(i) does not allow a customs administration to verify that information during a verification of origin, the value of any material with respect to which that person did not allow the customs administration to verify the information may be determined by that customs administration in accordance with subsection (2) with respect to the transaction in which that person sells, or otherwise transfers to another person, that material or a material that incorporates that material.

Use of value of VNM as determined under section 12(3) for traced material incorporated into another material

(8) Where a heavy-duty component, sub-component or listed material is incorporated into a material produced in the territory of a NAFTA country and that material is incorporated into a heavy-duty automotive good, the statement referred to in subsection (1)(b)(ii), (d)(i) or (e)(i) may state the value of non-originating materials, determined in accordance with section 12(3), with respect to the material that incorporates the heavy-duty component, sub-component or listed material.

Interpretations and clarifications for provisions applicable to rules for determining VNM for heavy-duty automotive goods

(9) For purposes of this section,

(a) for purposes of calculating the regional value content of a heavy-duty automotive good, sub-component or listed material, a producer of such a good may, in accordance with section 7(4), designate as an intermediate material any self-produced material, other than a heavy-duty component or sub-component, that is used in the production of that good;

(b) except as otherwise provided in section 12(6), this section does not apply with respect to after-market parts;

(c) this section does not apply to a sub-component for purposes of calculating its regional value content before it is incorporated into a heavy-duty automotive good; and

(d) for purposes of calculating the regional value content of a heavy-duty automotive good, the producer of that good may choose to treat any material used in the production of that good as a non-originating material, and the value of that material shall be determined in accordance with subsection (2) with respect to the transaction in which the producer acquired it.

Examples of application of rules for determining VNM for heavy-duty automotive goods

(10) Each of the following examples is an "Example" as referred to in section 2(4).

Example 1:

A listed material is imported from outside the territories of the NAFTA countries.

A cast head, produced outside the territories of the NAFTA countries, is imported into the territory of a NAFTA country and used in that country in the production of an engine that will be used as original equipment in the production of a heavy-duty vehicle. No other non-originating materials are used in the production of the engine. The cast head is a listed material; the engine is an automotive component.

Situation 1: Use of the listed material in an automotive component

For purposes of calculating the regional value content of the engine, the value of listed materials imported from outside the territories of the NAFTA countries is included in the value of non-originating materials used in the production of the engine. Because the cast head was produced outside the territories of the NAFTA countries, its value, under section 10(1)(c), is included in the value of non-originating materials used in the production of the engine.

Situation 2: Use of an originating automotive component incorporating the listed material

The engine is an originating material acquired by the producer of the heavy-duty vehicle. For purposes of calculating the regional value content of the heavy-duty vehicle that incorporates that engine (and incorporates the cast head), the value of non-originating materials used in the production of the heavy-duty vehicle is determined under section 10(1)(d) with respect to that engine. The producer may choose to include in the value of non-originating materials of the heavy-duty vehicle

(a) the value, determined under section 10(1)(d)(i), of the non-originating materials that are incorporated into the engine, which is the value, determined under sections 10(1) (a) through (c) and paragraph (e)(ii), of the non-originating materials;

(b) the value, determined under section 10(1)(d)(ii), which is an amount equal to the amount determined under section 10(1)(d)(iii) multiplied by the regional value-content requirement, expressed as a decimal, for the engine; or

(c) the value, determined under section 10(1)(d)(iii), of the engine.

The heavy-duty vehicle producer may only choose the first option if that producer has a statement, referred to in section 10(1)(d)(i), from the person from whom the engine was acquired. In this situation, the value, determined under section 10(1)(c), of the cast head, is included in the value of non-originating materials of the heavy-duty vehicle, with respect to the engine that is used in the production of the heavy-duty vehicle.

The heavy-duty vehicle producer may only choose the second option if that producer has a statement, referred to in section 10(1)(d)(ii), from the person from whom the engine was acquired. In this situation, because of the application of the equation, the value of the cast head will be included in the amount determined under section 10(1)(d)(ii) and is, consequently, included in the value of non-originating materials of the heavy-duty vehicle.

Situation 3: Use of a non-originating automotive component incorporating the listed material

The engine is a non-originating material acquired by the producer of the heavy-duty vehicle. For purposes of calculating the regional value content of the heavy-duty vehicle that incorporates that engine (and incorporates the cast head), the value of non-originating materials used in the production of the heavy-duty vehicle is determined under section 10(1)(e) with respect to that engine. The producer of the heavy-duty vehicle may choose to include in the value of non-originating materials either

(a) the value, as determined under section 10(1)(e)(i), of the non-originating materials that are incorporated into the engine, which is the value of the non-originating materials as determined under sections 10(1) (a) through (d) and (f), or

(b) the value of the engine, determined under section 10(1)(e)(ii).

The heavy-duty vehicle producer may only choose the first option if that producer has a statement, referred to in section 10(1)(e)(i), from the person from whom the engine was acquired. In this situation, the value of the cast head, as determined under section 10(1)(c), is included in the value of non-originating materials used in the production of the heavy-duty vehicle, with respect to the engine that is used in the production of the heavy-duty vehicle.

Example 2:

A material is imported from outside the territories of the NAFTA countries.

A rocker arm assembly, produced outside the territories of the NAFTA countries, is imported into the territory of a NAFTA country and used in that country in the production of an engine that will be used as original equipment in the production of a heavy-duty vehicle. No other non-originating materials are used in the production of the engine. The rocker arm assembly is neither a listed material nor a sub-component; the engine is an automotive component.

Situation 1: Use of the material in an automotive component

For purposes of calculating the regional value content of the engine, the value of non-originating materials that are not listed materials is included in the value of non-originating materials used in the production of the engine. Because the rocker arm assembly was produced outside the territories of the NAFTA countries, it is a non-originating material and its value, under section 10(1)(f), is included in the value of non-originating materials used in the production of the engine.

Situation 2: Use of an originating automotive component incorporating the material

The engine is an originating material acquired by the producer of the heavy-duty vehicle. For purposes of calculating the regional value content of the heavy-duty vehicle that incorporates that engine (and incorporates the rocker arm assembly), the value of non-originating materials used in the production of the heavy-duty vehicle is determined under section 10(1)(d) with respect to that engine. The producer may choose to include in the value of non-originating materials of the heavy-duty vehicle

(a) the value, determined under section 10(1)(d)(i), of the non-originating materials that are incorporated into the engine, which is the value, determined under sections 10(1) (a) through (c) and paragraph (e)(ii), of the non-originating materials;

(b) the value, determined under section 10(1)(d)(ii), which is an amount equal to the amount determined under section 10(1)(d)(iii) multiplied by the regional value-content requirement, expressed as a decimal, for the engine; or

(c) the value, determined under section 10(1)(d)(iii), of the engine.

The heavy-duty vehicle producer may only choose the first option if that producer has a statement, referred to in section 10(1)(d)(i), from the person from whom the engine was acquired. In this situation, the value of the rocker arm assembly, as determined under section 10(1)(f), is not included in the value of non-originating materials of the heavy-duty vehicle, with respect to the engine that is used in the production of the heavy-duty vehicle.

The heavy-duty vehicle producer may only choose the second option if that producer has a statement, referred to in section 10(1)(d)(ii), from the person from whom the engine was acquired. In this situation, because of the application of the equation, the value of the rocker arm assembly will be included in the amount determined under section 10(1)(d)(ii) and will, consequently, be included in the value of non-originating materials used in the production of the heavy-duty vehicle.

Situation 3: Use of a non-originating automotive component incorporating the material

The engine is a non-originating material acquired by the producer of the heavy-duty vehicle. For purposes of calculating the regional value content of the heavy-duty vehicle that incorporates that engine (and incorporates the rocker arm assembly), the value of non-originating materials used in the production of the heavy-duty vehicle is determined under section 10(1)(e) with respect to that engine. The producer of the heavy-duty vehicle may choose to include in the value of non-originating materials either

(a) the value, as determined under section 10(1)(e)(i), of the non-originating materials that are incorporated into the engine, which is the value of the non-originating materials as determined under sections 10(1)(a) through (d) and (f), or

(b) the value of the engine, determined under section 10(1)(e)(ii).

The heavy-duty vehicle producer may only choose the first option if that producer has a statement, referred to in section 10(1)(e)(i), from the person from whom the engine was acquired. In this situation, the value of the rocker arm assembly, as determined under section 10(1)(f), is included in the value of non-originating materials used in the production of the heavy-duty vehicle, with respect to the engine that is used in the production of the heavy-duty vehicle.

Situation 4: Use of the material in a self-produced automotive component

If the engine is a self-produced material rather than an acquired material, the heavy-duty vehicle producer is using the rocker arm as-

sembly in the production of the heavy-duty vehicle rather than in the production of the engine, because, under section 7(4), the engine cannot be designated as an intermediate material. For purposes of calculating the regional value content of the heavy-duty vehicle, the value, under section 10(1)(f), of the rocker arm assembly is included in the value of non-originating materials used in the production of the heavy-duty vehicle.

Example 3:

An automotive component is imported from outside the territories of the NAFTA countries.

A transmission, produced outside the territories of the NAFTA countries, is imported into the territory of a NAFTA country and used in that country as original equipment in the production of a heavy-duty vehicle. The transmission is an automotive component.

Situation: Use of the automotive component

For purposes of calculating the regional value content of the heavy-duty vehicle in which the transmission is used, the value of the transmission is included in the value of the non-originating materials under section 10(1)(c), regardless of whether the producer imported the transmission or acquired it from someone else in the territory of a NAFTA country.

Example 4:

An automotive component is imported from outside the territories of the NAFTA countries.

A transmission, produced outside the territories of the NAFTA countries, is imported into the territory of a NAFTA country and combined with an engine to produce an engine-transmission assembly that will be used as original equipment in the production of a heavy-duty vehicle. The transmission is an automotive component; the engine-transmission assembly is an automotive component assembly.

Situation: Use of the automotive component assembly

The automotive component assembly is acquired by a producer who uses it in the production of a heavy-duty vehicle. If the automotive component assembly that incorporates the imported transmission is an originating material, its value is determined, at the choice of the producer, under any of sections 10(1)(d) (i), (ii) or (iii). (See example 1 for more detailed explanations of these provisions.) If the automotive component assembly that incorporates the imported transmission is a non-originating material, its value is determined, at the choice of the producer, under sections 10(1)(e) (i) or (ii). (See example 1 for more detailed explanations of these provisions.)

Regardless of whether the automotive component assembly is an originating material or a non-originating material, the value of the automotive component that was imported from outside the territories of the NAFTA countries is included in the value of non-originating materials used in the production of the heavy-duty vehicle. The transmission is a non-originating material, and, for purposes of calculating the regional value content of an automotive component assembly or heavy-duty vehicle that incorporates that transmission, the value of the transmission is included in the value of non-originating materials used in the production of the automotive component assembly or heavy-duty vehicle that incorporates it.

Example 5:

A material is imported from outside the territories of the NAFTA countries.

An aluminum ingot, produced outside the territories of the NAFTA countries, is imported into the territory of a NAFTA country and used in that country in the production of cast block that will be used in an engine that will be used as original equipment in the production of a heavy-duty vehicle. The aluminum ingot is not a listed material; the cast block is a listed material; the engine is an automotive component.

Situation 1: Use of the material in an intermediate material that is a listed material

The engine producer designates the cast block as an intermediate material under section 7(4). For purposes of determining the origin of that cast block, because the aluminum ingot is classified under a different heading than the cast block, the cast block satisfies the applicable change in tariff classification and is an originating material.

Situation 2: Use of the listed material incorporating the material

For purposes of calculating the regional value content of the engine that incorporates that cast block (and thus incorporates the aluminum ingot), the value of non-originating materials is determined under section 10(1). Because none of sections 10(1) (a) through (f) require that a listed material that is an originating material be included in the value of non-originating materials used in the production of a good, the value of the cast block is not included in the value of non-originating materials used in the production of the engine or in the value of non-originating materials used in the production of an automotive component assembly or heavy-duty vehicle that incorporates the engine.

Because section 10(1)(d) does not refer to a listed material that is an originating material, the value of the non-originating aluminum ingot used in the production of the originating cast block is not included in the value of non-originating materials used in the production of any good or material that incorporates the originating cast block.

Example 6:

A non-originating listed material is used to produce a sub-component that is used to produce another sub-component.

A crankshaft, produced in the territory of NAFTA country A from a forging imported from outside the territories of the NAFTA countries, is a non-originating material. The crankshaft is sold to another producer, located in the same country, who uses it to produce an originating block assembly. That block assembly is sold to another producer, also located in the same country, who uses it to produce a finished block. The finished block is sold to a producer of engines, who is located in NAFTA country B, for use in the production of a heavy-duty vehicle. The crankshaft is a listed material; the block assembly is a sub-component, as is the finished block.

Situation 1: Calculating the regional value content of the finished block

A sub-component is not a heavy-duty automotive good. As referred to in section 10(9)(c), for purposes of calculating the regional value content of the sub-component before it is incorporated into a heavy-duty automotive good, such as when the sub-component is exported from the territory of one NAFTA country to the territory of another NAFTA country, the value of non-originating materials of the sub-component includes only the value of non-originating materials used in the production of that sub-component. Because the block assembly is an originating material, its value is not included in the value of non-originating materials of the finished block, nor is the value of the non-originating crankshaft included in the value of non-originating materials used in the production of the finished block because the crankshaft was used in the production of the block assembly and was not used in the production of the finished block.

Situation 2: Calculating the regional value content of the component that incorporates the finished block

For purposes of calculating the regional value content of the heavy-duty vehicle that incorporates a sub-component, the value of non-originating materials used in the production of the sub-component is determined under section 10(1)(d) or (e) with respect to that sub-component. In this situation, the value, under section 10(1)(b), of the non-originating crankshaft is included in the value of non-originating materials used in the production of the engine. (See examples 1 and 2 for more detailed explanations of sections 10(1)(d) and (e).)

Example 7:

A non-listed material is imported from outside the territories of the NAFTA countries and is used in the production of another non-listed material.

A bumper part, produced outside the territories of the NAFTA countries, is imported into the territory of a NAFTA country and is used in the production of a bumper. The bumper is used in the territory of a NAFTA country as original equipment in the production of a heavy-duty vehicle. Neither a bumper part nor a bumper is a listed material, sub-component, automotive component or automotive component assembly.

Situation 1: The non-listed material is an originating material

The bumper is an originating material. For purposes of calculating the regional value content of the heavy-duty vehicle, neither the value of the imported bumper part nor the value of the bumper is included in the value of the non-originating materials.

Situation 2: The non-listed material is a non-originating material

The bumper is a non-originating material. For purposes of calculating the regional value content of the heavy-duty vehicle, the value of non-originating materials used in the production of the heavy-duty vehicle is determined under section 10(1)(f) with respect to the bumper. In this situation, the value of the imported bumper is included in the value of non-originating materials of the heavy-duty vehicle. Because a bumper is not a listed material, the producer of the heavy-duty vehicle does not have the option, under section 10(1)(b)(ii), to include only the value of the imported bumper part in the value of non-originating materials used in the production of the heavy-duty vehicle.

Example 8:

Situation: Transhipment of a listed material

A producer, located in the territory of a NAFTA country, produces, in that country, a cast head that is an originating good. The producer exports the cast head to outside the territories of the NAFTA territories, where valves, springs, valve lifters, a camshaft and gears are added to it to create a cast head assembly. An engine producer, located in the territory of a NAFTA country, imports the cast head assembly into that country and uses it in the production of an engine that will be used as original equipment in the production of a heavy-duty vehicle. A cast head is a listed material; a cast head assembly is a sub-component.

For purposes of calculating the regional value content of the engine, the value of the imported cast head assembly is included in the value of non-originating materials under section 10(1)(c). The value of the cast head cannot be deducted from the value determined under section 10(1)(c). Although the cast head was once an originating good, under section 18 when further production was performed with respect to the cast head outside the territories of the NAFTA countries, it was no longer an originating good.

Example 9:

A material is imported from outside the territories of the NAFTA countries and a heavy-duty vehicle producer self-produces a non-originating listed material.

A material, produced outside the territories of the NAFTA countries, is imported into the territory of a NAFTA country and used in that country in the production of a water pump that will be used as original equipment by the same producer in the production of a heavy-duty vehicle. Although the producer, under section 7(4), designates the water pump as an intermediate material it is a non-originating material because it fails to satisfy the regional value-content requirement. A water pump is a listed material.

For purposes of calculating the regional value content of the heavy-duty vehicle, the value of non-originating materials includes, at the choice of the producer, either the total cost, determined under section 10(1)(a)(i), of the water pump or the value, determined under section 10(1)(a)(ii)(A), of the material imported from outside the territories of the NAFTA countries.

Example 10:

Situation: A material is acquired and used to produce a non-originating listed material

A material, produced outside the territories of the NAFTA countries, is acquired in the territory of a NAFTA country and used in that country in the production of a water pump that will be used as original equipment in the production of a heavy-duty vehicle. The producer of the water pump and the producer of the heavy-duty vehicle are separate, unrelated producers, located in the same country. A water pump is a listed material. The water pump is a non-originating material because it fails to satisfy the regional value-content requirement.

For purposes of calculating the regional value content of the heavy-duty vehicle, the value of non-originating materials includes, at the choice of the producer, either the value, determined under section 10(1)(b)(i) of the water pump, or, if the producer has a statement referred to in section 10(1)(b)(ii), the value on that statement, which is, in this situation, the value, determined under clause 10(1)(b)(ii)(B), of the material imported from outside the territories of the NAFTA countries.

If the statement states the value of non-originating materials of the listed material in accordance with section 12(3), the producer of the heavy-duty vehicle may, under section 10(8), use that value, under section 10(1)(b)(ii), as the value of non-originating materials used in the production of the heavy-duty vehicle with respect to that water pump.

SECTION 11. MOTOR VEHICLE AVERAGING

NC and VNM for motor vehicles may be averaged over producer's fiscal year

(1) For purposes of calculating the regional value content of light-duty vehicles or heavy-duty vehicles, the producer of those motor vehicles may choose that

(a) the sum of the net costs incurred and the sum of the values of non-originating materials used by the producer be calculated over the producer's fiscal year with respect to the motor vehicles that are in any one of the categories set out in subsection (5) that is chosen by the producer; and

(b) the sums referred to in paragraph (a) be used in the calculation referred to in section 6(3) as the net cost and the value of non-originating materials, respectively.

Information required when producer chooses to average for motor vehicles

(2) A choice made under subsection (1) shall

(a) state the category chosen by the producer, and

(i) where the category referred to in subsection (5)(a) is chosen, state the model line, model name, class of motor vehicle and tariff classification of the motor vehicles in that category, and the location of the plant at which the motor vehicles are produced,

(ii) where the category referred to in subsection (5)(b) is chosen, state the model name, class of motor vehicle and tariff classification of the motor vehicles in that category, and the location of the plant at which the motor vehicles are produced, and

(iii) where the category referred to in subsection (5)(c) is chosen, state the model line, model name, class of motor vehicle and tariff classification of the motor vehicles in that category, and the locations of the plants at which the motor vehicles are produced;

(b) state the basis of the calculation described in subsection (9);

(c) state the producer's name and address;

(d) state the period with respect to which the choice is made, including the starting and ending dates;

(e) state the estimated regional value content of motor vehicles in the category on the basis stated under paragraph (b);

(f) be dated and signed by an authorized officer of the producer; and

(g) be filed with the customs administration of each NAFTA country to which vehicles in that category are to be exported during the period covered by the choice, at least 10 days before the first day of the producer's fiscal year, or such shorter period as that customs administration may accept.

Averaging period

(3) Where the fiscal year of a producer begins after the date of the entry into force of the Agreement but before one year after that date, the producer may choose that the calculation of regional value content referred to in subsection (1) be made under that subsection over the period beginning on the date of the entry into force of the Agreement and ending at the end of that fiscal year, in which case the choice shall be filed with the customs administration of each NAFTA country to which vehicles are to be exported during the period covered by the choice not later than 10 days after the entry into force of the Agreement, or such longer period as that customs administration may accept.

(4) Where the fiscal year of a producer begins on the date of the entry into force of the Agreement, the producer may make the choice referred to in subsection (1) not later than 10 days after the entry into force of the Agreement, or such longer period as the customs administration referred to in subsection (2)(g) may accept.

Categories of motor vehicles for averaging

(5) The categories referred to in subsection (1) are the following:

(a) the same model line of motor vehicles in the same class of motor vehicles produced in the same plant in the territory of a NAFTA country;

(b) the same class of motor vehicles produced in the same plant in the territory of a NAFTA country; and

(c) the same model line of motor vehicles produced in the territory of a NAFTA country.

(6) Where applicable, a producer may choose that the calculation of the regional value content of motor vehicles referred to in Schedule V.1 be made in accordance with that schedule.

Timely filing of choice to average

(7) Subject to section 5(4) of Schedule V.1, the choice referred to in subsection (6) shall be filed with the customs administration of the NAFTA country to which vehicles referred to in that schedule are to be exported, at least 10 days before the first day of the producer's fiscal year with respect to which that choice is to apply or such shorter period as the customs administration may accept.

Choice to average cannot be rescinded

(8) A choice filed for the period referred to in subsection (1) or (3) may not be

(a) rescinded; or

(b) modified with respect to the category or basis of calculation.

(9) For purposes of this section, where a producer files a choice under subsection (1), (3) or (4), including a choice referred to in section 13(9), the net cost incurred and the values of non-originating materials used by the producer, with respect to

(a) all motor vehicles that fall within the category chosen by the producer and that are produced during the fiscal year or, in the case of a choice filed under subsection (3), during the period with respect to which the choice is made, or

(b) those motor vehicles to be exported to the territory of one or more of the NAFTA countries that fall within the category chosen by the producer and that are produced during the fiscal year or, in the case of a choice filed under subsection (3), during the period with respect to which the choice is made,

shall be included in the calculation of the regional value content under any of the categories set out in subsection (5).

Year-end analysis required if averaging based on estimated costs; obligation to notify of change in status

(10) Where the producer of a motor vehicle has calculated the regional value content of the motor vehicle on the basis of estimated costs, including standard costs, budgeted forecasts or other similar estimating procedures, before or during the producer's fiscal year, the producer shall conduct an analysis at the end of the producer's fiscal year of the actual costs incurred over the period with respect to the production of the motor vehicle, and, if the motor vehicle does not satisfy the regional value content requirement on the basis of the actual costs, immediately inform any person to whom the producer has provided a Certificate of Origin for the motor vehicle, or a written statement that the motor vehicle is an originating good, that the motor vehicle is a non-originating good.

SECTION 12. AUTOMOTIVE PARTS AVERAGING

NC and VNM for automotive parts may be averaged to determine RVC of parts

(1) The regional value content of any or all goods that are of the same tariff provision listed in Schedule IV, or any or all goods that are automotive component assemblies, automotive components, sub-components or listed materials, and are produced in the same plant, may, where the producer of those goods elects to do so, be calculated by

(a) calculating the sum of the net costs incurred and the sum of the values of non-originating materials used by the producer of the goods over the period set out in subsection (5) that is chosen by the producer with respect to any or all of those goods in any one of the categories set out in subsection (4) that is chosen by the producer; and

(b) using the sums referred to in paragraph (a) in the calculation referred to in section 6(3) as the net cost and the value of non-originating materials, respectively.

(2) The calculation of the regional value content made under subsection (1) shall apply with respect to each unit of the goods in the category set out in subsection (4) that is chosen by the producer and produced during the period chosen by the producer under subsection (5).

VNM for each unit in a category of goods for which averaging used

(3) The value of non-originating materials of each unit of the goods

(a) in the category set out in subsection (4) chosen by the producer, and

(b) produced during the period chosen by the producer under subsection (5),

shall be the sum of the values of non-originating materials referred to in subsection (1)(a) divided by the number of units of the goods in that category and produced during that period.

Categories of automotive parts for averaging

(4) The categories referred to in subsection (1)(a) are the following:

(a) original equipment for use in the production of lightduty vehicles;

(b) original equipment for use in the production of heavy-duty vehicles;

(c) after-market parts;

(d) any combination of goods referred to in paragraphs (a) through (c);

(e) goods that are in a category set out in any of paragraphs (a) through (d) and are sold to one or more motor vehicle producers; and

(f) goods that are in a category set out in any of paragraphs (a) through (e) and are exported to the territory of one or more of the NAFTA countries.

Periods for averaging RVC for automotive parts

(5) The period referred to in subsection (1)(a) is,

(a) with respect to goods referred to in subsection (4)(a), (b) or (d), or subsection (4)(e) or (f) where the goods in that category are in a category referred to in subsection (4)(a) or (b), any month, any consecutive three month period or the fiscal year of the motor vehicle producer to whom those goods are sold; and

(b) with respect to goods referred to in subsection (4)(c), or subsection (4)(e) or (f) where the goods in that category are in a category referred to in subsection (4)(c), any month, any consecutive three month period, the fiscal year of that producer or the fiscal year of the motor vehicle producer to whom those goods are sold.

Applicable method for averaging under different categories

(6) Where a producer chooses that the regional value content of goods be calculated in accordance with subsection (1) and the goods are in any of the categories set out in subsections (4)(d) through (f), the value of non-originating materials

(a) shall be determined in the manner set out in section 9, where any of those goods are light-duty automotive goods;

(b) shall be determined in the manner set out in section 10, where any of those goods are heavy-duty automotive goods but none of the goods are light-duty automotive goods; and

(c) shall be determined in the manner set out in section 7, where none of those goods are light-duty automotive goods or heavy-duty automotive goods.

Year-end analysis required if averaging based on estimated costs; obligation to notify of change in status

(7) Where the producer of a good has calculated the regional value content of the good on the basis of estimated costs, including standard costs, budgeted forecasts or other similar estimating procedures, before or during the period chosen under subsection (1), the producer shall conduct an analysis, at the end of the producer's fiscal year following the end of that period, of the actual costs incurred over the period with respect to the production of the good and, if the good does not satisfy the regional value content requirement on the basis of the actual costs during that period, immediately inform any person to whom the producer has provided a Certificate of Origin for the good, or a written statement that the good is an originating good, that the good is a non-originating good.

SECTION 13. SPECIAL REGIONAL VALUE-CONTENT REQUIREMENTS

Changes in regional value content level for automotive goods

(1) Notwithstanding the regional value-content requirement set out in Schedule I, and except as otherwise provided in subsection (2), the regional value-content requirement for a good referred to in paragraph (a) or (b) is as follows:

(a) for the fiscal year of a producer that begins on the day closest to January 1, 1998 and for the three following fiscal years of that producer, not less than 56 percent, and for the fiscal year of a producer that begins on the day closest to January 1, 2002 and thereafter, not less than 62.5 percent, in the case of

(i) a light-duty vehicle, and

(ii) a good provided for in any of headings 8407 and 8408 and subheading 8708.40, that is for use in a light-duty vehicle; and

(b) for the fiscal year of a producer that begins on the day closest to January 1, 1998 and for the three following fiscal years of that producer, not less than 55 percent, and for the fiscal year of a producer that begins on the day closest to January 1, 2002 and thereafter, not less than 60 percent, in the case of

(i) a heavy-duty vehicle,

(ii) a good provided for in any of headings 8407 and 8408 and subheading 8708.40 that is for use in a heavy-duty vehicle, and

(iii) except in the case of a good referred to in paragraph (a)(ii) or provided for in any of subheadings 8482.10 through 8482.80, 8483.20 and 8483.30, a good of a tariff provision listed in Schedule IV that is subject to a regional value-content requirement and is for use in a light-duty vehicle or a heavy-duty vehicle.

Regional value content level for motor vehicles produced in a new plant or in a retrofit plant

(2) Notwithstanding the regional value-content requirement set out in Schedule I, the regional value-content requirement for a light-duty vehicle or a heavy-duty vehicle that is produced in a plant is as follows:

(a) not less than 50 percent for five years after the date on which the first prototype of the motor vehicle is produced in the plant by a motor vehicle assembler, if

(i) the motor vehicle is of a class, marque or, except in the case of a heavy-duty vehicle, size category and type of underbody, that was not previously produced by the motor vehicle assembler in the territory of any of the NAFTA countries,

(ii) the plant consists of, or includes, a new building in which the motor vehicle is assembled, and

(iii) the value of machinery that was never previously used for production, and that is used in the new building or buildings for the purposes of the complete motor vehicle assembly process with respect to that motor vehicle, is at least 90 percent of the value of all machinery used for purposes of that process; and

(b) not less than 50 percent for two years after the date on which the first prototype of the motor vehicle is produced in the plant by a motor vehicle assembler following a refit of that plant, if the motor vehicle is of a class, marque or, except in the case of a heavy-duty vehicle, size category and type of underbody, that was not assembled by the motor vehicle assembler in the plant before the refit.

Value of machinery in a new plant

(3) For purposes of subsection (2)(a)(iii), the value of machinery shall be

(a) where the machinery was acquired by the producer of the motor vehicle from another person, the cost of that machinery that is recorded on the books of the producer;

(b) where the machinery was used previously by the producer of the motor vehicle in the production of another good, the cost of the machinery that is recorded on the books of the producer minus accumulated depreciation of that machinery that is recorded on those books; and

(c) where the machinery was produced by the producer of the good, the total cost incurred with respect to that machinery, calculated on the basis of the costs that are recorded on the books of the producer.

Averaging period for calculation of RVC for vehicles of new plant or refit plant

(4) For purposes of calculating the regional value content of a motor vehicle referred to in subsection (2) that is in any one of the categories set out in subsection (7) that is chosen by the producer, the producer may file with the customs administration of the NAFTA country into the territory of which vehicles in that category are to be imported an election to calculate the regional value content of such vehicles by

(a) calculating the sum of the net costs incurred and the sum of the values of non-originating materials used by the producer with respect to all of such motor vehicles in the category chosen over

(i) the period beginning on the day on which the first prototype of the motor vehicle is produced and ending on the last day of the producer's first fiscal year that begins after the beginning of the period,

(ii) a fiscal year of the producer that starts after the period referred to in subparagraph (i) and ends on or before the end of the period referred to in subsection (2) (a) or (b), or

(iii) the period beginning on the first day of the producer's fiscal year that begins before the end of the period referred to in subsection (2) (a) or (b) and ending at the end of that period, and

(b) using the sums referred to in paragraph (a) in the calculation referred to in section 6(3) as the net cost and the value of non-originating materials, respectively.

Information required on document filed when choosing to average; timely filing

(5) A choice made under subsection (4) shall

(a) state the category chosen by the producer and

(i) where the category referred to in subsection (7)(a) is chosen, the model name, model line, class of motor vehicle and tariff classification of the motor vehicles in that category, and the location of the plant at which the motor vehicles are produced, and

(ii) where the category referred to in subsection (7)(b) is chosen, state the model name, class of motor vehicle and tariff classification of the motor vehicles in that category, and the plant location at which the motor vehicles are produced;

(b) state the basis of the calculation described in subsection (8);

(c) state the producer's name and address;

(d) state the period with respect to which the choice is made, including the starting and ending dates;

(e) state the estimated regional value content of motor vehicles in the category on the basis stated under paragraph (b);

(f) state whether the choice is with respect to a motor vehicle referred to in subsection (2) (a) or (b);

(g) be dated and signed by an authorized officer of the producer; and

(h) be filed with the customs administration of each NAFTA country to which vehicles in that category are to be exported during the period covered by the choice, at least 10 days before the first day of the producer's fiscal year, or such shorter period as that customs administration may accept.

No rescission or modification permitted

(6) A choice filed for the period referred to in subsection (4) may not be

(a) rescinded; or

(b) modified with respect to the category or basis of calculation.

Categories of motor vehicles for averaging

(7) The categories referred to in subsection (4) are the following:

(a) the same model line of motor vehicles in the same class of motor vehicles produced in the same plant in the territory of a NAFTA country; and

(b) the same class of motor vehicles produced in the same plant in the territory of a NAFTA country.

(8) For purposes of subsection (4), the net cost incurred and the values of non-originating materials used by the producer, with respect to

(a) all motor vehicles that fall within the category chosen by the producer and that are produced during the period with respect to which the choice is made, or

(b) those motor vehicles to be exported to the territory of one or more of the NAFTA countries that fall within the category chosen by the producer and that are produced during the period with respect to which the choice is made,

shall be included in the calculation of the regional value content under any of the categories set out in subsection (7).

Period for averaging RVC of motor vehicles of new or refit plant

(9) Where the period referred to in subsection (4) ends on a day other than the last day of the producer's fiscal year, the producer may, for purposes of section 11, make the choice referred to in that section with respect to

(a) the period beginning on the day following the end of that period and ending on the last day of that fiscal year; or

(b) the period beginning on the day following the end of that period and ending on the last day of the following full fiscal year.

Year-end analysis required if averaging based on estimated costs; obligation to notify of change in status

(10) Where the producer of a motor vehicle has calculated the regional value content of the motor vehicle on the basis of estimated costs, including standard costs, budgeted forecasts or other similar estimating procedures, before or during the producer's fiscal year, the producer shall conduct an analysis at the end of the producer's fiscal year of the actual costs incurred over the period with respect to the production of the motor vehicle, and, if the motor vehicle does not satisfy the regional value content requirement on the basis of the actual costs, immediately inform any person to whom the producer has provided a Certificate of Origin for the motor vehicle, or a written statement that the motor vehicle is an originating good, that the motor vehicle is a non-originating good.

PART VI
GENERAL PROVISIONS
SECTION 14. ACCUMULATION

Option to determine origin of good by accumulating the production of a material with production of the good in which the material is used

(1) Subject to subsections (2) and (4), for purposes of determining whether a good is an originating good, an exporter or producer of a good may choose to accumulate the production, by one or more producers in the territory of one or more of the NAFTA countries, of materials that are incorporated into that good so that the production of the materials shall be considered to have been performed by that exporter or producer.

Statement required; information as to net cost and value of non-originating materials from production of material if accumulating for regional value content requirement

(2) Where a good is subject to a regional value-content requirement and an exporter or producer of the good has a statement signed by a producer of a material that is used in the production of the good that

(a) states the net cost incurred and the value of non-originating materials used by the producer of the material in the production of that material,

(i) the net cost incurred by the producer of the good with respect to the material shall be the net cost incurred by the producer of the material plus, where not included in the net cost incurred by the producer of the material, the costs referred to in sections 7(1) (c) through (e), and

(ii) the value of non-originating materials used by the producer of the good with respect to the material shall be the value of non-originating materials used by the producer of the material; or

(b) states any amount, other than an amount that includes any of the value of non-originating materials, that is part of the net cost incurred by the producer of the material in the production of that material,

(i) the net cost incurred by the producer of the good with respect to the material shall be the value of the material, determined in accordance with section 7(1), and

(ii) the value of non-originating materials used by the producer of the good with respect to the material shall be the value of the material, determined in accordance with section 7(1), minus the amount stated in the statement.

Accumulated production considered to be production of a single producer

(3) For purposes of section 7(4), where a producer of the good chooses to accumulate the production of materials under subsection (1), that production shall be considered to be the production of the producer of the good.

(4) For purposes of this section,

(a) in order to accumulate the production of a material,

(i) where the good is subject to a regional value-content requirement, the producer of the good must have a statement described in subsection (2) that is signed by the producer of the material, and

(ii) where an applicable change in tariff classification is applied to determine whether the good is an originating good, the producer of the good must have a statement signed by the producer of the material that states the tariff classification of all non-originating materials used by that producer in the production of that material and that the production of the material took place entirely in the territory of one or more of the NAFTA countries; and

(b) a producer of a good who chooses to accumulate is not required to accumulate the production of all materials that are incorporated into the good.

Examples of accumulation of production

(5) Each of the following examples is an "Example" as referred to in section 2(4).

Example 1: section 14(1)

Producer A, located in NAFTA country A, imports unfinished bearing rings provided for in subheading 8482.99 into NAFTA country A from a non-NAFTA territory. Producer A further processes the unfinished bearing rings into finished bearing rings, which are of the same subheading. The finished bearing rings of Producer A do not satisfy an applicable change in tariff classification and therefore do not qualify as originating goods. The net cost of the finished bearing rings (per unit) is calculated as follows:

Product costs:	
Value of originating materials	$0.15
Value of non-originating materials	0.75
Other product costs	0.35
Period costs: (including $0.05 in excluded costs)	0.15
Other costs:	0.05
Total cost of the finished bearing rings, per unit	$1.45
Excluded costs: (included in period costs)	0.05
Net cost of the finished bearing rings, per unit	$1.40

Producer A sells the finished bearing rings to Producer B who is located in NAFTA country A for $1.50 each. Producer B further processes them into bearings, and intends to export the bearings to NAFTA country B. Although the bearings satisfy the applicable change in tariff classification, the bearings are subject to a regional value-content requirement.

Situation A:

Producer B does not choose to accumulate costs incurred by Producer A with respect to the bearing rings used in the production of the bearings. The net cost of the bearings (per unit) is calculated as follows:

Product costs:	
Value of originating materials	$0.45
Value of non-originating materials (value, per unit, of the bearing rings purchased from Producer A)	1.50
Other product costs	0.75
Period costs: (including $0.05 in excluded costs)	0.15
Other costs	0.05
Total cost of the bearings, per unit	$2.90
Excluded costs: (included in period costs)	0.05
Net cost of the bearings, per unit	$2.85

Under the net cost method, the regional value content of the bearings is

$$RVC = \frac{NC - VNM}{NC} \times 100$$

$$= \frac{\$2.85 - \$1.50}{\$2.85} \times 100$$

$$= 47.4\%$$

Therefore, the bearings are non-originating goods.

Situation B:

Producer B chooses to accumulate costs incurred by Producer A with respect to the bearing rings used in the production of the bearings. Producer A provides a statement described in section 14(2)(a) to Producer B. The net cost of the bearings (per unit) is calculated as follows:

Product costs:	
Value of originating materials ($0.45 + $0.15)	$0.60
Value of non-originating materials (value, per unit, of the unfinished bearing rings imported by Producer A)	0.75
Other product costs ($0.75 + $0.35)	1.10
Period costs: (($0.15 + $0.15), including $0.10 in excluded costs)	0.30
Other costs: ($0.05 + $0.05)	0.10
Total cost of the bearings, per unit	$2.85
Excluded costs: (included in period costs)	0.10
Net cost of the bearings, per unit	$2.75

Under the net cost method, the regional value content of the bearings is

$$RVC = \frac{NC - VNM}{NC} \times 100$$

$$= \frac{\$2.75 - \$0.75}{\$2.75} \times 100$$

$$= 72.7\%$$

Therefore, the bearings are originating goods.

Situation C:

Producer B chooses to accumulate costs incurred by Producer A with respect to the bearing rings used in the production of the bearings. Producer A provides to Producer B a statement described in section 14(2)(b) that specifies an amount equal to the net cost minus the value of non-originating materials used to produce the finished bearing rings ($1.40 − $0.75=.65). The net cost of the bearings (per unit) is calculated as follows:

Product costs:	
Value of originating materials ($0.45 + $0.65)	$1.10
Value of non-originating materials ($1.50 − $0.65)	0.85
Other product costs	0.75
Period costs: (including $0.05 in excluded costs)	0.15
Other costs	0.05
Total cost of the bearings, per unit	$2.90
Excluded costs: (included in period costs)	0.05
Net cost of the bearings, per unit	$2.85

Under the net cost method, the regional value content of the bearings is

$$RVC = \frac{NC - VNM}{NC} \times 100$$

$$= \frac{\$2.85 - \$0.85}{\$2.85} \times 100$$

$$= 70.2\%$$

Therefore, the bearings are originating goods.

Situation D:

Producer B chooses to accumulate costs incurred by Producer A with respect to the bearing rings used in the production of the bearings. Producer A provides to Producer B a statement described in section 14(2)(b) that specifies an amount equal to the value of other product costs used in the production of the finished bearing rings ($0.35). The net cost of the bearings (per unit) is calculated as follows:

Product costs:	
Value of originating materials	$0.45
Value of non-originating materials ($1.50 − $0.35)	1.15
Other product costs ($0.75 + $0.35)	1.10
Period costs: (including $0.05 in excluded costs)	0.15

Other costs	0.05
Total cost of the bearings, per unit	$2.90
Excluded costs: (included in period costs)	0.05
Net cost of the bearings, per unit	$2.85

Under the net cost method, the regional value content of the bearings is

$$RVC = \frac{NC - VNM}{NC} \times 100$$

$$= \frac{\$2.85 - \$1.15}{\$2.85} \times 100$$

$$= 59.7\%$$

Therefore, the bearings are originating goods.

Example 2: section 14(1)

Producer A, located in NAFTA country A, imports non-originating cotton, carded or combed, provided for in heading 5203 for use in the production of cotton yarn provided for in heading 5205. Because the change from cotton, carded or combed, to cotton yarn is a change within the same chapter, the cotton does not satisfy the applicable change in tariff classification for heading 5205, which is a change from any other chapter, with certain exceptions. Therefore, the cotton yarn that Producer A produces from non-originating cotton is a non-originating good.

Producer A then sells the non-originating cotton yarn to Producer B, also located in NAFTA country A, who uses the cotton yarn in the production of woven fabric of cotton provided for in heading 5208. The change from non-originating cotton yarn to woven fabric of cotton is insufficient to satisfy the applicable change in tariff classification for heading 5208, which is a change from any heading outside headings 5208 through 5212, except from certain headings, under which various yarns, including cotton yarn provided for in heading 5205, are classified. Therefore, the woven fabric of cotton that Producer B produces from non-originating cotton yarn produced by Producer A is a non-originating good.

However, under section 14(1), if Producer B chooses to accumulate the production of Producer A, the production of Producer A would be considered to have been performed by Producer B. The rule for heading 5208, under which the cotton fabric is classified, does not exclude a change from heading 5203, under which carded or combed cotton is classified. Therefore, under section 15(1), the change from carded or combed cotton provided for in heading 5203 to the woven fabric of cotton provided for in heading 5208 would satisfy the applicable change of tariff classification for heading 5208. The woven fabric of cotton would be considered as an originating good.

Producer B, in order to choose to accumulate Producer A's production, must have a statement described in section 14(4)(a)(ii).

SECTION 15. INABILITY TO PROVIDE SUFFICIENT INFORMATION

Supplier of material unable to provide information; beyond control of supplier; procedure to be followed by Customs

(1) Where, during a verification of origin of a good, the person from whom a producer of the good acquired a material used in the production of that good is unable to provide the customs administration that is conducting the verification with sufficient information to substantiate that the material is an originating material or that the value of the material declared for purpose of calculating the regional value content of the good is accurate, and the inability of that person to provide the information is due to reasons beyond the control of that person, the customs administration shall, before making a determination as to the origin or value of the material, consider the following:

(a) whether the customs administration of the NAFTA country into the territory of which the good was imported issued an advance ruling under Article 509 of the Agreement, as implemented in each NAFTA country, with respect to that material that concluded that the material is an originating material or that the value of the material declared for purposes of calculating the regional value content of the good is accurate;

(b) whether an independent auditor has confirmed the accuracy of

(i) any signed statement referred to in this Appendix with respect to the material,

(ii) the information that was used by the person from whom the producer acquired the material to substantiate whether the material is an originating material, or

(iii) the information submitted by the producer of the material with an application for an advance ruling where, on the basis of that information, the customs administration concluded that the material is an originating material or that the value declared for the purpose of calculating the regional value content of the good is accurate;

(c) whether the customs administration has, before the start of the origin verification of the good, conducted a verification of origin of identical materials or similar materials produced by the producer of the material and determined that

(i) the identical materials or similar materials are originating materials, or

(ii) any signed statement referred to in this Appendix with respect to those identical materials or similar materials is accurate;

(d) whether the producer of the good has exercised due diligence to ensure that any signed statement that is referred to in this Appendix with respect to the material and that was provided by the person from whom the producer acquired the material is accurate;

(e) where the customs administration has access only to partial records of the person from whom the producer acquired the material, whether the records provide sufficient evidence to substantiate that the material is an originating material or that the value of the material declared for purposes of calculating the regional value content of the good is accurate;

(f) whether the customs administration can obtain, subject to Article 507 of the Agreement, as implemented in each NAFTA country, by means other than those referred to in paragraphs (a) through (e), relevant information regarding the determination of the origin or value of the material from the customs administration of the NAFTA country in the territory of which the person from whom the producer acquired the material was located; and

(g) whether the producer of the good, the person from whom the producer acquired the material or a representative of that person or producer agrees to bear the expenses incurred in providing the customs administration with the assistance that it may require for determining the origin or value of the material.

"Reasons beyond control" of supplier

(2) For purposes of subsection (1), "reasons beyond the control" of the person from whom the producer of the good acquired the material includes

(a) the bankruptcy of the person from whom the producer acquired the material or any other financial distress situation or business reorganization that resulted in that person or a related person having lost control of the records containing the information that substantiate that the material is an originating material or the value of the material declared for the purpose of calculating the regional value content of the good;

(b) any other reason that results in partial or complete loss of records of that producer that the producer could not reasonably have been expected to foresee, including loss of records due to fire, flooding or other natural cause.

Exporter or producer of good unable to provide information; reasons beyond control of exporter or producer; procedure to be followed by Customs

(3) Where, during a verification of origin of a good, the exporter or producer of the good is unable to provide the customs administration conducting the verification with sufficient information to substantiate that the good is an originating good, and the inability of that person to provide the information is due to reasons beyond the control of that person, the customs administration shall, before making a determination as to the origin of the good, consider the following factors:

(a) whether the customs administration of the NAFTA country into the territory of which the good was imported issued an advance ruling under Article 509 of the Agreement, as implemented in each NAFTA country, with respect to that good that concluded that the good is an originating good;

(b) whether an independent auditor has confirmed the accuracy of an origin statement with respect to the good;

(c) whether the customs administration has, before the start of the origin verification of the good, conducted a verification of origin of identical goods or similar goods produced by the producer of the good and determined that the identical goods or similar goods are originating goods;

(d) where the customs administration has access only to partial records of the exporter or producer of the good, whether the records provide sufficient evidence to substantiate that the good is an originating good;

(e) whether the customs administration can obtain, subject to Article 507 of the Agreement, as implemented in each NAFTA country, by means other than those referred to in paragraphs (a) through (d), relevant information regarding the determination of the origin of the good from the customs administration of the NAFTA country in the territory of which the exporter or producer of the good was located; or

(f) whether the exporter or producer of the good or a representative of that person agrees to bear the expenses incurred in providing the customs administration with the assistance that it may require for determining the origin or value of the good.

"Reasons beyond control"

(4) For purposes of subsection (3), "reasons beyond the control" of the exporter or producer of the good includes

(a) the bankruptcy of the exporter or producer or any other financial distress situation or business reorganization that resulted in that person or a related person having lost control of the records containing the information that substantiate that the good is an originating good;

(b) any other reason that results in partial or complete loss of records of that exporter or producer that that person could not reasonably have been expected to foresee, including loss of records due to fire, flooding or other natural cause.

SECTION 16. TRANSSHIPMENT

Effect of subsequent processing outside the territory of a NAFTA country; loss of originating good status

(1) A good is not an originating good by reason of having undergone production occurring entirely in the territory of one or more of the NAFTA countries that would enable the good to qualify as an originating good if, subsequent to that production, the good undergoes further production or any other operation outside the territories of the NAFTA countries, other than unloading, reloading or any other operation necessary to preserve the good in good condition or to transport the good to the territory of a NAFTA country.

Transshipped good considered entirely non-originating

(2) A good that is a non-originating good by application of subsection (1) is considered to be entirely non-originating for purposes of this Appendix.

Exceptions for certain goods

(3) Subsection (1) does not apply with respect to a good provided for in any of subheadings 8541.10 through 8541.60 and 8542.11 through 8542.80 where any further production or other operation that that good undergoes outside the territories of the NAFTA countries does not result in a change in the tariff classification of the good to a subheading outside subheadings 8541.10 through 8542.90.

SECTION 17. NON-QUALIFYING OPERATIONS

Mere dilution; production or pricing practice to circumvent the provisions of this Appendix

17. A good is not an originating good merely by reason of

(a) mere dilution with water or another substance that does not materially alter the characteristics of the good; or

(b) any production or pricing practice with respect to which it may be demonstrated, on the basis of a preponderance of evidence, that the object was to circumvent this Appendix.

SCHEDULE I

Schedule I shall be the text of Annex 401 to the Agreement.

SCHEDULE II
VALUE OF GOODS

SECTION 1. Definitions.

For purposes of this Schedule, unless otherwise stated:

"buyer" refers to a person who purchases a good from the producer;

"buying commissions" means fees paid by a buyer to that buyer's agent for the agent's services in representing the buyer in the purchase of a good;

"producer" refers to the producer of the good being valued.

SECTION 2.

For purposes of Article 402(2) of the Agreement, as implemented by section 6(2) of this Appendix, the transaction value of a good shall be the price actually paid or payable for the good, determined in accordance with section 3 and adjusted in accordance with section 4.

SECTION 3.

(1) The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the producer. The payment need not necessarily take the form of a transfer of money; it may be made by letters of credit or negotiable instruments. The payment may be made directly or indirectly to the producer. For an illustration of this, the settlement by the buyer, whether in whole or in part, of a debt owed by the producer is an indirect payment.

(2) Activities undertaken by the buyer on the buyer's own account, other than those for which an adjustment is provided in section 4, shall not be considered to be an indirect payment, even though the activities might be regarded as being for the benefit of the producer. For an illustration of this, the buyer, by agreement with the producer, undertakes activities relating to the marketing of the good. The costs of such activities shall not be added to the price actually paid or payable.

(3) The transaction value shall not include the following charges or costs, provided that they are distinguished from the price actually paid or payable:

(a) charges for construction, erection, assembly, maintenance or technical assistance related to the good undertaken after the good has been sold to the buyer; or

(b) duties and taxes paid in the country in which the buyer is located with respect to the good.

(4) The flow of dividends or other payments from the buyer to the producer that do not relate to the purchase of the good are not part of the transaction value.

SECTION 4.

(1) In determining the transaction value of a good, the following shall be added to the price actually paid or payable:

(a) to the extent that they are incurred by the buyer, or by a related person on behalf of the buyer, with respect to the good being valued and are not included in the price actually paid or payable

(i) commissions and brokerage fees, except buying commissions,

(ii) the costs of transporting the good to the producer's point of direct shipment and the costs of loading, unloading, handling and insurance that are associated with that transportation, and

(iii) where the packaging materials and containers in which the good is packaged for retail sale are classified with the good under the Harmonized System, the value of the packaging materials and containers;

(b) the value, reasonably allocated in accordance with subsection (12), of the following elements where they are supplied directly or indirectly to the producer by the buyer, free of charge or at reduced cost for use in connection with the production and sale of the good, to the extent that the value is not included in the price actually paid or payable:

(i) a material, other than an indirect material, used in the production of the good,

(ii) tools, dies, molds and similar indirect materials used in the production of the good,

(iii) an indirect material, other than those referred to in subparagraph (ii) or in paragraphs (c), (e) or (f) of the definition "indirect material" set out in Article 415 of the Agreement, as implemented by section 2(1) of this Appendix, used in the production of the good, and

(iv) engineering, development, artwork, design work, and plans and sketches necessary for the production of the good, regardless of where performed;

(c) the royalties related to the good, other than charges with respect to the right to reproduce the good in the territory of one or more of the NAFTA countries, that the buyer must pay directly or indirectly as a condition of sale of the good, to the extent that such royalties are not included in the price actually paid or payable; and

(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the good that accrues directly or indirectly to the producer.

(2) The additions referred to in subsection (1) shall be made to the price actually paid or payable under this section only on the basis of objective and quantifiable data.

(3) Where objective and quantifiable data do not exist with regard to the additions required to be made to the price actually paid or payable under subsection (1), the transaction value cannot be determined under section 2.

(4) No additions shall be made to the price actually paid or payable for the purpose of determining the transaction value except as provided in this section.

(5) The amounts to be added under subsections (1)(a) (i) and (ii) shall be

(a) those amounts that are recorded on the books of the buyer, or

(b) where those amounts are costs incurred by a related person on behalf of the buyer and are not recorded on the books of the buyer, those amounts that are recorded on the books of that related person.

(6) The value of the packaging materials and containers referred to in subsection (1)(a)(iii) and the value of the elements referred to in subsection (1)(b)(i) shall be

(a) where the packaging materials and containers or the elements are imported from outside the territory of the NAFTA country in which the producer is located, the customs value of the packaging materials and containers or the elements,

(b) where the buyer, or a related person on behalf of the buyer, purchases the packaging materials and containers or the elements from an unrelated person in the territory of the NAFTA country in which the producer is located, the price actually paid or payable for the packaging materials and containers or the elements,

(c) where the buyer, or a related person on behalf of the buyer, acquires the packaging materials and containers or the elements from an unrelated person in the territory of the NAFTA country in which the producer is located other than through a purchase, the value of the consideration related to the acquisition of the packaging materials and containers or the elements, based on the cost of the consideration that is recorded on the books of the buyer or the related person, or

(d) where the packaging materials and containers or the elements are produced by the buyer, or by a related person, in the territory of the NAFTA country in which the producer is located, the total cost of the packaging materials and containers or the elements, determined in accordance with subsection (7),

and shall include the following costs that are recorded on the books of the buyer or the related person supplying the packaging materials and containers or the elements on behalf of the buyer, to the extent that such costs are not included under paragraph (a) through (d):

(e) the costs of freight, insurance, packing, and all other costs incurred in transporting the packaging materials and containers or the elements to the location of the producer,

(f) duties and taxes paid or payable with respect to the packaging materials and containers or the elements, other than duties and taxes that are waived, refunded, refundable or otherwise recoverable, including credit against duty or tax paid or payable,

(g) customs brokerage fees, including the cost of in-house customs brokerage services, incurred with respect to the packaging materials and containers or the elements, and

(h) the cost of waste and spoilage resulting from the use of the packaging materials and containers or the elements in the production of the material, less the value of renewable scrap or by-product.

(7) For purposes of subsection (6)(d), the total cost of the packaging materials and containers referred to in subsection (1)(a)(iii) or the elements referred to in subsection (1)(b)(i) shall be

(a) where the packaging materials and containers or the elements are produced by the buyer, at the choice of the buyer,

(i) the total cost incurred with respect to all goods produced by the buyer, calculated on the basis of the costs that are recorded on the books of the buyer, that can be reasonably allocated to the packaging materials and containers or the elements in accordance with Schedule VII, or

(ii) the aggregate of each cost incurred by the buyer that forms part of the total cost incurred with respect to the packaging materials and containers or the elements, calculated on the basis of the costs that are recorded on the books of the buyer, that can be reasonably allocated to the packaging materials and containers or the elements in accordance with Schedule VII; and

(b) where the packaging materials and containers or the elements are produced by a person who is related to the buyer, at the choice of the buyer,

(i) the total cost incurred with respect to all goods produced by that related person, calculated on the basis of the costs that are recorded on the books of that person, that can be reasonably allocated to the packaging materials and containers or the elements in accordance with Schedule VII, or

(ii) the aggregate of each cost incurred by that related person that forms part of the total cost incurred with respect to the packaging materials and containers or the elements, calculated on the basis of the costs that are recorded on the books of that person, that can be reasonably allocated to the packaging materials and containers or the elements in accordance with Schedule VII.

(8) Except as provided in subsections (10) and (11), the value of the elements referred to in subsections (1)(b) (ii) through (iv) shall be

(a) the cost of those elements that is recorded on the books of the buyer, or

(b) where such elements are provided by another person on behalf of the buyer and the cost is not recorded on the books of the buyer, the cost of those elements that is recorded on the books of that other person.

(9) Where the elements referred to in subsections (1)(b) (ii) through (iv) were previously used by or on behalf of the buyer, the value of the elements shall be adjusted downward to reflect that use.

(10) Where the elements referred to in subsections (1)(b) (ii) and (iii) were leased by the buyer or a person related to the buyer, the value of the elements shall be the cost of the lease as recorded on the books of the buyer or that related person.

(11) No addition shall be made to the price actually paid or payable for the elements referred to in subsection (1)(b)(iv) that are available in the public domain, other than the cost of obtaining copies of them.

(12) The producer shall choose the method of allocating to the good the value of the elements referred to in subsections (1)(b) (ii) through (iv), provided that the value is reasonably allocated to the good in a manner appropriate to the circumstances. The methods the producer may choose to allocate the value include allocating the value over the number of units produced up to the time of the first shipment or allocating the value over the entire anticipated production where contracts or firm commitments exist for that production. For an illustration of this, a buyer provides the producer with a mould to be used in the production of the good and contracts with the producer to buy 10,000 units of that good. By the time the first shipment of 1,000 units arrives, the producer has already produced 4,000 units. In these circumstances, the producer may choose to allocate the value of the mould over 4,000 units or 10,000 units but shall not choose to allocate the value of the elements to the first shipment of 1,000 units. The producer may choose to allocate the entire value of the elements to a single shipment of a good only where that single shipment comprises all of the units of the good acquired by the buyer under the contract or commitment for that number of units of the good between the producer and the buyer.

(13) The addition for the royalties referred to in subsection (1)(c) shall be the payment for the royalties that is recorded on the books of the buyer, or where the payment for the royalties is recorded on the books of another person, the payment for the royalties that is recorded on the books of that other person.
(14) The value of the proceeds referred to in subsection (1)(d) shall be the amount that is recorded for such proceeds on the books of the buyer or the producer.

SCHEDULE III
UNACCEPTABLE TRANSACTION VALUE

SECTION 1. Definitions.

For purposes of this Schedule, unless otherwise stated
"buyer" refers to a person who purchases a good from the producer;
"customs administration" refers to the customs administration of the NAFTA country into whose territory the good being valued is imported; and
"producer" refers to the producer of the good being valued.

SECTION 2.

(1) There is no transaction value for a good where the good is not the subject of a sale.
(2) The transaction value of a good is unacceptable where
(a) there are restrictions on the disposition or use of the good by the buyer, other than restrictions that
(i) are imposed or required by law or by the public authorities in the territory of the NAFTA country in which the buyer is located,
(ii) limit the geographical area in which the good may be resold, or
(iii) do not substantially affect the value of the good;
(b) the sale or price actually paid or payable is subject to a condition or consideration for which a value cannot be determined with respect to the good;
(c) part of the proceeds of any subsequent resale, disposal or use of the good by the buyer will accrue directly or indirectly to the producer, and an appropriate addition to the price actually paid or payable cannot be made in accordance with section 4(1)(d) of Schedule II; or
(d) except as provided in section 3, the producer and the buyer are related persons and the relationship between them influenced the price actually paid or payable for the good.
(3) The conditions or considerations referred to in subsection (2)(b) include the following circumstances:
(a) the producer establishes the price actually paid or payable for the good on condition that the buyer will also buy other goods in specified quantities;
(b) the price actually paid or payable for the good is dependent on the price or prices at which the buyer sells other goods to the producer of the good; and
(c) the price actually paid or payable is established on the basis of a form of payment extraneous to the good, such as where the good is a semi-finished good that has been provided by the producer to the buyer on condition that the producer will receive a specified quantity of the finished good from the buyer.
(4) For purposes of subsection (2)(b), conditions or considerations relating to the production or marketing of the good shall not render the transaction value unacceptable, such as where the buyer undertakes on the buyer's own account, even though by agreement with the producer, activities relating to the marketing of the good.
(5) Where objective and quantifiable data do not exist with regard to the additions required to be made to the price actually paid or payable under section 4(1) of Schedule II, the transaction value cannot be determined under the provisions of section 2 of that Schedule. For an illustration of this, a royalty is paid on the basis of the price actually paid or payable in a sale of a liter of a particular good that was purchased by the kilogram and made up into a solution. If the royalty is based partially on the purchased good and partially on other factors that have nothing to do with that good, such as when the purchased good is mixed with other ingredients and is no longer separately identifiable, or when the royalty cannot be distinguished from special financial arrangements between the producer and the buyer, it would be inappropriate to add the royalty and the transaction value of the good could not be determined. However, if the amount of the royalty is based only on the purchased good and can be readily quantified, an addition to the price actually paid or payable can be made and the transaction value can be determined.

SECTION 3.

(1) In determining whether the transaction value is unacceptable under section 2(2)(d), the fact that the producer and the buyer are related persons shall not in itself be grounds for the customs administration to render the transaction value unacceptable. In such cases, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship between the producer and the buyer did not influence the price actually paid or payable. Where the customs administration has reasonable grounds for considering that the relationship between the producer and the buyer influenced the price, the customs administration shall communicate the grounds to the producer, and that producer shall be given a reasonable opportunity to respond to the grounds communicated by the customs administration. If that producer so requests, the customs administration shall communicate in writing the grounds on which it considers that the relationship between the producer and the buyer influenced the price actually paid or payable.

(2) Subsection (1) provides that, where the producer and the buyer are related persons, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted as the value provided that the relationship between the producer and the buyer did not influence the price actually paid or payable. It is not intended under subsection (1) that there should be an examination of the circumstances in all cases where the producer and the buyer are related persons. Such an examination will only be required where the customs administration has doubts that the price actually paid or payable is acceptable because of the relationship between the producer and the buyer. Where the customs administration does not have doubts that the price actually paid or payable is acceptable, it shall accept that price without requesting further information. For an illustration of this, the customs administration may have previously examined the relationship between the producer and the buyer, or it may already have detailed information concerning the relationship between the producer and the buyer, and may already be satisfied from that examination or information that the relationship between them did not influence the price actually paid or payable.

(3) In applying subsection (1), where the producer and the buyer are related persons and the customs administration has doubts that the transaction value is acceptable without further inquiry, the customs administration shall give the producer an opportunity to supply such further information as may be necessary to enable it to examine the circumstances surrounding the sale. In such a case, the customs administration shall examine the relevant aspects of the sale, including the way in which the producer and the buyer organize their commercial relations and the way in which the price actually paid or payable for the good being valued was arrived at, in order to determine whether the relationship between the producer and the buyer influenced that price actually paid or payable. Where it can be shown that the producer and the buyer buy from and sell to each other as if they were not related persons, the price actually paid or payable shall be considered as not having been influenced by the relationship between them. For an illustration of this, if the price actually paid or payable for the good had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way in which the producer settles prices for sales to unrelated buyers, the price actually paid or payable shall be considered as not having been influenced by the relationship between the buyer and the producer. As another illustration, where it is shown that the price actually paid or payable for the good is adequate to ensure recovery of the total cost of producing the good plus a profit that is representative of the producer's overall profit realized over a representative period of time, such as on an annual basis, in sales of goods of the same class or kind, the price actually paid or payable shall be considered as not having been influenced by the relationship between the producer and the buyer.

(4) In a sale between a producer and a buyer who are related persons, the transaction value shall be accepted and determined in accordance with section 2 of Schedule II wherever the producer demonstrates that the transaction value of the good in that sale closely approximates a test value referred to in subsection (5).

(5) The value to be used as a test value shall be the transaction value of identical goods or similar goods sold at or about the same time as the good being valued is sold to an unrelated buyer who is located in the territory of the NAFTA country in which the buyer is located.

(6) In applying a test value referred to in subsection (4), due account shall be taken of demonstrated differences in commercial levels, quantity levels, the value of the elements specified in section 4(1)(b) of Schedule II and the costs incurred by the producer in sales to unrelated buyers that are not incurred by the producer in sales to a related person.

(7) The application of the test value referred to in subsection (4) shall be used at the initiative of the producer and shall be used only for comparison purposes to determine whether the transaction value of the good is acceptable. The test value shall not be used as the transaction value of that good.

(8) Subsection (4) provides an opportunity for the producer to demonstrate that the transaction value closely approximates a test value previously accepted by the customs administration, and is therefore acceptable under subsections (1) and (4). Where the application of a test value under subsection (4) demonstrates that the transaction value of the good being valued is acceptable, the customs administration shall not examine the question of influence in regard to the relationship between the producer and the buyer under subsection (1). Where the customs administration already has sufficient information available, without further inquiries, that the transaction value closely approximates a test value referred to in subsection (4), the producer is not required to apply a test value to demonstrate that the transaction value is acceptable under that subsection.

(9) A number of factors must be taken into consideration for the purpose of determining whether the transaction value of the identical goods or similar goods closely approximates the transaction value of the good being valued. These factors include the nature of the good, the nature of the industry itself, the season in which the good is sold, and whether the difference in values is commercially significant. Since these factors may vary from case to case, it would be impossible to apply an acceptable standardized difference such as a fixed amount or fixed percentage difference in each case. For an illustration of this, a small difference in value in a case involving one type of good could be unacceptable, while a large difference in a case involving another type of good might be acceptable for the purposes of determining whether the transaction value closely approximates a test value set out in subsection (4).

SCHEDULE IV
LIST OF TARIFF PROVISIONS FOR THE PURPOSES OF SECTION 9 OF THE APPENDIX

4009
4010.10
4011
4016.93.10
4016.99.30 and 4016.99.55
7007.11 and 7007.21
7009.10
8301.20
8407.31
8407.32

8407.33
8407.34.05, 8407.34.15 and 8407.34.25
8407.34.35, 8407.34.45 and 8407.34.55
8408.20
8409
8413.30
8414.59.30
8414.80.05
8415.81 through 8415.83
8421.39.40
8481.20, 8481.30 and 8481.80
8482.10 through 8482.80
8483.10 through 8483.40
8483.50
8501.10
8501.20
8501.31
8501.32.45
8507.20.40, 8507.30.40, 8507.40.40 and 8507.80.40
8511.30
8511.40
8511.50
8512.20
8512.40
8519.91
8527.21
8527.29
8536.50
8536.90
8537.10.30
8539.10
8539.21
8544.30
8706
8707
8708.10.30
8708.21
8708.29.20
8708.29.10
8708.29.15
8708.39
8708.40
8708.50
8708.60
8708.70.05, 8708.70.25 and 8708.70.45
8708.80
8708.91
8708.92
8708.93.15 and 8708.93.60
8708.94
8708.99.03, 8708.99.27 and 8708.99.55
8708.99.06, 8708.99.31 and 8708.99.58
8708.99.09, 8708.99.34 and 8708.99.61
8708.99.12, 8708.99.37 and 8708.99.64
8708.99.15, 8708.99.40 and 8708.99.67
8708.99.18, 8708.99.43 and 8708.99.70
8708.99.21, 8708.99.46 and 8708.99.73
8708.99.24, 8708.99.49 and 8708.99.80
9031.80
9032.89
9401.20

SCHEDULE V

LIST OF AUTOMOTIVE COMPONENTS AND MATERIALS FOR THE PURPOSES OF SECTION 10 OF THE APPENDIX

Item	COLUMN I AUTOMOTIVE COMPONENTS	COLUMN II LISTED MATERIALS
1.	Engines provided for in heading 8407 or 8408	cast blocks, cast heads, fuel nozzles, fuel injector pumps, glow plugs, turbochargers, superchargers, electronic engine controls, intake manifolds, exhaust manifolds, intake valves, exhaust valves, crankshafts, camshafts, alternators, starters, air cleaner assemblies, pistons, connecting rods and assemblies made therefrom, rotor assemblies for rotary engines, flywheels (for manual transmissions), flexplates (for automatic transmissions), oil pans, oil pumps, pressure regulators, water pumps, crankshaft gears, camshaft gears, radiator assemblies, charge-air coolers.
2.	Gear boxes (transmissions) provided for in subheading 8708.40.	(a) for manual transmissions: transmission cases and clutch housings; clutches; internal shifting mechanisms; gear sets, synchronizers and shafts; and (b) for torque convertor type transmissions: transmission cases and convertor housings; torque convertor assemblies; gear sets and clutches; electronic transmission controls.

SCHEDULE VI
REGIONAL VALUE-CONTENT CALCULATION FOR CAMI

SECTION 1. Definitions.

In this Schedule,

"closed" means, with respect to a plant, a closure

(a) for purposes of re-tooling for a change in model line, or

(b) as a result of any event or circumstance (other than the imposition of antidumping duties or countervailing duties, or an interruption of operations resulting from a labor strike, lock-out, labor dispute, picketing or boycott of or by employees of CAMI Automotive, Inc. or General Motors of Canada Limited) that CAMI Automotive, Inc. or General Motors of Canada Limited could not reasonably have been expected to avert by corrective action or by exercise of due care and diligence, including a shortage of materials, failure of utilities, or inability to obtain or a delay in obtaining raw materials, parts, fuel or utilities;

"GM" means General Motors of Canada Limited, General Motors Corporation, General Motors de Mexico, S.A de C.V., and any subsidiary directly or indirectly owned by any of them, or by any combination thereof;

"producer" means CAMI Automotive, Inc.

SECTION 2.

For purposes of section 11 of this Appendix, for purposes of determining the regional value content, in a fiscal year, of a motor vehicle of a class of motor vehicles or a model line produced by the producer in the territory of Canada and imported into the territory of the United States, the producer may elect to calculate the regional value content by

(a) calculating

(i) the sum of

(A) the net cost incurred by the producer, during that fiscal year, in the production in the territory of Canada of motor vehicles of a category referred to in section 3 that is chosen by the producer, and

(B) the net cost incurred by General Motors of Canada Limited, during the fiscal year that corresponds most closely to the producer's fiscal year, in the production in the territory of Canada of a corresponding class of motor vehicles or model line, and

(ii) the sum of

(A) the value, determined in accordance with section 9 of this Appendix for light-duty vehicles and section 10 of this Appendix for heavy-duty vehicles, of the non-originating materials that are used by the producer, during that fiscal year, in the production in the territory of Canada of motor vehicles of a category referred to in section 2.1 that is chosen by the producer, and

(B) the value, determined in accordance with section 9 of this Appendix for light-duty vehicles and section 10 of this Appendix for heavy-duty vehicles, of the non-originating materials that are used by General Motors of Canada Limited, during the fiscal year that corresponds most closely to the producer's fiscal year, in the production in the territory of Canada of a corresponding class of motor vehicles or model line, and

(b) using the sums referred to in paragraphs (a)(i) and (ii) as the net cost and the value of non-originating materials, respectively, in the calculation referred to in section 6(3) of this Appendix,

provided that

(c) at the beginning of the producer's fiscal year, General Motors of Canada Limited owns 50 percent or more of the voting common stock of the producer, and

(d) GM acquires 75 percent or more by unit of quantity of the class of motor vehicles or model line, as the case may be, that the producer produced in the territory of Canada in the producer's fiscal year for sale in the territory of one or more of the NAFTA countries.

SECTION 3.

The categories referred to in clauses 2(a)(i)(A) and (ii)(A) are the following:

(a) the class of motor vehicles that the producer produced in the territory of Canada in the producer's fiscal year for sale in the territory of one or more of the NAFTA countries; and

(b) the model line that the producer produced in the territory of Canada in the producer's fiscal year for sale in the territory of one or more of the NAFTA countries.

SECTION 4.

Where GM does not satisfy the requirement set out in section 2(d), the producer may choose that the regional value content be calculated in accordance with section 2 only for those motor vehicles that are acquired by GM for distribution under the GEO marque or another GM marque.

SECTION 5.

(1) The producer may choose that the calculation referred to in section 2 be made over a period of two fiscal years where

(a) any plant operated by the producer or by General Motors of Canada Limited is closed for more than two consecutive months; and

(b) the motor vehicles of a category referred to in section 2.1, with respect to which the producer chooses that the regional value content be calculated in accordance with section 2, are produced in that plant.

(2) Subject to subsection (3), the period of two fiscal years referred to in subsection (1) corresponds to the fiscal year in which the plant is closed and, at the choice of the producer, the preceding or the subsequent fiscal year.

(3) Where the plant is closed for a period that spans two fiscal years, the calculation referred to in section 2 may be made only over those two fiscal years.

(4) Where the producer has chosen that the regional value content be calculated over two fiscal years under this section, the choice referred to in section 11(6) of this Appendix shall be filed not later than 10 days after the end of the period during which the plant is closed, or at such later time as the customs administration may accept.

SECTION 6.

For purposes of this Schedule, a motor vehicle producer shall be deemed to be GM where, as a result of an amalgamation, reorganization, division or similar transaction, that motor vehicle producer

(a) acquires all or substantially all of the assets used by GM, and

(b) directly or indirectly controls, or is controlled by, GM, or both that motor vehicle producer and any GM are controlled by the same person.

SCHEDULE VII
REASONABLE ALLOCATION OF COSTS

SECTION 1. Definitions.

For purposes of this Schedule,

"costs" means any costs that are included in total cost and that need to be allocated pursuant to sections 5(8), 6(11) and 7(6) and sections 7(12)(b)(ii) and 10(1)(a)(i) of this Appendix, section 4(7) of Schedule II and section 5(7) of Schedule VIII;

"discontinued operations" means a segment of a producer's business that has been discontinued;

"indirect overhead" means period costs and other costs;

"internal management purpose" means any purpose relating to tax reporting, financial reporting, financial planning, decision-making, pricing, cost recovery, cost control management or performance measurement; and

"overhead" means costs, other than direct material costs and direct labor costs.

SECTION 2. Interpretation.

(1) In this Schedule, reference to "producer" shall, for purposes of section 4(7) of Schedule II, be read as a reference to "buyer".

(2) In this Schedule, reference to "good" shall,

(a) for purposes of section 6(14) of this Appendix, be read as a reference to "identical goods or similar goods, or any combination thereof";

(b) for purposes of section 7(6) of this Appendix, be read as a reference to "intermediate material";

(c) for purposes of section 7(12)(b)(ii) of this Appendix, be read as a reference to "packaging materials and containers";

(d) for purposes of section 11 of this Appendix, be read as a reference to "category of vehicles that is chosen pursuant to section 11(1) of this Appendix";

(e) for purposes of section 12 of this Appendix, be read as a reference to "category of goods chosen pursuant to section 12(1) of this Appendix";

(f) for purposes of section 13(4) of this Appendix, be read as a reference to "category of vehicles chosen pursuant to section 13(4) of this Appendix";

(g) for purposes of section 4(7) of Schedule II, be read as a reference to "packaging materials and containers or the elements"; and

(h) for purposes of section 5(7) of Schedule VIII, be read as a reference to "elements".

Methods to Reasonably Allocate Costs

SECTION 3.

(1) Where a producer of a good is using, for an internal management purpose, a cost allocation method to allocate to the good direct material costs, or part thereof, and that method reasonably reflects the direct material used in the production of the good based on the criterion of benefit, cause or ability to bear, that method shall be used to reasonably allocate the costs to the good.

(2) Where a producer of a good is using, for an internal management purpose, a cost allocation method to allocate to the good direct labor costs, or part thereof, and that method reasonably reflects the direct labor used in the production of the good based on the criterion of benefit, cause or ability to bear, that method shall be used to reasonably allocate the costs to the good.

(3) Where a producer of a good is using, for an internal management purpose, a cost allocation method to allocate to the good overhead, or part thereof, and that method is based on the criterion of benefit, cause or ability to bear, that method shall be used to reasonably allocate the costs to the good.

SECTION 4.

Where costs are not reasonably allocated to a good under section 3, those costs are reasonably allocated to the good if they are allocated,

(a) with respect to direct material costs, on the basis of any method that reasonably reflects the direct material used in the production of the good based on the criterion of benefit, cause or ability to bear;

(b) with respect to direct labor costs, on the basis of any method that reasonably reflects the direct labor used in the production of the good based on the criterion of benefit, cause or ability to bear; and

(c) with respect to overhead, on the basis of any of the following methods:

(i) the method set out in Addendum A, Addendum B or Addendum C,

(ii) a method based on a combination of the methods set out in Addenda A and B or Addenda A and C, and

(iii) a cost allocation method based on the criterion of benefit, cause or ability to bear.

SECTION 5.

Any cost allocation method referred to in section 3 or 4 that is used by a producer for the purposes of this Appendix shall be used throughout the producer's fiscal year.

Costs Not Reasonably Allocated

SECTION 6.

The allocation to a good of any of the following is considered not to be reasonably allocated to the good:

(a) costs of a service provided by a producer of a good to another person where the service is not related to the good;

(b) gains or losses resulting from the disposition of a discontinued operation;

(c) costs relating to the cumulative effect of accounting changes; and

(d) gains or losses resulting from the sale of a capital asset of the producer.

SECTION 7.

Any costs allocated under section 3 on the basis of a cost allocation method that is used for an internal management purpose that is solely for the purpose of qualifying a good as an originating good are considered not to be reasonably allocated.

ADDENDUM A
COST RATIO METHOD

Calculation of Cost Ratio

For the overhead to be allocated, the producer may choose one or more allocation bases that reflect a relationship between the overhead and the good based on the criterion of benefit, cause or ability to bear.

With respect to each allocation base that is chosen by the producer for allocating overhead, a cost ratio is calculated for each good produced by the producer in accordance with the following formula:

$$CR = \frac{AB}{TAB}$$

where

CR is the cost ratio with respect to the good;

AB is the allocation base for the good; and

TAB is the total allocation base for all the goods produced by the producer.

Allocation to a Good of Costs Included in Overhead

The costs with respect to which an allocation base is chosen are allocated to a good in accordance with the following formula:

$$CAG = CA \times CR$$

where

CAG is the costs allocated to the good;

CA is the costs to be allocated; and

CR is the cost ratio with respect to the good.

Excluded Costs

Under section 6(11)(b) of this Appendix, where excluded costs are included in costs to be allocated to a good, the cost ratio used to allocate that cost to the good is used to determine the amount of excluded costs to be subtracted from the costs allocated to the good.

Allocation Bases for Costs

The following is a non-exhaustive list of allocation bases that may be used by the producer to calculate cost ratios:

Direct Labor Hours
Direct Labor Costs
Units Produced
Machine-hours
Sales Dollars or Pesos
Floor Space

"Examples"

The following examples illustrate the application of the cost ratio method to costs included in overhead.

Example 1: Direct Labor Hours

A producer who produces Good A and Good B may allocate overhead on the basis of direct labor hours spent to produce Good A and Good B. A total of 8,000 direct labor hours have been spent to produce Good A and Good B: 5,000 hours with respect to Good A and 3,000 hours with respect to Good B. The amount of overhead to be allocated is $6,000,000.

Calculation of the Ratios:

Good A: 5,000 hours/8,000 hours = .625

Good B: 3,000 hours/8,000 hours = .375

Allocation of overhead to Good A and Good B:

Good A: $6,000,000 × .625 = $3,750,000

Good B: $6,000,000 × .375 = $2,250,000

Example 2: Direct Labor Costs

A producer who produces Good A and Good B may allocate overhead on the basis of direct labor costs incurred in the production of Good A and Good B. The total direct labor costs incurred in the production of Good A and Good B is $60,000: $50,000 with respect to Good A and $10,000 with respect to Good B. The amount of overhead to be allocated is $6,000,000.

Calculation of the Ratios:

Good A: $50,000/$60,000 = .833

Good B: $10,000/$60,000 = .167

Allocation of Overhead to Good A and Good B:

Good A: $6,000,000 × .833 = $4,998,000

Good B: $6,000,000 × .167 = $1,002,000

Example 3: Units Produced

A producer of Good A and Good B may allocate overhead on the basis of units produced. The total units of Good A and Good B produced is 150,000: 100,000 units of Good A and 50,000 units of Good B. The amount of overhead to be allocated is $6,000,000.

Calculation of the Ratios:

Good A: 100,000 units/150,000 units = .667

Good B: 50,000 units/150,000 units = .333

Allocation of Overhead to Good A and Good B:

Good A: $6,000,000 × .667 = $4,002,000

Good B: $6,000,000 × .333 = $1,998,000

Example 4: Machine-hours

A producer who produces Good A and Good B may allocate machine-related overhead on the basis of machine-hours utilized in the production of Good A and Good B. The total machine-hours utilized for the production of Good A and Good B is 3,000 hours: 1,200 hours with respect to Good A and 1,800 hours with respect to Good B. The amount of machine-related overhead to be allocated is $6,000,000.

Calculation of the Ratios:

Good A: 1,200 machine-hours/3,000 machine-hours = .40

Good B: 1,800 machine-hours/3,000 machine-hours = .60

Allocation of Machine-Related Overhead to Good A and Good B:

Good A: $6,000,000 × .40 = $2,400,000

Good B: $6,000,000 × .60 = $3,600,000

Example 5: Sales Dollars or Pesos

A producer who produces Good A and Good B may allocate overhead on the basis of sales dollars. The producer sold 2,000 units of Good A at $4,000 and 200 units of Good B at $3,000. The amount of overhead to be allocated is $6,000,000.

Total Sales Dollars for Good A and Good B:

Good A: $4,000 × 2,000 = $8,000,000

Good B: $3,000 × 200 = $600,000

Total Sales Dollars: $8,000,000 + $600,000 = $8,600,000

Calculation of the Ratios:

Good A: $8,000,000/$8,600,000 = .93

Good B: $600,000/$8,600,000 = .07

Allocation of Overhead to Good A and Good B:

Good A: $6,000,000 × .93 = $5,580,000

Good B: $6,000,000 × .07 = $420,000

Example 6: Floor Space

A producer who produces Good A and Good B may allocate overhead relating to utilities (heat, water and electricity) on the basis of floor space used in the production and storage of Good A and Good B. The total floor space used in the production and storage of Good A and Good B is 100,000 square feet: 40,000 square feet with respect to Good A and 60,000 square feet with respect to Good B. The amount of overhead to be allocated is $6,000,000.

Calculation of the Ratios:

Good A: 40,000 square feet/100,000 square feet = .40

Good B: 60,000 square feet/100,000 square feet = .60

Allocation of Overhead (Utilities) to Good A and Good B:

Good A: $6,000,000 × .40 = $2,400,000

Good B: $6,000,000 × .60 = $3,600,000

ADDENDUM B
DIRECT LABOR AND DIRECT MATERIAL RATIO METHOD

Calculation of Direct Labor and Direct Material Ratio

For each good produced by the producer, a direct labor and direct material ratio is calculated in accordance with the following formula:

$$DLDMR = \frac{DLC + DMC}{TDLC + TDMC}$$

where

DLDMR is the direct labor and direct material ratio for the good;

DLC is the direct labor costs of the good;

DMC is the direct material costs of the good;

TDLC is the total direct labor costs of all goods produced by the producer; and
TDMC is the total direct material costs of all goods produced by the producer.

Allocation of Overhead to a Good

Overhead is allocated to a good in accordance with the following formula:

$$OAG = O \times DLDMR$$

where
OAG is the overhead allocated to the good;
O is the overhead to be allocated; and
DLDMR is the direct labor and direct material ratio for the good.

Excluded Costs

Under section 6(11)(b) of this Appendix, where excluded costs are included in overhead to be allocated to a good, the direct labor and direct material ratio used to allocate overhead to the good is used to determine the amount of excluded costs to be subtracted from the overhead allocated to the good.

"Examples"

Example 1:

The following example illustrates the application of the direct labor and direct material ratio method used by a producer of a good to allocate overhead where the producer chooses to calculate the net cost of the good in accordance with section 6(11)(a) of this Appendix.

A producer produces Good A and Good B. Overhead (O) minus excluded costs (EC) is $30 and the other relevant costs are set out in the following table:

	Good A	Good B	Total
Direct labor costs (DLC)	$5	$5	$10
Direct material costs (DMC)	10	5	15
Totals	$15	$10	$25

Overhead Allocated to Good A
OAG (Good A)=O ($30) × ΔΔΔMP ($15/$25)
OAG (Good A)=$18.00
Overhead Allocated to Good B
OAG (Good B)=O ($30) × ΔΔΔMP ($10/$25)
OAG (Good B)=$12.00

Example 2:

The following example illustrates the application of the direct labor and direct material ratio method used by a producer of a good to allocate overhead where the producer chooses to calculate the net cost of the good in accordance with section 6(11)(b) of this Appendix and where excluded costs are included in overhead.

A producer produces Good A and Good B. Overhead (O) is $50 (including excluded costs (EC) of $20). The other relevant costs are set out in the table of Example 1.

Overhead Allocated to Good A
OAG (Good A)=[O ($50) × DLDMR ($15/$25)] − [EC ($20) × DLDMR ($15/$25)]
OAG (Good A)=$18.00
Overhead Allocated to Good B
OAG (Good B)=[O ($50) × DLDMR ($10/$25)] − [EC ($20) × DLDMR ($10/$25)]
OAG (Good B)=$12.00

ADDENDUM C
DIRECT COST RATIO METHOD

Direct Overhead

Direct overhead is allocated to a good on the basis of a method based on the criterion of benefit, cause or ability to bear.

Indirect Overhead

Indirect overhead is allocated on the basis of a direct cost ratio.

Calculation of Direct Cost Ratio

For each good produced by the producer, a direct cost ratio is calculated in accordance with the following formula:

$$DCR = \frac{DLC + DMC + DO}{TDLC + TDMC + TDO}$$

where
DCR is the direct cost ratio for the good;
DLC is the direct labor costs of the good;
DMC is the direct material costs of the good;
DO is the direct overhead of the good;
TDLC is the total direct labor costs of all goods produced by the producer;
TDMC is the total direct material costs of all goods produced by the producer; and
TDO is the total direct overhead of all goods produced by the producer;

Allocation of Indirect Overhead to a Good

Indirect overhead is allocated to a good in accordance with the following formula:

$$IOAG = IO \times DCR$$

where

IOAG is the indirect overhead allocated to the good;

IO is the indirect overhead of all goods produced by the producer; and

DCR is the direct cost ratio of the good.

Excluded Costs

Under section 6(11)(b) of this Appendix, where excluded costs are included in

(a) direct overhead to be allocated to a good, those excluded costs are subtracted from the direct overhead allocated to the good; and

(b) indirect overhead to be allocated to a good, the direct cost ratio used to allocate indirect overhead to the good is used to determine the amount of excluded costs to be subtracted from the indirect overhead allocated to the good.

"Examples"

Example 1:

The following example illustrates the application of the direct cost ratio method used by a producer of a good to allocate indirect overhead where the producer chooses to calculate the net cost of the good in accordance with section 6(11)(a) of this Appendix.

A producer produces Good A and Good B. Indirect overhead (IO) minus excluded costs (EC) is $30. The other relevant costs are set out in the following table:

	Good A	Good B	Total
Direct labor costs (DLC)	$5	$5	$10
Direct material costs (DMC)	10	5	15
Direct overhead (DO)	8	2	10
Totals	$23	$12	$35

Indirect Overhead Allocated to Good A

IOAG (Good A) = IO ($30) × DCR ($23/$35)

IOAG (Good A) = $19.71

Indirect Overhead Allocated to Good B

IOAG (Good B) = IO ($30) × DCR ($12/$35)

IOAG (Good B) = $10.29

Example 2:

The following example illustrates the application of the direct cost ratio method used by a producer of a good to allocate indirect overhead where the producer has chosen to calculate the net cost of the good in accordance with section 6(11)(b) of this Appendix and where excluded costs are included in indirect overhead.

A producer produces Good A and Good B. The indirect overhead (IO) is $50 (including excluded costs (EC) of $20). The other relevant costs are set out in the table to Example 1.

Indirect Overhead Allocated to Good A

IOAG (Good A) = [IO ($50) × DCR ($23/$35)] –[EC ($20) × DCR ($23/$35)]

IOAG (Good A) = $19.72

Indirect Overhead Allocated to Good B

IOAG (Good B) = [IO ($50) × DCR ($12/$35)] – [EC ($20) × DCR ($12/$35)]

IOAG (Good B) = $10.28

SCHEDULE VIII
VALUE OF MATERIALS

SECTION 1. Definitions.

For purposes of this Schedule, unless otherwise stated,

"buying commissions" means fees paid by a producer to that producer's agent for the agent's services in representing the producer in the purchase of a material;

"customs administration" refers to the customs administration of the NAFTA country into whose territory the good, in the production of which the material being valued is used, is imported;

"materials of the same class or kind" means, with respect to materials being valued, materials that are within a group or range of materials that

(a) is produced by a particular industry or industry sector, and

(b) includes identical materials or similar materials;

"producer" refers to the producer who used the material in the production of a good that is subject to a regional value content requirement;

"seller" refers to a person who sells the material being valued to the producer.

SECTION 2.

(1) Except as provided under subsections (2) and (3), the transaction value of a material under Article 402(9)(a) of the Agreement, as implemented by section 7(1)(b) and sections 9(5) and 10(2) of this Appendix, shall be the price actually paid or payable for the material determined in accordance with section 4 and adjusted in accordance with section 5.

(2) There is no transaction value for a material where the material is not the subject of a sale.

(3) The transaction value of a material is unacceptable where

(a) there are restrictions on the disposition or use of the material by the producer, other than restrictions that

(i) are imposed or required by law or by the public authorities in the territory of the NAFTA country in which the producer of the good or the seller of the material is located,

(ii) limit the geographical area in which the material may be used, or

(iii) do not substantially affect the value of the material;

(b) the sale or price actually paid or payable is subject to a condition or consideration for which a value cannot be determined with respect to the material;

(c) part of the proceeds of any subsequent disposal or use of the material by the producer will accrue directly or indirectly to the seller, and an appropriate addition to the price actually paid or payable cannot be made in accordance with section 5(1)(d); and

(d) except as provided in section 3, the producer and the seller are related persons and the relationship between them influenced the price actually paid or payable for the material.

(4) The conditions or considerations referred to in subsection (3)(b) include the following circumstances:

(a) the seller establishes the price actually paid or payable for the material on condition that the producer will also buy other materials or goods in specified quantities;

(b) the price actually paid or payable for the material is dependent on the price or prices at which the producer sells other materials or goods to the seller of the material; and

(c) the price actually paid or payable is established on the basis of a form of payment extraneous to the material, such as where the material is a semi-finished material that has been provided by the seller to the producer on condition that the seller will receive a specified quantity of the finished material from the producer.

(5) For purposes of subsection (3)(b), conditions or considerations relating to the use of the material shall not render the transaction value unacceptable, such as where the producer undertakes on the producer's own account, even though by agreement with the seller, activities relating to the warranty of the material used in the production of a good.

(6) Where objective and quantifiable data do not exist with regard to the additions required to be made to the price actually paid or payable under section 5(1), the transaction value cannot be determined under the provisions of section 2(1). For an illustration of this, a royalty is paid on the basis of the price actually paid or payable in a sale of a liter of a particular good that is produced by using a material that was purchased by the kilogram and made up into a solution. If the royalty is based partially on the purchased material and partially on other factors that have nothing to do with that material, such as when the purchased material is mixed with other ingredients and is no longer separately identifiable, or when the royalty cannot be distinguished from special financial arrangements between the seller and the producer, it would be inappropriate to add the royalty and the transaction value of the material could not be determined. However, if the amount of the royalty is based only on the purchased material and can be readily quantified, an addition to the price actually paid or payable can be made and the transaction value can be determined.

SECTION 3.

(1) In determining whether the transaction value is unacceptable under section 2(3)(d), the fact that the seller and the producer are related persons shall not in itself be grounds for the customs administration to render the transaction value unacceptable. In such cases, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship between the seller and the producer did not influence the price actually paid or payable. Where the customs administration has reasonable grounds for considering that the relationship between the seller and the producer influenced the price, the customs administration shall communicate the grounds to the producer, and that producer shall be given a reasonable opportunity to respond to the grounds communicated by the customs administration. If that producer so requests, the customs administration shall communicate in writing the grounds on which it considers that the relationship between the seller and the producer influenced the price actually paid or payable.

(2) Subsection (1) provides that, where the seller and the producer are related persons, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted as the value provided that the relationship between the seller and the producer did not influence the price actually paid or payable. It is not intended under subsection (1) that there should be an examination of the circumstances in all cases where the seller and the producer are related persons. Such an examination will only be required where the customs administration has doubts that the price actually paid or payable is acceptable because of the relationship between the seller and the producer. Where the customs administration does not have doubts that the price actually paid or payable is acceptable, it shall accept that price without requesting further information. For an illustration of this, the customs administration may have previously examined the relationship between the seller and the producer, or it may already have detailed information concerning the relationship between the seller and the producer, and may already be satisfied from that examination or information that the relationship between them did not influence the price actually paid or payable.

(3) In applying subsection (1), where the seller and the producer are related persons and the customs administration has doubts that the transaction value is acceptable without further inquiry, the customs administration shall give the producer an opportunity to supply such further information as may be necessary to enable it to examine the circumstances surrounding the sale. In such a case, the customs administration shall examine the relevant aspects of the sale, including the way in which the seller and the producer organize their commercial relations and the way in which the price actually paid or payable by that producer for the material being valued was arrived at, in order to determine whether the relationship between the seller and the producer influenced that price actually paid or payable. Where it can be shown that the seller and the producer buy from and sell to each other as if they were not related persons, the price actually paid or payable shall be considered as not having been influenced by the relationship between them. For an illustration of this, if the price actually paid or payable for the material had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way in which the seller settles prices for sales to unrelated buyers, the price actually paid or payable shall be considered as not having been influenced by the relationship between the producer and the seller. For another illustration of this, where it is shown that the price actually paid or payable for the material is adequate to ensure recovery of the total cost of producing the material plus a profit that is representative of the seller's overall profit realized over a representative period of time, such as on an annual basis, in sales of materials of the same class or kind, the price actually paid or payable shall be considered as not having been influenced by the relationship between the seller and the producer.

(4) In a sale between a seller and a producer who are related persons, the transaction value shall be accepted and determined in accordance with section 2(1), wherever the seller or the producer demonstrates that the transaction value of the material in that sale closely approximates one of the following test values that occurs at or about the same time as the sale and is chosen by the seller or the producer:

(a) the transaction value in sales to unrelated buyers of identical materials or similar materials, as determined in accordance with section 2(1);

(b) the value of identical materials or similar materials, as determined in accordance with section 9; or

(c) the value of identical materials or similar materials, as determined in accordance with section 10.

(5) In applying a test value referred to in subsection (4), due account shall be taken of demonstrated differences in commercial levels, quantity levels, the value of the elements specified in section 5(1)(b) and the costs incurred by the seller in sales to unrelated buyers that are not incurred by the seller in sales by the seller to a related person.

(6) The application of a test value referred to in subsection (4) shall be used at the initiative of the seller, or at the initiative of the producer with the consent of the seller, and shall be used only for comparison purposes to determine whether the transaction value of the material is acceptable. The test value shall not be used as the transaction value of that material.

(7) Subsection (4) provides an opportunity for the seller or the producer to demonstrate that the transaction value closely approximates a test value previously accepted by the customs administration of the NAFTA country in which the producer is located, and is therefore acceptable under subsection (1). Where the application of a test value under subsection (4) demonstrates that the transaction value of the material being valued is acceptable, the customs administration shall not examine the question of influence in regard to the relationship between the seller and the producer under subsection (1). Where the customs administration already has sufficient information available, without further inquiries, that the transaction value closely approximates one of the test values determined under subsection (4), the seller or the producer is not required to apply a test value to demonstrate that the transaction value is acceptable under that subsection.

(8) A number of factors must be taken into consideration for the purpose of determining whether the transaction value of the identical materials or similar materials closely approximates the transaction value of the material being valued. These factors include the nature of the material, the nature of the industry itself, the season in which the material is sold, and whether the difference in values is commercially significant. Since these factors may vary from case to case, it would be impossible to apply an acceptable standardized difference such as a fixed amount or fixed percentage difference in each case. For an illustration of this, a small difference in value in a case involving one type of material could be unacceptable, while a large difference in a case involving another type of material might be acceptable for the purposes of determining whether the transaction value closely approximates a test value set out in subsection (4).

SECTION 4.

(1) The price actually paid or payable is the total payment made or to be made by the producer to or for the benefit of the seller of the material. The payment need not necessarily take the form of a transfer of money: it may be made by letters of credit or negotiable instruments. Payment may be made directly or indirectly to the seller. For an illustration of this, the settlement by the producer, whether in whole or in part, of a debt owed by the seller, is an indirect payment.

(2) Activities undertaken by the producer on the producer's own account, other than those for which an adjustment is provided in section 5, shall not be considered to be an indirect payment, even though the activities might be regarded as being for the benefit of the seller.

(3) The transaction value shall not include charges for construction, erection, assembly, maintenance or technical assistance related to the use of the material by the producer, provided that they are distinguished from the price actually paid or payable.

(4) The flow of dividends or other payments from the producer to the seller that do not relate to the purchase of the material are not part of the transaction value.

SECTION 5.

(1) In determining the transaction value of the material, the following shall be added to the price actually paid or payable:

(a) to the extent that they are incurred by the producer with respect to the material being valued and are not included in the price actually paid or payable,

(i) commissions and brokerage fees, except buying commissions, and

(ii) the costs of containers which, for customs purposes, are classified with the material under the Harmonized System;

(b) the value, reasonably allocated in accordance with subsection (12), of the following elements where they are supplied directly or indirectly to the seller by the producer free of charge or at reduced cost for use in connection with the production and sale of the material, to the extent that the value is not included in the price actually paid or payable:

(i) a material, other than an indirect material, used in the production of the material being valued,

(ii) tools, dies, molds and similar indirect materials used in the production of the material being valued,

(iii) an indirect material, other than those referred to in subparagraph (ii) or in paragraphs (c), (e) or (f) of the definition "indirect material" set out in Article 415 of the Agreement, as implemented by section 2(1) of this Appendix, used in the production of the material being valued, and

(iv) engineering, development, artwork, design work, and plans and sketches performed outside the territory of the NAFTA country in which the producer is located that are necessary for the production of the material being valued;

(c) the royalties related to the material, other than charges with respect to the right to reproduce the material in the territory of the NAFTA country in which the producer is located that the producer must pay directly or indirectly as a condition of sale of the material, to the extent that such royalties are not included in the price actually paid or payable; and

(d) the value of any part of the proceeds of any subsequent disposal or use of the material that accrues directly or indirectly to the seller.

(2) The additions referred to in subsection (1) shall be made to the price actually paid or payable under this section only on the basis of objective and quantifiable data.

(3) Where objective and quantifiable data do not exist with regard to the additions required to be made to the price actually paid or payable under subsection (1), the transaction value cannot be determined under section 2(1).

(4) No additions shall be made to the price actually paid or payable for the purpose of determining the transaction value except as provided in this section.

(5) The amounts to be added under subsection (1)(a) shall be those amounts that are recorded on the books of the producer.

(6) The value of the elements referred to in subsection (1)(b)(i) shall be

(a) where the elements are imported from outside the territory of the NAFTA country in which the seller is located, the customs value of the elements;

(b) where the producer, or a related person on behalf of the producer, purchases the elements from an unrelated person in the territory of the NAFTA country in which the seller is located, the price actually paid or payable for the elements;

(c) where the producer, or a related person on behalf of the producer, acquires the elements from an unrelated person in the territory of the NAFTA country in which the seller is located other than through a purchase, the value of the consideration related to the acquisition of the elements, based on the cost of the consideration that is recorded on the books of the producer or the related person; or

(d) where the elements are produced by the producer, or by a related person, in the territory of the NAFTA country in which the seller is located, the total cost of the elements, determined in accordance with subsection (7), and shall include the following costs, that are recorded on the books of the producer or the related person supplying the elements on behalf of the producer, to the extent that such costs are not included under paragraph (a) through (d):

(e) the costs of freight, insurance, packing, and all other costs incurred in transporting the elements to the location of the seller,

(f) duties and taxes paid or payable with respect to the elements, other than duties and taxes that are waived, refunded, refundable or otherwise recoverable, including credit against duty or tax paid or payable,

(g) customs brokerage fees, including the cost of in-house customs brokerage services, incurred with respect to the elements, and

(h) the cost of waste and spoilage resulting from the use of the elements in the production of the material, minus the value of renewable scrap or by-product.

(7) For the purposes of subsection (6)(d), the total cost of the elements referred to in subsection (1)(b)(i) shall be

(a) where the elements are produced by the producer, at the choice of the producer,

(i) the total cost incurred with respect to all goods produced by the producer, calculated on the basis of the costs that are recorded on the books of the producer, that can be reasonably allocated to the elements in accordance with Schedule VII, or

(ii) the aggregate of each cost incurred by the producer that forms part of the total cost incurred with respect to the elements, calculated on the basis of the costs that are recorded on the books of the producer, that can be reasonably allocated to the elements in accordance with Schedule VII; and

(b) where the elements are produced by a person who is related to the producer, at the choice of the producer,

(i) the total cost incurred with respect to all goods produced by that related person, calculated on the basis of the costs that are recorded on the books of that person, that can be reasonably allocated to the elements in accordance with Schedule VII, or

(ii) the aggregate of each cost incurred by that related person that forms part of the total cost incurred with respect to the elements, calculated on the basis of the costs that are recorded on the books of that person, that can be reasonably allocated to the elements in accordance with Schedule VII.

(8) Except as provided in subsections (10) and (11), the value of the elements referred to in subsections (1)(b)(ii) through (iv) shall be

(a) the cost of those elements that is recorded on the books of the producer, or

(b) where such elements are provided by another person on behalf of the producer and the cost is not recorded on the books of the producer, the cost of those elements that is recorded on the books of that other person.

(9) Where the elements referred to in subsections (1)(b)(ii) through (iv) were previously used by or on behalf of the producer, the value of the elements shall be adjusted downward to reflect that use.

(10) Where the elements referred to in subsections (1)(b)(ii) and (iii) were leased by the producer or a person related to the producer, the value of the elements shall be the cost of the lease that is recorded on the books of the producer or that related person.

(11) No addition shall be made to the price actually paid or payable for the elements referred to in subsection (1)(b)(iv) that are available in the public domain, other than the cost of obtaining copies of them.

(12) The producer shall choose the method of allocating to the material the value of the elements referred to in subsections (1)(b)(ii) through (iv), provided that the value is reasonably allocated to the material in a manner appropriate to the circumstances. The methods the producer may choose to allocate the value include allocating the value over the number of units produced up to the time of the first shipment or allocating the value over the entire anticipated production where contracts or firm commitments exist for that production. For an illustration of this, a producer provides the seller with a mould to be used in the production of the material and contracts with the seller to buy 10,000 units of that material. By the time the first shipment of 1,000 units arrives, the seller has already produced 4,000 units. In these circumstances, the producer may choose to allocate the value of the mould over 4,000 units or 10,000 units but shall not choose to allocate the value of the elements to the first shipment of 1,000 units. The producer may choose to allocate the entire value of the elements to a single shipment of material only where that single shipment comprises all of the units of the material acquired by the producer under the contract or commitment for that number of units of the material between the seller and the producer.

(13) The addition for the royalties referred to in subsection (1)(c) shall be the payment for the royalties that is recorded on the books of the producer, or where the payment for the royalties is recorded on the books of another person, the payment for the royalties that is recorded on the books of that other person.

(14) The value of the proceeds referred to in subsection (1)(d) shall be the amount that is recorded for such proceeds on the books of the producer or the seller.

SECTION 6.

(1) If there is no transaction value under section 2(2) or the transaction value is unacceptable under section 2(3), the value of the material, referred to Article 402(9)(b) of the Agreement, as implemented by section 7(1)(b)(ii) of Part III of this Appendix, shall be the transaction value of identical materials sold, at or about the same time as the material being valued was shipped to the producer, to a buyer located in the same country as the producer.

(2) In applying this section, the transaction value of identical materials in a sale at the same commercial level and in substantially the same quantity of materials as the material being valued shall be used to determine the value of the material. Where no such sale is found, the transaction value of identical materials sold at a different commercial level or in different quantities, adjusted to take into account the differences attributable to the commercial level or quantity, shall be used, provided that such adjustments can be made on the basis of evidence that clearly establishes that the adjustment is reasonable and accurate, whether the adjustment leads to an increase or a decrease in the value.

(3) A condition for adjustment under subsection (2) because of different commercial levels or different quantities is that such adjustment be made only on the basis of evidence that clearly establishes that an adjustment is reasonable and accurate. For an illustration of this, a bona fide price list contains prices for different quantities. If the material being valued consists of a shipment of 10 units and the only identical materials for which a transaction value exists involved a sale of 500 units, and it is recognized that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller's bona fide price list and using the price applicable to a sale of 10 units. This does not require that sales had to have been made in quantities of 10 as long as the price list has been established as being bona fide through sales at other quantities. In the absence of such an objective measure, however, the determination of a value under this section is not appropriate.

(4) If more than one transaction value of identical materials is found, the lowest such value shall be used to determine the value of the material under this section.

SECTION 7.

(1) If there is no transaction value under section 2(2) or the transaction value is unacceptable under section 2(3), and the value of the material cannot be determined under section 6, the value of the material, referred to in Article 402(9)(b) of the Agreement, as implemented by section 7(1)(b)(ii) of Part III of this Appendix, shall be the transaction value of similar materials sold, at or about the same time as the material being valued was shipped to the producer, to a buyer located in the same country as the producer.

(2) In applying this section, the transaction value of similar materials in a sale at the same commercial level and in substantially the same quantity of materials as the material being valued shall be used to determine the value of the material. Where no such sale is found, the transaction value of similar materials sold at a different commercial level or in different quantities, adjusted to take into account the differences attributable to the commercial level or quantity, shall be used, provided that such adjustments can be made on the basis of evidence that clearly establishes that the adjustment is reasonable and accurate, whether the adjustment leads to an increase or a decrease in the value.

(3) A condition for adjustment under subsection (2) because of different commercial levels or different quantities is that such adjustment be made only on the basis of evidence that clearly establishes that an adjustment is reasonable and accurate. For an illustration of this, a bona fide price list contains prices for different quantities. If the material being valued consists of a shipment of 10 units and the only similar materials for which a transaction value exists involved a sale of 500 units, and it is recognized that the seller grants quantity discounts, the required adjustment may be accomplished by resorting to the seller's bona fide price list and using the price applicable to a sale of 10 units. This does not require that sales had to have been made in quantities of 10 as long as the price list has been established as being bona fide through sales at other quantities. In the absence of such an objective measure, however, the determination of a value under this section is not appropriate.

(4) If more than one transaction value of similar materials is found, the lowest such value shall be used to determine the value of the material under this section.

SECTION 8.

If there is no transaction value under section 2(2) or the transaction value is unacceptable under section 2(3), and the value of the material cannot be determined under section 6 or 7, the value of the material, referred to in Article 402(9)(b) of the Agreement, as implemented by section 7(1)(b)(ii) of Part III of this Appendix, shall be determined under section 9 or, when the value cannot be determined under that section, under section 10 except that, at the request of the producer, the order of application of section 9 and 10 shall be reversed.

SECTION 9.

(1) Under this section, if identical materials or similar materials are sold in the territory of the NAFTA country in which the producer is located, in the same condition as the material was in when received by the producer, the value of the material, referred to in Article 402(9)(b) of the Agreement, as implemented by section 7(1)(b)(ii) of Part III of this Appendix, shall be based on the unit price at which those identical materials or similar materials are sold, in the greatest aggregate quantity, at or about the same time as the material being valued is received by the producer, to persons located in that territory who are not related to the seller, subject to deductions for the following:

(a) either the amount of commissions usually earned or the amount generally reflected for profit and general expenses, in connection with sales, in the territory of that NAFTA country, of materials of the same class or kind as the material being valued; and

(b) taxes, if included in the unit price, payable in the territory of that NAFTA country, which are either waived, refunded or recoverable by way of credit against taxes actually paid or payable.

(2) If neither identical materials nor similar materials are sold at or about the same time the material being valued is received by the producer, the value shall, subject to the deductions provided for under subsection (1), be based on the unit price at which identical materials or similar materials are sold in the territory of the NAFTA country in which the producer is located, in the same condition as the material was in when received by the producer, at the earliest date within 90 days after the date the material being valued was received by the producer.

(3) The expression "unit price at which identical materials or similar materials are sold, in the greatest aggregate quantity" in subsection (1) means the price at which the greatest number of units is sold in sales between unrelated persons. For an illustration of this, materials are sold from a price list which grants favorable unit prices for purchases made in larger quantities.

Sale Quantity	Unit Price	Number of Sales	Total Quantity Sold at Each Price
1–10 units	100	10 sales of 5 units	65
		5 sales of 3 units	
11–25 units	95	5 sales of 11 units	55
Over 25 units	90	1 sale of 30 units	80
		1 sale of 50 units	

The greatest number of units sold at a particular price is 80; therefore, the unit price in the greatest aggregate quantity is 90.

As another illustration of this, two sales occur. In the first sale 500 units are sold at a price of 95 currency units each. In the second sale 400 units are sold at a price of 90 currency units each. In this illustration, the greatest number of units sold at a particular price is 500; therefore, the unit price in the greatest aggregate quantity is 95.

(4) Any sale to a person who supplies, directly or indirectly, free of charge or at reduced cost for use in connection with the production of the material, any of the elements specified in section 5(1)(b), shall not be taken into account in establishing the unit price for the purposes of this section.

(5) The amount generally reflected for profit and general expenses referred to in subsection (1)(a) shall be taken as a whole. The figure for the purposes of deducting an amount for profit and general expenses shall be determined on the basis of information supplied by or on behalf of the producer unless the figures provided by the producer are inconsistent with those usually reflected in sales, in the country in which the producer is located, of materials of the same class or kind as the material being valued. Where the figures provided by the producer are inconsistent with those figures, the amount for profit and general expenses shall be based on relevant information other than that supplied by or on behalf of the producer.

(6) For the purposes of this section, general expenses are the direct and indirect costs of marketing the material in question.

(7) In determining either the commissions usually earned or the amount generally reflected for profit and general expenses under this section, the question as to whether certain materials are materials of the same class or kind as the material being valued shall be determined on a case-by-case basis with reference to the circumstances involved. Sales in the country in which the producer is located of the narrowest group or range of materials of the same class or kind as the material being valued, for which the necessary information can be provided, shall be examined. For the purposes of this section, "materials of the same class or kind" includes materials imported from the same country as the material being valued as well as materials imported from other countries or acquired within the territory of the NAFTA country in which the producer is located.

(8) For the purposes of subsection (2), the earliest date shall be the date by which sales of identical materials or similar materials are made, in sufficient quantity to establish the unit price, to other persons in the territory of the NAFTA country in which the producer is located.

SECTION 10.

(1) Under this section, the value of a material, referred to in Article 402(9)(b) of the Agreement, as implemented by section 7(1)(b)(ii) of Part III of this Appendix, shall be the sum of

(a) the cost or value of the materials used in the production of the material being valued, as determined on the basis of the costs that are recorded on the books of the producer of the material,

(b) the cost of producing the material being valued, as determined on the basis of the costs that are recorded on the books of the producer of the material, and

(c) an amount for profit and general expenses equal to that usually reflected in sales, in the territory of the NAFTA country in which the producer is located, by producers of materials of the same class or kind as the material being valued in the country in which the material is produced,

and shall include, to the extent they are not already included under paragraph (a) or (b) and where the elements are supplied directly or indirectly to the producer of the material being valued by the producer free of charge or at a reduced cost for use in the production of that material,

(d) the value of elements referred to in section 5(1)(b)(i), determined in accordance with section 5(6), and

(e) the value of elements referred to in section 5(1)(b)(ii) through (iv), determined in accordance with section 5(8) and reasonably allocated to the material in accordance with section 5(12).

(2) For purposes of subsections (1) (a) and (b), where the costs recorded on the books of the producer of the material relate to the production of other goods and materials as well as to the production of the material being valued, the costs referred to in subsections (1) (a) and (b) with respect to the material being valued shall be those costs recorded on the books of the producer of the material that can be reasonably allocated to that material in accordance with Schedule VII.

(3) The amount for profit and general expenses referred to in subsection (1)(c) shall be determined on the basis of information supplied by or on behalf of the producer of the material being valued unless the profit and general expenses figures that are supplied with that information are inconsistent with those usually reflected in sales by producers of materials of the same class or kind as the material being valued in the country in which the material is produced. The information supplied shall be prepared in a manner consistent with generally accepted accounting principles of the country in which the material being valued is produced. Where the material is produced in the territory of a NAFTA country, the information shall be prepared in accordance with the generally accepted accounting principles set out in the authorities listed for that NAFTA country in Schedule VI.

(4) For purposes of subsection (1)(c) and subsection (3), general expenses means the direct and indirect costs of producing and selling the material that are not included under subsections (1) (a) and (b).

(5) For purposes of subsection (3), the amount for profit and general expenses shall be taken as a whole. Where, in the information supplied by or on behalf of the producer of a material, the profit figure is low and the general expenses figure is high, the profit and general expense figures taken together may nevertheless be consistent with those usually reflected in sales of materials of the same class or kind as the material being valued. Where the producer of a material can demonstrate that it is taking a nil or low profit on its sales of the material because of particular commercial circumstances, its actual profit and general expense figures shall be taken into account, provided that the producer of the material has valid commercial reasons to justify them and its pricing policy reflects usual pricing policies in the branch of industry concerned. For an illustration of this, such a situation might occur where producers have been forced to lower prices temporarily because of an unforeseeable drop in demand, or where the producers sell the material to complement a range of materials and goods being produced in the country in which the material is sold and accept a low profit to maintain competitiveness. A further illustration is where a material was being launched and the producer accepted a nil or low profit to offset high general expenses associated with the launch.

(6) Where the figures for the profit and general expenses supplied by or on behalf of the producer of the material are not consistent with those usually reflected in sales of materials of the same class or kind as the material being valued that are made by other producers in the country in which that material is sold, the amount for profit and general expenses may be based on relevant information other than that supplied by or on behalf of the producer of the material.

(7) Where a customs administration uses information other than that supplied by or on behalf of the producer of the material for the purposes of determining the value of a material under this section, the customs administration shall communicate to the producer, if that producer so requests, the source of such information, the data used and the calculations based upon such data, subject to the provisions on confidentiality under Article 507 of the Agreement, as implemented in each NAFTA country.

(8) Whether certain materials are of the same class or kind as the material being valued shall be determined on a case-by-case basis with reference to the circumstances involved. For purposes of determining the amount for profit and general expenses usually reflected under the provisions of this section, sales of the narrowest group or range of materials of the same class or kind, which includes the material being valued, for which the necessary information can be provided, shall be examined. For the purposes of this section, the materials of the same class or kind must be from the same country as the material being valued.

SECTION 11.

(1) Where there is no transaction value under section 2(2) or the transaction value is unacceptable under section 2(3), and the value of the materials cannot be determined under sections 6 through 10, the value of the material, referred to in Article 402(9)(b) of the Agreement, as implemented by section 7(1)(b)(ii) of Part III of this Appendix, shall be determined under this section using reasonable means consistent with the principles and general provisions of this Schedule and on the basis of data available in the country in which the producer is located.

(2) The value of the material determined under this section shall not be determined on the basis of

(a) a valuation system which provides for the acceptance of the higher of two alternative values;

(b) a cost of production other than the value determined in accordance with section 10;

(c) minimum values;

(d) arbitrary or fictitious values;

(e) where the material is produced in the territory of the NAFTA country in which the producer is located, the price of the material for export from that territory; or

(f) where the material is imported, the price of the material for export to a country other than to the territory of the NAFTA country in which the producer is located.

(3) To the greatest extent possible, the value of the material determined under this section shall be based on the methods of valuation set out in sections 2 through 10, but a reasonable flexibility in the application of such methods would be in conformity with the aims and provisions of this section. For an illustration of this, under section 6, the requirement that the identical materials should be sold at or about the same time as the time the material being valued is shipped to the producer could be flexibly interpreted. Similarly, identical materials produced in a country other than the country in which the material is produced could be the basis for determining the value of the material, or the value of identical materials already determined under section 9 could be used. For another illustration, under section 7, the requirement that the similar materials should be sold at or about the same time as the material being valued are shipped to the producer could be flexibly interpreted. Likewise, similar materials produced in a country other than the country in which the material is produced could be the basis for determining the value of the material, or the value of similar materials already determined under the provisions of section 9 could be used. For a further illustration, under section 9, the ninety days requirement could be administered flexibly.

SCHEDULE IX

METHODS FOR DETERMINING THE VALUE OF NON-ORIGINATING MATERIALS THAT ARE IDENTICAL MATERIALS AND THAT ARE USED IN THE PRODUCTION OF A GOOD UNDER THE TRANSACTION VALUE METHOD

Definitions and Interpretation

SECTION 1. Definitions.

For purposes of this Schedule,

"FIFO method" means the method by which the value of non-originating materials first received in materials inventory, determined in accordance with section 7 of this Appendix, is considered to be the value of non-originating materials used in the production of the good first shipped to the buyer of the good;

"identical materials" means, with respect to a material, materials that are the same as that material in all respects, including physical characteristics, quality and reputation but excluding minor differences in appearance;

"LIFO method" means the method by which the value of non-originating materials last received in materials inventory, determined in accordance with section 7 of this Appendix, is considered to be the value of non-originating materials used in the production of the good first shipped to the buyer of the good;

"materials inventory" means, with respect to a single plant of the producer of a good, an inventory of non-originating materials that are identical materials and that are used in the production of the good; and

"rolling average method" means the method by which the value of non-originating materials used in the production of a good that is shipped to the buyer of the good is based on the average value, calculated in accordance with section 4, of the non-originating materials in materials inventory.

General

SECTION 2.

The methods for determining the value of non-originating materials that are identical materials and that are referred to in section 6(10) of this Appendix are the following:

(a) FIFO method;

(b) LIFO method; and

(c) rolling average method.

SECTION 3.

(1) Where a producer of a good chooses, with respect to non-originating materials that are identical materials, any of the methods referred to in section 2, the producer may not use another of those methods with respect to any other non-originating materials that are identical materials and that are used in the production of that good or in the production of any other good with respect to which the transaction value method has been chosen.

(2) Where a producer of a good produces the good in more than one plant, the method chosen by the producer shall be used with respect to all plants of the producer in which the good is produced.

(3) The method chosen by the producer to determine the value of non-originating materials may be chosen at any time during the producer's fiscal year and may not be changed during that fiscal year.

Average Value for Rolling Average Method

SECTION 4.

(1) The average value of non-originating materials that are identical materials and that are used in the production of a good that is shipped to the buyer of the good is calculated by dividing

(a) the total value of non-originating materials that are identical materials in materials inventory prior to the shipment of the good, determined in accordance with section 7 of this Appendix,

by

(b) the total units of those non-originating materials in materials inventory prior to the shipment of the good.

(2) The average value calculated under subsection (1) is applied to the remaining units of non-originating materials in materials inventory.

ADDENDUM

"EXAMPLES" ILLUSTRATING THE APPLICATION OF THE METHODS FOR DETERMINING THE VALUE OF NON-ORIGINATING MATERIALS THAT ARE IDENTICAL MATERIALS AND THAT ARE USED IN THE PRODUCTION OF A GOOD UNDER THE TRANSACTION VALUE METHOD

The following "examples" are based on the figures set out in the table below and on the following assumptions:

(a) Materials A are non-originating materials that are identical materials that are used in the production of Good A;

(b) one unit of Materials A is used to produce one unit of Good A;

(c) all other materials used in the production of Good A are originating materials;

(d) Good A is subject to a regional value-content requirement and the producer has chosen the transaction value method; and
(e) Good A is produced in a single plant.

Date (M/D/Y)	Materials inventory (Receipts of materials A)		Sales (Shipments of good A)
	Quantity (Units)	Unit Cost*	Quantity (Units)
01/01/94	200	1.05	
01/03/94	1,000	1.00	
01/05/94	1,000	1.10	
01/08/94			500
01/09/94			500
01/10/94	1,000	1.05	
01/14/94			1,500
01/16/94	2,000	1.10	
01/18/94			1,500

*Unit cost is determined in accordance with section 7 of this Appendix.

Example 1: FIFO method
By applying the FIFO method:
(1) the 200 units of Materials A received on 01/01/94 and valued at $1.05 per unit and 300 units of the 1,000 units of Material A received on 01/03/94 and valued at $1.00 per unit are considered to have been used in the production of the 500 units of Good A shipped on 01/08/94; therefore, the value of the non-originating materials used in the production of those goods is considered to be $510 [(200 unit × $1.05)+($300 units × $1.00)];
(2) 500 units of the remaining 700 units of Materials A received on 01/03/94 and valued at $1.00 per unit are considered to have been used in the production of the 500 units of Good A shipped on 01/09/94; therefore, the value of the non-originating materials used in the production of those goods is considered to be $500 (500 units × $1.00);
(3) the remaining 200 units of the 1,000 of Materials A received on 01/03/94 and valued at $1.00 per unit, the 1,000 units of Materials A received on 01/05/94 and valued at $1.10 per unit, and 300 units of the 1,000 Materials A received on 01/10/94 and valued at $1.05 per unit are considered to have been used in the production of the 1,500 units of Good A shipped on 01/14/94; therefore, the value of non-originating materials used in the production of those goods is considered to be $1,615 [(200 units × $1.00) + (1,000 units × $1.10)+(300 units × $1.05)]; and
(4) the remaining 700 units of the 1,000 units of Materials A received on 01/10/94 and valued at $1.05 per unit and 800 units of the 2,000 units of Materials A received on 01/16/94 and valued at $1.10 per unit are considered to have been used in the production of the 1,500 units of Good A shipped on 01/18/94; therefore, the value of non-originating materials used in the production of those goods is considered to be $1,615 [(700 × $1.05) + (800 × $1.10)].

Example 2: LIFO method
By applying the LIFO method:
(1) 500 units of the 1,000 units of Materials A received on 01/05/94 and valued at $1.10 per unit are considered to have been used in the production of the 500 units of Good A shipped on 01/08/94; therefore, the value of the non-originating materials used in the production of those goods is considered to be $550 (500 units × $1.10);
(2) the remaining 500 units of the 1,000 units of Materials A received on 01/05/94 and valued at $1.10 per unit are considered to have been used in the production of the 500 units of Good A shipped on 01/09/94; therefore, the value of non-originating materials used in the production of those goods is considered to be $550 (500 unit × $1.10);
(3) the 1,000 units of Materials A received on 01/10/94 and valued at $1.05 per unit and 500 units of the 1,000 units of Material A received on 01/03/94 and valued at $1.00 per unit are considered to have been used in the production of the 1,500 units of Good A shipped on 01/14/94; therefore, the value of non-originating materials used in the production of those goods is considered to be $1,550 [(1,000 units × $1.05) + (500 units × $1.00)]; and
(4) 1,500 units of the 2,000 units of Materials A received on 01/16/94 and valued at $1.10 per unit are considered to have been used in the production of the 1,500 units of Good A shipped on 01/18/94; therefore, the value of non-originating materials used in the production of those goods is considered to be $1,650 (1,500 units × $1.10).

Example 3: Rolling average method
The following table identifies the average value of non-originating Materials A as determined under the rolling average method. For purposes of this example, a new average value of non-originating Materials A is calculated after each receipt.

	Materials inventory			
	Date (M/D/Y)	Quantity (Units)	Unit Cost*	Total Value
Beginning Inventory	1/1/94	200	$1.05	$210
Receipt	1/3/94	*1,000*	*1.00*	*1,000*
AVERAGE VALUE		1,200	1.008	1,210
Receipt	1/5/94	*1,000*	*1.10*	*1,100*
AVERAGE VALUE		2,200	1.05	2,310
Shipment	1/8/94	*500*	*1.05*	*525*
AVERAGE VALUE		1,700	1.05	1,785
Shipment	1/9/94	*500*	*1.05*	*525*

Materials inventory				
	Date (M/D/Y)	Quantity (Units)	Unit Cost*	Total Value
AVERAGE VALUE		1,200	1.05	1,260
Receipt	1/16/94	*2,000*	*1.10*	*2,200*
AVERAGE VALUE		3,200	1.08	3,460

* unit cost is determined in accordance with section 7 of this Appendix.

By applying the rolling average method:
(1) the value of non-originating materials used in the production of the 500 units of Good A shipped on 01/08/94 is considered to be $525 (500 units × $1.05); and
(2) the value of non-originating materials used in the production of the 500 units of Good A shipped on 01/09/94 is considered to be $525 (500 units × $1.05).

SCHEDULE X
INVENTORY MANAGEMENT METHODS

PART I
FUNGIBLE MATERIALS

Definitions and Interpretation

SECTION 1. Definitions.

For purposes of this Part,
"average method" means the method by which the origin of fungible materials withdrawn from materials inventory is based on the ratio, calculated under section 5, of originating materials and non-originating materials in materials inventory;
"FIFO method" means the method by which the origin of fungible materials first received in materials inventory is considered to be the origin of fungible materials first withdrawn from materials inventory;
"LIFO method" means the method by which the origin of fungible materials last received in materials inventory is considered to be the origin of fungible materials first withdrawn from materials inventory;
"materials inventory" means,

(a) with respect to a producer of a good, an inventory of fungible materials that are used in the production of the good, and

(b) with respect to a person from whom the producer of the good acquired those fungible materials, an inventory from which fungible materials are sold or otherwise transferred to the producer of the good;

"opening inventory" means the materials inventory at the time an inventory management method is chosen;
"origin identifier" means any mark that identifies fungible materials as originating materials or non-originating materials.

General

SECTION 2.

The inventory management methods for determining whether fungible materials referred to in section 7(14)(a) of this Appendix are originating materials are the following:

(a) specific identification method;
(b) FIFO method;
(c) LIFO method; and
(d) average method.

SECTION 3.

Where a producer of a good or a person from whom the producer acquired the materials that are used in the production of the good chooses an inventory management method referred to in section 2, that method shall be used from the time the choice is made until the end of the fiscal year of the producer or person.

Specific Identification Method

SECTION 4.

(1) Except as otherwise provided under subsection (2), where the producer or person referred to in section 3 chooses the specific identification method, the producer or person shall physically segregate, in materials inventory, originating materials that are fungible materials from non-originating materials that are fungible materials.
(2) Where originating materials or non-originating materials that are fungible materials are marked with an origin identifier, the producer or person need not physically segregate those materials under subsection (1) if the origin identifier remains visible throughout the production of the good.

Average Method

SECTION 5.

Where the producer or person referred to in section 3 chooses the average method, the origin of fungible materials withdrawn from materials inventory is determined on the basis of the ratio of originating materials and non-originating materials in materials inventory that is calculated under sections 6 through 8.

SECTION 6.

(1) Except as otherwise provided in sections 7 and 8, the ratio is calculated with respect to a month or three-month period, at the choice of the producer or person, by dividing

(a) the sum of

(i) the total units of originating materials or non-originating materials that are fungible materials and that were in materials inventory at the beginning of the preceding one-month or three-month period, and

(ii) the total units of originating materials or non-originating materials that are fungible materials and that were received in materials inventory during that preceding one-month or three-month period,

by

(b) the sum of

(i) the total units of originating materials and non-originating materials that are fungible materials and that were in materials inventory at the beginning of the preceding one-month or three-month period, and

(ii) the total units of originating materials and non-originating materials that are fungible materials and that were received in materials inventory during that preceding one-month or three-month period.

(2) The ratio calculated with respect to a preceding month or three-month period under subsection (1) is applied to the fungible materials remaining in materials inventory at the end of the preceding month or three-month period.

SECTION 7.

(1) Where the good is subject to a regional value-content requirement and the regional value content is calculated under the net cost method and the producer or person chooses to average over a period under sections 6(15), 11(1), (3) or (6), 12(1) or 13(4) of this Appendix, the ratio is calculated with respect to that period by dividing

(a) the sum of

(i) the total units of originating materials or non-originating materials that are fungible materials and that were in materials inventory at the beginning of the period, and

(ii) the total units of originating materials or non-originating materials that are fungible materials and that were received in materials inventory during that period,

by

(b) the sum of

(i) the total units of originating materials and non-originating materials that are fungible materials and that were in materials inventory at the beginning of the period, and

(ii) the total units of originating materials and non-originating materials that are fungible materials and that were received in materials inventory during that period.

(2) The ratio calculated with respect to a period under subsection (1) is applied to the fungible materials remaining in materials inventory at the end of the period.

SECTION 8.

(1) Where the good is subject to a regional value-content requirement and the regional value content of that good is calculated under the transaction value method or the net cost method, the ratio is calculated with respect to each shipment of the good by dividing

(a) the total units of originating materials or non-originating materials that are fungible materials and that were in materials inventory prior to the shipment,

by

(b) the total units of originating materials and non-originating materials that are fungible materials and that were in materials inventory prior to the shipment.

(2) The ratio calculated with respect to a shipment of a good under subsection (1) is applied to the fungible materials remaining in materials inventory after the shipment.

Manner of Dealing with Opening Inventory

SECTION 9.

(1) Except as otherwise provided under subsections (2) and (3), where the producer or person referred to in section 3 has fungible materials in opening inventory, the origin of those fungible materials is determined by

(a) identifying, in the books of the producer or person, the latest receipts of fungible materials that add up to the amount of fungible materials in opening inventory;

(b) determining the origin of the fungible materials that make up those receipts; and

(c) considering the origin of those fungible materials to be the origin of the fungible materials in opening inventory.

(2) Where the producer or person chooses the specific identification method and has, in opening inventory, originating materials or non-originating materials that are fungible materials and that are marked with an origin identifier, the origin of those fungible materials is determined on the basis of the origin identifier.

(3) The producer or person may consider all fungible materials in opening inventory to be non-originating materials.

PART II
FUNGIBLE GOODS
Definitions and Interpretation

SECTION 10. Definitions.

For purposes of this Part,

"average method" means the method by which the origin of fungible goods withdrawn from finished goods inventory is based on the ratio, calculated under section 12, of originating goods and non-originating goods in finished goods inventory;

"FIFO method" means the method by which the origin of fungible goods first received in finished goods inventory is considered to be the origin of fungible goods first withdrawn from finished goods inventory;

"finished goods inventory" means an inventory from which fungible goods are sold or otherwise transferred to another person;

"LIFO method" means the method by which the origin of fungible goods last received in finished goods inventory is considered to be the origin of fungible goods first withdrawn from finished goods inventory;

"opening inventory" means the finished goods inventory at the time an inventory management method is chosen; and

"origin identifier" means any mark that identifies fungible goods as originating goods or non-originating goods.

General

SECTION 11.

The inventory management methods for determining whether fungible goods referred to in section 7(14)(b) of this Appendix are originating goods are the following:

(a) specific identification method;
(b) FIFO method;
(c) LIFO method; and
(d) average method.

SECTION 12.

Where an exporter of a good or a person from whom the exporter acquired the good chooses an inventory management method referred to in section 11, that method shall be used from the time the choice is made until the end of the fiscal year of the exporter or person.

Specific Identification Method

SECTION 13.

(1) Except as provided under subsection (2), where the exporter or person referred to in section 12 chooses the specific identification method, the exporter or person shall physically segregate, in finished goods inventory, originating goods that are fungible goods from non-originating goods that are fungible goods.

(2) Where originating goods or non-originating goods that are fungible goods are marked with an origin identifier, the exporter or person need not physically segregate those goods under subsection (1) if the origin identifier is visible on the fungible goods.

Average Method

SECTION 14.

(1) Where the exporter or person referred to in section 12 chooses the average method, the origin of fungible goods withdrawn from finished goods inventory during a month or three-month period, at the choice of the exporter or person, is determined on the basis of the ratio of originating goods and non-originating goods in finished goods inventory for the preceding one-month or three-month period that is calculated by dividing

(a) the sum of

(i) the total units of originating goods or non-originating goods that are fungible goods and that were in finished goods inventory at the beginning of the preceding one-month or three-month period, and

(ii) the total units of originating goods or non-originating goods that are fungible goods and that were received in finished goods inventory during that preceding one-month or three-month period,

by

(b) the sum of

(i) the total units of originating goods and non-originating goods that are fungible goods and that were in finished goods inventory at the beginning of the preceding one-month or three-month period, and

(ii) the total units of originating goods and non-originating goods that are fungible goods and that were received in finished goods inventory during that preceding one-month or three-month period.

(2) The calculated with respect to a preceding month or three-month period under subsection (1) is applied to the fungible goods remaining in finished goods inventory at the end of the preceding month or three-month period.

Manner of Dealing with Opening Inventory

SECTION 15.

(1) Except as otherwise provided under subsections (2) and (3), where the exporter or person referred to in section 12 has fungible goods in opening inventory, the origin of those fungible goods is determined by

(a) identifying, in the books of the exporter or person, the latest receipts of fungible goods that add up to the amount of fungible goods in opening inventory;
(b) determining the origin of the fungible goods that make up those receipts; and
(c) considering the origin of those fungible goods to be the origin of the fungible goods in opening inventory.

(2) Where the exporter or person chooses the specific identification method and has, in opening inventory, originating goods or non-originating goods that are fungible goods and that are marked with an origin identifier, the origin of those fungible goods is determined on the basis of the origin identifier.

(3) The exporter or person may consider all fungible goods in opening inventory to be non-originating goods.

ADDENDUM A

"EXAMPLES" ILLUSTRATING THE APPLICATION OF THE INVENTORY MANAGEMENT METHODS TO DETERMINE THE ORIGIN OF FUNGIBLE MATERIALS

The following "examples" are based on the figures set out in the table below and on the following assumptions:

(a) originating Material A and non-originating Material A that are fungible materials are used in the production of Good A;
(b) one unit of Material A is used to produce one unit of Good A;
(c) Material A is only used in the production of Good A;
(d) all other materials used in the production of Good A are originating materials; and
(e) the producer of Good A exports all shipments of Good A to the territory of a NAFTA country.

Date (M/D/Y)	Materials inventory sales (Receipts of material A)		Sales (Shipments of good A)
	Quality (Units)	Unit Cost*	Quantity (Units)
12/18/93	100 (O[1])	1.00	
12/27/93	100 (N[2])	1.10	
01/01/94	200 (OI[3])		
01/01/94	1,000 (O)	1.00	
01/05/94	1,000 (N)	1.10	
01/10/94			100
01/10/94	1,000 (O)	1.05	
01/15/94			700
01/16/94	2,000 (N)	1.10	
01/20/94			1,000
01/23/94			900

* unit cost is determined in accordance with section 7 of this Appendix.
[1] "O" denotes originating materials.
[2] "N" denotes non-originating materials.
[3] "OI" denotes opening inventory.

Example 1: FIFO method

Good A is subject to a regional value-content requirement. Producer A is using the transaction value method to determine the regional value content of Good A.

By applying the FIFO method:

(1) the 100 units of originating Material A in opening inventory that were received in materials inventory on 12/18/93 are considered to have been used in the production of the 100 units of Good A shipped on 01/10/94; therefore, the value of non-originating materials used in the production of those goods is considered to be $0;

(2) the 100 units of non-originating Material A in opening inventory that were received in materials inventory on 12/27/93 and 600 units of the 1,000 units of originating Material A that were received in materials inventory on 01/01/94 are considered to have been used in the production of the 700 units of Good A shipped on 01/15/94; therefore, the value of non-originating materials used in the production of those goods is considered to be $110 (100 units×$1.10);

(3) the remaining 400 units of the 1,000 units of originating Material A that were received in materials inventory on 01/01/94 and 600 units of the 1,000 units of non-originating Material A that were received in materials inventory on 01/05/94 are considered to have been used in the production of the 1,000 units of Good A shipped on 01/20/94; therefore, the value of non-originating materials used in the production of those goods is considered to be $660 (600 units×$1.10); and

(4) the remaining 400 units of the 1,000 units of non-originating Material A that were received in materials inventory on 01/05/94 and 500 units of the 1,000 units of originating Material A that were received in materials inventory on 01/10/94 are considered to have been used in the production of the 900 units of Good A shipped on 01/23/94; therefore, the value of non-originating materials used in the production of the those goods is considered to be $440 (400 units×$1.10).

Example 2: LIFO method

Good A is subject to a change in tariff classification requirement and the non-originating Material A used in the production of Good A does not undergo the applicable change in tariff classification. Therefore, where originating Material A is used in the production of Good A, Good A is an originating good and, where non-originating Material A is used in the production of Good A, Good A is a non-originating good.

By applying the LIFO method:

(1) 100 units of the 1,000 units of non-originating Material A that were received in materials inventory on 01/05/94 are considered to have been used in the production of the 100 units of Good A shipped on 01/10/94;

(2) 700 units of the 1,000 units of originating Material A that were received in materials inventory on 01/10/94 are considered to have been used in the production of the 700 units of Good A shipped on 01/15/94;

(3) 1,000 units of the 2,000 units of non-originating Material A that were received in materials inventory on 01/16/94 are considered to have been used in the production of the 1,000 units of Good A shipped on 01/20/94; and

(4) 900 units of the remaining 1,000 units of non-originating Material A that were received in materials inventory on 01/16/94 are considered to have been used in the production of the 900 units of Good A shipped on 01/23/94.

Example 3: Average method

Good A is subject to an applicable regional value-content requirement. Producer A is using the transaction value method to determine the regional value content of Good A. Producer A determines the average value of non-originating Material A and the ratio of originating Material A to total value of originating Material A and non-originating Material A in the following table.

QUANTITY (UNITS)	DATE (M/D/Y)	MATERIALS INVENTORY						SALES (SHIPMENTS OF GOOD A)
		(RECEIPTS OF MATERIAL A)			(NON-ORIGINATING MATERIAL)			
		QUANTITY (UNITS)	TOTAL VALUE	UNIT COST*	QUANTITY (UNITS)	TOTAL VALUE	RATIO	QUANTITY (UNITS)
RECEIPT	12/18/93	100 (O[1])	100	1.00				
RECEIPT	12/27/93	100 (N[2])	110	1.10	100	110.00		

QUANTITY (UNITS)	DATE (M/D/Y)	MATERIALS INVENTORY						SALES (SHIPMENTS OF GOOD A)
		(RECEIPTS OF MATERIAL A)			(NON-ORIGINATING MATERIAL)			
		QUANTITY (UNITS)	TOTAL VALUE	UNIT COST*	QUANTITY (UNITS)	TOTAL VALUE	RATIO	QUANTITY (UNITS)
NEW AVERAGE INV. VALUE.	.....	200 (OI[3])	210	1.05	100	105.00	0.50	
RECEIPT	01/01/94	1,000 (O)	1,000	1.00				
NEW AVERAGE INV. VALUE.	.....	1,200	1,210	1.01	100	101.00	0.08	
RECEIPT	01/05/94	1,000 (N)	1,100	1.10	1,000	1,100.00		
NEW AVERAGE INV. VALUE.	.....	2,200	2,310	1.05	1,100	1,155.00	0.50	
SHIPMENT	01/10/94	(100)	(105)	1.05	(50)	(52.50)	.....	100
RECEIPT	01/10/94	1,000 (O)	1,050	1.05				
NEW AVERAGE INV. VALUE.	.....	3,100	3,255	1.05	1,050	1,102.50	0.34	
SHIPMENT	01/15/94	(700)	(735)	1.05	(238)	(249.90)	.....	700
RECEIPT	01/16/94	2,000 (N)	2,200	1.10	2,000	2,000.00		
NEW AVERAGE INV. VALUE.	.....	4,400	4,720	1.07	2,816	3,013.20	0.64	
SHIPMENT	01/20/94	(1,000)	(1,070)	1.07	(640)	(648.80)	.....	1,000
SHIPMENT	01/23/94	(900)	(963)	1.07	(576)	(616.32)	.....	900
NEW AVERAGE INV. VALUE.	.....	2,500	2,687	1.07	1,600	1,712.00	0.64	

*Unit cost is determined in accordance with section 7 of this Appendix.
[1] "O" denotes originating materials.
[2] "N" denotes non-originating materials.
[3] "OI" denotes opening inventory.

By applying the average method:
(1) before the shipment of the 100 units of Material A on 01/10/94, the ratio of units of originating Material A to total units of Material A in materials inventory was .50 (1,100 units/2,200 units) and the ratio of units of non-originating Material A to total units of Material A in materials inventory was .50 (1,100 units/2,200 units); based on those ratios, 50 units (100 units × .50) of originating Material A and 50 units (100 units × .50) of non-originating Material A are considered to have been used in the production of the 100 units of Good A shipped on 01/10/94; therefore, the value of non-originating Material A used in the production of those goods is considered to be $52.50 [100 units × $1.05(average unit value) × .50]; the ratios are applied to the units of Material A remaining in materials inventory after the shipment: 1,050 units (2,100 units × .50) are considered to be originating materials and 1,050 units (2,100 units × .50) are considered to be non-originating materials;
(2) before the shipment of the 700 units of Good A on 01/15/94, the ratio of units of originating Material A to total units of Material A in materials inventory was 66% (2,050 units/3,100 units) and the ratio of units of non-originating Material A to total units of Material A in materials inventory was 34% (1,050 units/3,100 units); based on those ratios, 462 units (700 units × .66) of originating Material A and 238 units (700 units × .34) of non-originating Material A are considered to have been used in the production of the 700 units of Good A shipped on 01/15/94; therefore, the value of non-originating Material A used in the production of those goods is considered to be $249.90 [700 units × $1.05(average unit value) × 34%]; the ratios are applied to the units of Material A remaining in materials inventory after the shipment: 1,584 units (2,400 units × .66) are considered to be originating materials and 816 units (2,400 units × .34) are considered to be non-originating materials;
(3) before the shipment of the 1,000 units of Material A on 01/20/94, the ratio of units of originating Material A to total units of Material A in materials inventory was 36% (1,584 units/4,400 units) and the ratio of units of non-originating Material A to total units of Material A in materials inventory was 64% (2,816 units/4,400 units); based on those ratios, 360 units (1,000 units × .36) of originating Material A and 640 units (1,000 units × .64) of non-originating Material A are considered to have been used in the production of the 1,000 units of Good A shipped on 01/20/94; therefore, the value of non-originating Material A used in the production of those goods is considered to be $684.80 [1,000 units × $1.07 (average unit value) × 64%]; those ratios are applied to the units of Material A remaining in materials inventory after the shipment: 1,224 units (3,400 units × .36) are considered to be originating materials and 2,176 units (3,400 units × .64) are considered to be non-originating materials;
(4) before the shipment of the 900 units of Good A on 01/23/94, the ratio of units of originating Material A to total units of Material A in materials inventory was 36% (1,224 units/3,400 units) and the ratio of units of non-originating Material A to total units of Material A in materials inventory was 64% (2,176 units/3,400 units,; based on those ratios, 324 units (900 units × .36) of originating Material A and 576 units (900 units × .64) of non-originating Material A are considered to have been used in the production of the 900 units of Good A shipped on 01/23/94; therefore, the value of non-originating Material A used in the production of those goods is considered to be $616.32 [900 units × $1.07 (average unit value) × 64%]; those ratios are applied to the units of Material A remaining in materials inventory after the shipment: 900 units (2,500 units × .36) are considered to be originating materials and 1,600 units (2,500 units × .64) are considered to be non-originating materials.
Example 4: Average method
Good A is subject to an applicable regional value-content requirement. Producer A is using the net cost method and is averaging over a period of one month under section 6(15)(a) of this Appendix to determine the regional value content of Good A. By applying the average method:

the ratio of units of originating Material A to total units of Material A in materials inventory for January 1994 is 40.4% (2,100 units/5,200 units);
based on that ratio, 1,091 units (2,700 units x .404) of originating Material A and 1,609 units (2,700 units − 1,091 units) of non-originating Material A are considered to have been used in the production of the 2,700 units of Good A shipped in January 1994; therefore, the value of non-originating materials used in the production of those goods is considered to be $0.64 per unit [$5,560 (total value of Material A in materials inventory)/ $5,200 (units of Material A in materials inventory) = $1.07 (average unit value) x (1 − .404)] or $1,728 ($0.64 x 2,700 units); and that ratio is applied to the units of Good A remaining in finished goods inventory on January 31, 1994: 1,010 units (2,500 units x .404) are considered to be originating goods and 1,490 units (2,500 units − 1,010 units) are considered to be non-originating goods.

ADDENDUM B
"EXAMPLES" ILLUSTRATING THE APPLICATION OF THE INVENTORY MANAGEMENT METHODS TO DETERMINE THE ORIGIN OF FUNGIBLE GOODS

The following "examples" are based on the figures set out in the table below and on the assumption that Exporter A acquires originating Good A and non-originating Good A that are fungible goods and physically combines or mixes Good A before exporting those goods to the buyer of those goods.

DATE (M/D/Y)	FINISHED GOODS INVENTORY (RECEIPTS OF GOOD A)	SALES (SHIPMENTS OF GOOD A)
	QUANTITY (UNITS)	QUANTITY (UNITS)
12/18/93	100 (O[1])	
12/27/93	100 (N[2])	
01/01/94	200 (OI[3])	
01/01/94	1,000 (O)	
01/05/94	1,000 (N)	
01/10/94		100
01/10/94	1,000 (O)	
01/15/94		700
01/16/94	2,000 (N)	
01/20/94		1,000
01/23/94		900

[1] "O" denotes originating goods.
[2] "N" denotes non-originating goods.
[3] "OI" denotes opening inventory.

Example 1: FIFO method
By applying the FIFO method:
(1) the 100 units of originating Good A in opening inventory that were received in finished goods inventory on 12/18/93 are considered to be the 100 units of Good A shipped on 01/10/94;
(2) the 100 units of non-originating Good A in opening inventory that were received in finished goods inventory on 12/27/93 and 600 units of the 1,000 units of originating Good A that were received in finished goods inventory on 01/01/94 are considered to be the 700 units of Good A shipped on 01/15/94;
(3) the remaining 400 units of the 1,000 units of originating Good A that were received in finished goods inventory on 01/01/94 and 600 units of the 1,000 units of non-originating Good A that were received in finished goods inventory on 01/05/94 are considered to be the 1,000 units of Good A shipped on 01/20/94; and
(4) the remaining 400 units of the 1,000 units of non-originating Good A that were received in finished goods inventory on 01/05/94 and 500 units of the 1,000 units of originating Good A that were received in finished goods inventory on 01/10/94 are considered to be the 900 units of Good A shipped on 01/23/94.

Example 2: LIFO method
By applying the LIFO method:
(1) 100 units of the 1,000 units of non-originating Good A that were received in finished goods inventory on 01/05/94 are considered to be the 100 units of Good A shipped on 01/10/94;
(2) 700 units of the 1,000 units of originating Good A that were received in finished goods inventory on 01/10/94 are considered to be the 700 units of Good A shipped on 01/15/94;
(3) 1,000 units of the 2,000 units of non-originating Good A that were received in finished goods inventory on 01/16/94 are considered to be the 1,000 units of Good A shipped on 01/20/94; and
(4) 900 units of the remaining 1,000 units of non-originating Good A that were received in finished goods inventory on 01/16/94 are considered to be the 900 units of Good A shipped on 01/23/94.

Example 3: Average method
Exporter A chooses to determine the origin of Good A on a monthly basis. Exporter A exported 3,000 units of Good A during the month of February 1994. The origin of the units of Good A exported during that month is determined on the basis of the preceding month, that is January 1994.
By applying the average method:
the ratio of originating goods to all goods in finished goods inventory for the month of January 1994 is 40.4% (2,100 units/5,200 units);
based on that ratio, 1,212 units (3,000 units x .404) of Good A shipped in January 1994 are considered to be originating goods and 1,788 units (3,000 units − 1,212 units) of Good A are considered to be non-originating goods;
and

that ratio is applied to the units of Good A remaining in finished goods inventory on January 31, 1994: 1,010 units (2,500 units × .404) are considered to be originating goods and 1,490 units (2,500 units − 1,010 units) are considered to be non-originating goods.

SCHEDULE XI
METHOD FOR CALCULATING NON-ALLOWABLE INTEREST COSTS
Definitions and Interpretation

SECTION 1. Definitions.

For purposes of this Schedule,

"fixed-rate contract" means a loan contract, instalment purchase contract or other financing agreement in which the interest rate remains constant throughout the life of the contract or agreement;

"linear interpolation" means, with respect to the yield on federal government debt obligations, the application of the following mathematical formula:

$$A + [((B-A) \times (E-D)) / (C-D)]$$

where

A is the yield on federal government debt obligations that are nearest in maturity but of shorter maturity than the weighted average principal maturity of the payment schedule under the fixed-rate contract or variable-rate contract to which they are being compared,

B is the yield on federal government debt obligations that are nearest in maturity but of greater maturity than the weighted average principal maturity of that payment schedule,

C is the maturity of federal government debt obligations that are nearest in maturity but of greater maturity than the weighted average principal maturity of that payment schedule,

D is the maturity of federal government debt obligations that are nearest in maturity but of shorter maturity than the weighted average principal maturity of that payment schedule, and

E is the weighted average principal maturity of that payment schedule; "payment schedule" means the schedule of payments, whether on a weekly, bi-weekly, monthly, yearly or other basis, of principal and interest, or any combination thereof, made by a producer to a lender in accordance with the terms of a fixed-rate contract or variable-rate contract;

"variable-rate contract" means a loan contract, instalment purchase contract or other financing agreement in which the interest rate is adjusted at intervals during the life of the contract or agreement in accordance with its terms;

"weighted average principal maturity" means, with respect to fixed-rate contracts and variable-rate contracts, the numbers of years, or portion thereof, that is equal to the number obtained by

(a) dividing the sum of the weighted principal payments,

(i) in the case of a fixed-rate contract, by the original amount of the loan, and

(ii) in the case of a variable-rate contract, by the principal balance at the beginning of the interest rate period for which the weighted principal payments were calculated; and

(b) rounding the amount determined under paragraph (a) to the nearest single decimal place and, where that amount is the midpoint between two such numbers, to the greater of those two numbers;

"weighted principal payment" means,

(a) with respect to fixed-rate contracts, the amount determined by multiplying each principal payment under the contract by the number of years, or portion thereof, between the date the producer entered into the contract and the date of that principal payment, and

(b) with respect to variable-rate contracts

(i) the amount determined by multiplying each principal payment made during the current interest rate period by the number of years, or portion thereof, between the beginning of that interest rate period and the date of that payment, and

(ii) the amount equal to the outstanding principal owing, but not necessarily due, at the end of the current interest rate period, multiplied by the number of years, or portion thereof, between the beginning and the end of that interest rate period;

"yield on federal government debt obligations" means

(a) in the case of a producer located in Canada, the yield for federal government debt obligations set out in the Bank of Canada's *Weekly Financial Statistics*

(i) where the interest rate is adjusted at intervals of less than one year, under the title "Treasury Bills", and

(ii) in any other case, under the title "Selected Government of Canada benchmark bond yields", for the week that the producer entered into the contract or the week of the most recent interest rate adjustment date, if any, under the contract,

(b) in the case of a producer located in Mexico, the yield for federal government debt obligations set out in *La Seccion de Indicadores Monetarios, Financieros, y de Finanzas Publicas, de los Indicadores Economicos,* published by the Banco de Mexico under the title *"Certificados de la Tesoreria de la Federacion"* for the week that the producer entered into the contract or the week of the most recent interest rate adjustment date, if any, under the contract, and

(c) in the case of a producer located in the United States, the yield for federal government debt obligations set out in the Federal Reserve statistical release (H.15) *Selected Interest Rates*

(i) where the interest rate is adjusted at intervals of less than one year, under the title "U.S. government securities, Treasury bills, Secondary market", and

(ii) in any other case, under the title "U.S. Government Securities, Treasury constant maturities",

for the week that the producer entered into the contract or the week of the most recent interest rate adjustment date, if any, under the contract.

General

SECTION 2.

For purposes of calculating non-allowable interest costs

(a) with respect to a fixed-rate contract, the interest rate under that contract shall be compared with the yield on federal government debt obligations that have maturities of the same length as the weighted average principal maturity of the payment schedule under the contract (that yield determined by linear interpolation, where necessary);

(b) with respect to a variable-rate contract

(i) in which the interest rate is adjusted at intervals of less than or equal to one year, the interest rate under that contract shall be compared with the yield on federal government debt obligations that have maturities closest in length to the interest rate adjustment period of the contract, and

(ii) in which the interest rate is adjusted at intervals of greater than one year, the interest rate under the contract shall be compared with the yield on federal government debt obligations that have maturities of the same length as the weighted average principal maturity of the payment schedule under the contract (that yield determined by linear interpolation, where necessary); and

(c) with respect to a fixed-rate or variable-rate contract in which the weighted average principal maturity of the payment schedule under the contract is greater than the maturities offered on federal government debt obligations, the interest rate under the contract shall be compared to the yield on federal government debt obligations that have maturities closest in length to the weighted average principal maturity of the payment schedule under the contract.

ADDENDUM

"EXAMPLE" ILLUSTRATING THE APPLICATION OF THE METHOD FOR CALCULATING NON-ALLOWABLE INTEREST COSTS IN THE CASE OF A FIXED-RATE CONTRACT

The following example is based on the figures set out in the table below and on the following assumptions:

(a) a producer in a NAFTA country borrows $1,000,000 from a person of the same NAFTA country under a fixed-rate contract;

(b) under the terms of the contract, the loan is payable in 10 years with interest paid at the rate of 6 percent per year on the declining principal balance;

(c) the payment schedule calculated by the lender based on the terms of the contract requires the producer to make annual payments of principal and interest of $135,867.36 over the life of the contract;

(d) there are no federal government debt obligations that have maturities equal to the 6 year weighted average principal maturity of the contract; and

(e) the federal government debt obligations that are nearest in maturity to the weighted average principal maturity of the contract are of 5 and 7 year maturities, and the yields on them are 4.7 percent and 5.0 percent, respectively.

Years of Loan	Principal Balance [1]	Interest Payment [2]	Principal Payment [3]	Payment Schedule	Weighted Principal Payment [4]
1	$924,132.04	$60,000.00	$75,867.96	$135,867.96	$75,867.96
2	843,712.00	55,447.92	80,420.04	135,867.96	160,840.08
3	758,466.76	50,622.72	85,245.24	135,867.96	255,735.72
4	668,106.81	45,508.01	90,359.95	135,867.96	361,439.82
5	572,325.26	40,086.41	95,781.55	135,867.96	478,907.76
6	470,796.81	34,339.52	101,528.44	135,867.96	609,170.67
7	363,176.66	28,247.81	107,620.15	135,867.96	753,341.06
8	249,099.30	21,790.60	114,077.36	135,867.96	912,618.88
9	128,177.30	14,945.96	120,922.00	135,867.96	1,088,298.02
10	(0.00)	7,690.66	128,177.32	135.867.96	1,281,773.22
					$5,977,993.19

[1] the principal balance represents the loan balance at the end of each full year the loan is in effect and is calculated by subtracting the current year's principal payment from the prior year's ending loan balance.

[2] interest payments are calculated by multiplying the prior year's ending loan balance by the contract interest rate of 6 percent.

[3] principal payments are calculated by subtracting the current year's interest payments from the annual payment schedule amount.

[4] the weighted principal payment is determined by, for each year of the loan, multiplying that year's principal payment by the number of years the loan had been in effect at the end of that year.

[5] the weighted average principal maturity of the contract is calculated by dividing the sum of the weighted principal payments by the original loan amount and rounding the amount determined to the nearest decimal place

Weighted Average Principal Maturity

$5,977,993.19/$1,000,000=5.977993 or 6 years [5]

By applying the above method,

(1) the weighted average principal maturity of the payment schedule under the 6 percent contract is 6 years;

(2) the yields on the closest maturities for comparable federal government debt obligations of 5 years and 7 years are 4.7 percent and 5.0 percent, respectively; therefore, using linear interpolation, the yield on a federal government debt obligation that has a maturity equal to the weighted average principal maturity of the contract is 4.85 percent. This number is calculated as follows:

$4.7+[((5.0-4.7)\times(6-5))/(7-5)]$

$= 4.7+0.15$

$= 4.85\%$; and

(3) the producer's contract interest rate of 6 percent is within 700 basis points of the 4.85 percent yield on the comparable federal government debt obligation; therefore, none of the producer's interest costs are considered to be non-allowable interest costs for purposes of the definition "non-allowable interest costs".

"EXAMPLE" ILLUSTRATING THE APPLICATION OF THE METHOD FOR CALCULATING NON-ALLOWABLE INTEREST COSTS IN THE CASE OF A VARIABLE-RATE CONTRACT

The following example is based on the figures set out in the tables below and on the following assumptions:
(a) a producer in a NAFTA country borrows $1,000,000 from a person of the same NAFTA country under a variable-rate contract;
(b) under the terms of the contract, the loan is payable in 10 years with interest paid at the rate of 6 percent per year for the first two years and 8 percent per year for the next two years on the principal balance, with rates adjusted each two years after that;
(c) the payment schedule calculated by the lender based on the terms of the contract requires the producer to make annual payments of principal and interest of $135,867.96 for the first two years of the loan, and of $146,818.34 for the next two years of the loan;
(d) there are no federal government debt obligations that have maturities equal to the 1.9 year weighted average principal maturity of the first two years of the contract;
(e) there are no federal government debt obligations that have maturities equal to the 1.9 year weighted average principal maturity of the third and fourth years of the contract; and
(f) the federal government debt obligations that are nearest in maturity to the weighted average principal maturity of the contract are 1 and 2 year maturities, and the yields on them are 3.0 percent and 3.5 percent respectively.

Beginning of Year	Principal Balance	Interest Rate (%)	Interest Payment	Principal Payment	Payment Schedule	Weighted Principal Payment
1	$1,000,000.00	6.00	$60,000.00	$75,867.96	$135,867.96	$75,867.96
2		6.00	55,447.92	80,420.04	135,867.96	1,848,264.08
	924,132.04					$1,924,132.04

Weighted Average Principal Maturity
$1,924,132.04/$1,000,000=1.92413204 or 1.9 years
By applying the above method:
(1) the weighted average principal maturity of the payment schedule of the first two years of the contract is 1.9 years;
(2) the yield on the closest maturities of federal government debt obligations of 1 year and 2 years are 3.0 and 3.5 percent, respectively; therefore, using linear interpolation, the yield on a federal government debt obligation that has a maturity equal to the weighted average principal maturity of the payment schedule of the first two years of the contract is 3.45 percent. This amount is calculated as follows:

$3.0+[(3.5-3.0)\times(1.9-1.0)) / (2.0-1.0)]$
$= 3.0+0.45$
$= 3.45\%$; and

(3) the producer's contract rate of 6 percent for the first two years of the loan is within 700 basis points of the 3.45 percent yield on federal government debt obligations that have maturities equal to the 1.9 year weighted average principal maturity of the payment schedule of the first two years of the producer's loan contract; therefore, none of the producer's interest costs are considered to be non-allowable interest costs for purposes of the definition "non-allowable interest costs".

Beginning of Year	Principal Balance	Interest Rate (%)	Interest Payment	Principal Payment	Payment Schedule	Weighted Principal Payment
1	$1,000,000.00	6.00	$60,000.00	$75,867.96	$135,867.96	
2	924,132.04	6.00	55,447.92	80,420.04	135,867.96	
3	843,712.01	8.00	67,496.96	79,321.38	146,818.34	$79,321.38
4	764,390.62	8.00	61,151.25	85,667.09	146,818.34	1,528,781.24
						$1,608,102.62

Weighted Average Principal Maturity
$1,608,102.62 / $843,712.01 = 1.905985 or 1.9 years
By applying the above method:
(1) the weighted average principal maturity of the payment schedule under the first two years of the contract is 1.9 years;
(2) the federal government debt obligations that are nearest in maturities to the weighted average principal maturity of the contract are 1 and 2 year maturities, and the yields on them are 3.0 and 3.5 percent, respectively; therefore, using linear interpolation, the yield on a federal government debt obligation that has a maturity equal to the weighted average principal maturity of the payment schedule of the first two years of the contract is 3.45 percent. This amount is calculated as follows:

$3.0 + [(3.5-3.0) \times (1.9-1.0)) / (2.0-1.0)]$
$= 3.0 + 0.45$

= 3.45%

(3) the producer's contract interest rate, for the third and fourth years of the loan, of 8 percent is within 700 basis points of the 3.45 percent yield on federal government debt obligations that have maturities equal to the 1.9 year weighted average principal maturity of the payment schedule under the third and fourth years of the producer's loan contract; therefore, none of the producer's interest costs are considered to be non-allowable interest costs for purposes of the definition "non-allowable interest costs".

SCHEDULE XII
GENERALLY ACCEPTED ACCOUNTING PRINCIPLES

SECTION 1.

Generally Accepted Accounting Principles means the recognized consensus or substantial authoritative support in the territory of a NAFTA country with respect to the recording of revenues, expenses, costs, assets and liabilities, disclosure of information and preparation of financial statements. These standards may be broad guidelines of general application as well as detailed standards, practices and procedures.

SECTION 2.

For purposes of Generally Accepted Accounting Principles, the recognized consensus or authoritative support are referred to or set out in the following publications:

(a) with respect to the territory of Canada, *The Canadian Institute of Chartered Accountants Handbook,* as updated from time to time;

(b) with respect to the territory of Mexico, *Los Principios de Contabilidad Generalmente Aceptados,* issued by the *Instituto Mexicano de Contadores Públicos A.C. (IMCP),* including the *boletines complementarios,* as updated from time to time; and

(c) with respect to the territory of the United States,

(i) the following publications of the American Institute of Certified Public Accountants (AICPA), as updated from time to time:

(A) *AICPA Professional Standards,*
(B) *Committee on Accounting Procedure Accounting Research Bulletins,*
(C) *Accounting Principles Board Opinions and Statements,*
(D) *APB Accounting and Auditing Guides,*
(E) *AICPA Statements of Position, and*
(F) *AICPA Issues Papers and Practice Bulletins,*

(ii) the following publications of the Financial Accounting Standards Board (FASB), as updated from time to time:

(A) *FASB Accounting Standards and Interpretations,*
(B) *FASB Technical Bulletins, and*
(C) *FASB Concepts Statements.*

PART 191—DRAWBACK

1. The general authority citation for part 191 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States), 1313, 1624.

* * * * *

2. Section 191.0 is amended by adding a sentence at the end to read as follows:

§ 191.0 Scope.

* * * Additional drawback provisions relating to the North American Free Trade Agreement are contained in subpart E of part 181 of this chapter.

George J. Weise,
Commissioner of Customs.

Approved: December 16, 1993.

John P. Simpson,
Deputy Assistant Secretary of the Treasury.

[FR Doc. 93-31322 Filed 12-29-93; 8:45 am]
BILLING CODE 4820-02-P

federal register

Thursday
December 30, 1993

Part III

Environmental Protection Agency

40 CFR Part 82

Protection of Stratospheric Ozone; Labeling Supplemental Proposal; Notice of Proposed Rulemaking

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL-4818-4]

Protection of Stratospheric Ozone; Labeling Supplemental Proposal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend EPA's existing labeling regulations by adding an exemption from the regulations where destruction of controlled substances takes place, adding an exemption for spare parts that are used in repair, making revisions to clarify the labeling of waste, and making several other minor clarifying revisions. EPA is proposing these revisions in response to numerous comments, in order to recognize and alleviate the burden placed on specific parties whose activities contribute no additional emissions of ozone-depleting substances.

DATES: Written comments on this proposed rule must be received on or before January 31, 1994, unless a public hearing is requested. In the case where a public hearing is requested, the public hearing will be scheduled at 9 a.m. on January 14, 1994. Comments must then be received on or before 30 days following the public hearing. Any party requesting a public hearing must notify EPA by 5 p.m. Eastern Standard Time on January 7, 1994. All requests for and inquiries regarding a public hearing should be directed to Sue Stendebach at 202/233-9117.

ADDRESSES: Comments on this proposed rulemaking should be submitted (in duplicate if possible) to: Public Docket No. A-91-60, room M-1500 (LE-131), Waterside Mall, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. The docket may be inspected from 8:30 a.m. until 12 noon, and from 1:30 p.m. to 3 p.m., Monday through Friday. A reasonable fee may be charged for copying docket materials. A hearing, if requested, will be held at the EPA auditorium, 401 M Street, SW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Sue Stendebach, Regulatory Development and Operations Section, Program Implementation Branch, Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation, 6205-J, 401 M Street, SW., Washington, DC 20460. 202/233-9117.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

I. Introduction

In a final rule published on February 11, 1993 (58 FR 8136), EPA promulgated regulations to implement section 611 of the Clean Air Act, as amended by the Clean Air Act Amendments of 1990 (CAA). The regulations mandate that, effective May 15, 1993, labels are required on containers of class I and class II substances and products containing or manufactured with class I substances. The rule also calls for labels on all products containing or manufactured with class I or class II substances, beginning on January 1, 2015.

The regulations provide an exemption for manufacturers that have achieved a reduction in the total use of CFC-113 and/or methyl chloroform (MCF) for products manufactured using those substances as solvents by 95 percent as compared to their 1990 use levels. This provision is based on a 1991 United Nations Environment Programme report, Solvents, Coatings and Adhesives. EPA provided the exemption in order to compensate for the lack of technically and economically viable substitutes for an estimated 5 percent of the uses of CFC-113 and MCF in the solvent sector In addition, this provision recognizes the early efforts by those companies to attain a near elimination of such substances, and to provide an incentive for other companies to strive towards the same goal.

The final regulations exempt products manufactured using class I substances on an intermittent basis, and not as a direct part of the manufacturing process of the product, such as that employed in spot cleaning textiles during the manufacturing process. The rule explains that such intermittent contact use of controlled substances was found to be incidental "contact." The final rule also explains that intermittent "contact" uses, though they may involve a brief initial physical contact between the ozone-depleting "controlled substance" and the product, occur infrequently, typically as part of an upkeep process, and that the controlled substance does not come into contact with every product. In other situations, where the controlled substance has contact on an intermittent basis only with the surface area of manufacturing equipment, and although there may be an initial contact with the first few products themselves, the controlled substance will not contact every product manufactured thereafter. Labeling is therefore not required in either of the above cases.

The placement of the warning statement is explained in terms of its conspicuousness and legibility, as well as ready availability to the actual person responsible for the purchase at the time of purchase, or at the time of product delivery. The provision for product delivery was added to the rule for products purchased through the mail, by telephone, and where the consumer does not view the product at the time of purchase. Other options for placement discussed are the display panel area of a product, alternative labeling such as hang tags, and supplemental printed materials, all to be available to the consumer at the time of purchase.

Products made for export are exempt from the final regulations because such

products primarily affect foreign commerce and because the label on such a product will not be viewed by any consumer until after it has left the jurisdiction of the Agency. Moreover, such products would be put at a competitive disadvantage in the world marketplace with the same products manufactured in countries where there are no similar labeling requirements.

In contrast, imports are covered under the labeling requirements. The regulations require importers to ensure that a product is properly labeled at the site of U.S. Customs clearance. The importer must have a "reasonable belief" that the imports are properly labeled or are not subject to the labeling requirements. Two options discussed in the preamble to the final rule for demonstrating reasonable belief are to investigate at least one step back into the manufacturing process of the import, or to draft a contractual agreement with the importer's supplier abroad, indicating that the import is/is not manufactured with, or containing, controlled substances.

The final regulations exempt research and development (R&D) activities from the labeling requirements, since the products being developed are not being introduced into interstate commerce. However, products that have completed the R&D process and are then manufactured must be labeled when they are introduced into interstate commerce.

Manufacturers were required to label their products containing or manufactured with class I substances, and containers containing class I or class II substances, beginning on May 15, 1993.

II. Destruction Exemption From the Labeling Requirements

A. Background on Destruction Policies

1. Background on Montreal Protocol's Destruction Policy

The Montreal Protocol, to which over 125 nations are now Parties, requires that each nation that is a Party to it control the production and consumption of substances that deplete the ozone layer. Under the existing Protocol, "production" of controlled substances is defined as "the amount of controlled substances produced, minus the amount destroyed by technologies to be approved by the Parties." At the second meeting of the Parties to the Protocol (the Parties) in London, a technical advisory committee was established to examine the existing destruction technologies, devise criteria by which to approve technologies, and evaluate environmental concerns associated with the technologies. Until the Fourth Meeting of the Parties, no destruction technology had been approved by the Parties.

2. Fourth Meeting of the Parties to the Montreal Protocol

At the Fourth Meeting of the Parties to the Montreal Protocol, which took place from November 23–25, 1992, in Copenhagen, the Parties approved five destruction technologies to be used for destroying controlled substances. The technologies are: liquid injection incineration, reactor cracking, gaseous/fume oxidation, rotary kiln incinerators, and cement kilns. The Parties also agreed that additional acceleration of the phaseout of controlled substances would result in the need for a greater global destruction program for these substances. With the approval of the five technologies, the Parties noted that the technologies could attain a destruction efficiency of 99.99 percent with proper controls and operating techniques; however, they did not require a specific efficiency. The Parties encouraged a "Code of Good Housekeeping Procedures," set forth in the United Nations Environmental Programme (UNEP) Report entitled Ad-Hoc Technical Advisory Committee on ODS Destruction Technologies, to minimize losses to the environment through control systems and standards for operating such systems. Finally, the Parties agreed to report the quantities of ozone-depleting substances destroyed annually to the Protocol.

Liquid injection incinerators are typically single-chamber units with waste burners. They may also include liquid injection stages of a multiple-chamber incinerator. These incinerators are used to destroy wastes with a low ash content and can be used to destroy sludge, slurry, vapor, or combustible liquid. Liquid wastes are burned in suspension after being injected through burners and atomized to fine droplets.

A reactor cracking process uses a cylindrical graphite, water-cooled reactor and an oxygen-hydrogen burner system. Since 1983, this process has treated waste gases resulting from the production of chlorofluorocarbons (CFCs). The gases are converted to hydrofluoric acid, hydrochloric acid, carbon dioxide, chlorine, and water. The two acids are usable in-house and/or marketable, and the chlorine is scrubbed, leaving only water vapor, oxygen, and carbon dioxide as waste gases.

Gaseous/fume oxidation destroys waste vapor streams, most often volatile organic compounds. A combustion temperature of around 1100 degrees centigrade is needed to destroy most ozone-depleting compounds. Acid gas scrubbers are required for incineration of halogenated waste vapors, such as those from controlled substances. Fume incinerators can be direct flame incinerators, consisting of the combustion chamber and a burner, or recuperative fume incinerators that use heat exchangers to preheat the waste vapor feed stream or the combustion air. Fume incinerators are usually found in chemical process or manufacturing plants.

Rotary kiln incinerators can handle a wide variety of both solid and liquid wastes. Rotary kiln incinerators typically have at least two combustion chambers, the afterburner ensuring that complete combustion of exhaust gases takes place. Liquid wastes can be fed either into the rotary kiln area or directly into the afterburner chamber. If fed into the afterburner chamber, the liquid is atomized in the burner or combustion zone.

Cement kilns, under proper operation, can destroy most organic chemical wastes. Tests have been conducted using CFC–113, with a destruction efficiency of greater than 99.99 percent demonstrated. Destruction of ozone-depleting substances in cement kilns appears beneficial; however, each unit must be reviewed on a case-by-case basis to determine its appropriateness for this use.

With the approval of these five destruction technologies, Parties to the Protocol can subtract from the definition of production that amount of controlled substance(s) that is destroyed by these means, under certain conditions discussed in the proposed accelerated phaseout rule that was published on March 18, 1993 (57 FR 33754).

B. Phaseout Regulations

On July 30, 1992, the EPA published final regulations implementing section 604 of the Clean Air Act (57 FR 33753), which established the phaseout schedule for class I and class II substances set forth in the Clean Air Act. Destruction was also addressed in the regulations in terms of those class I substances that are coincidental and unavoidable by-products (CUBPs) of a manufacturing process. Associated with this exemption is a set of reporting requirements. Companies are required to document the amount of "CUBPs" produced and destroyed in a manner consistent with the requirements of the Resource Conservation and Recovery Act (RCRA) or other applicable rules. These destruction technologies are also required to meet the Maximum Available Control Technology (MACT)

standards for efficiency. For purposes of Title VI of the Act, EPA stated that companies that destroy CUBPs of carbon tetrachloride using technologies that achieve a 99.99 percent destruction efficiency may obtain an exemption from production allowances. Based on a report submitted by a company destroying CUBPs, the Administrator would evaluate the merits of the document and decide whether to grant an exemption for that company's annual production and consumption allowances.

The phaseout regulations reported that further data was necessary on destruction technologies in order to exempt more than CUBPs from the phaseout allowance system. Since the Parties approved the five destruction technologies in November 1992, EPA has proposed regulations accelerating the phaseout of controlled substances (58 FR 15013, March 18, 1993). That proposal also contained proposed regulations concerning destruction.

C. Proposed Accelerated Phaseout Destruction Provisions

The proposed accelerated phaseout regulations, published on March 18, 1993, would implement the United States' acceleration of the phaseout of class I substances, consistent with the recent adjustments to the Protocol agreed upon last November by the Parties in Copenhagen; accelerate the phaseout of certain class II substances; list and phase out hydrobromofluorocarbons (HBFCs); list and phase out methyl bromide; and responded to petitions received by the Agency from environmental and industry groups.

In addition, in that NPRM EPA proposed revising the definition of production such that controlled substances that are to be destroyed are eliminated from the definition of production and credit is allowed for destruction of controlled substances similar to credit received for the transformation of such chemicals. The destruction of such substances must employ any one of the five technologies identified above that are approved by the Parties. Due to the proposed credit for destruction, EPA proposed eliminating the now unnecessary CUBP provision, since all such destruction would be credited.

The proposal defines "destruction" in terms of technologies approved for destruction by the Parties that result in expiration of the chemical without any commercially useful end product being produced. The Agency proposed this definition in order to distinguish destruction from transformation, which requires that the resulting end product serve a commercial purpose. The proposal indicated that to be eligible for the destruction exemption, the controlled substances must be destroyed by one of the five destruction technologies approved by the Parties.

As explained more fully in the March 18, 1993 proposal, EPA believes that, while it is not required to follow the approach of the Protocol Parties regarding destruction, it has the authority to do so.

D. Proposed Destruction Provision in the Final Labeling Rule

The preamble to the final labeling regulations (58 FR 8136, February 11, 1993) requested comment on a destruction exemption from the labeling requirements based on the proposed accelerated phaseout rule, which was being drafted at the time. The Agency requested comment on whether it could and should provide an exemption from the labeling requirements for the use of controlled substances that are subsequently destroyed using one of the above-mentioned approved technologies with procedures that are consistent with the Resource Conservation and Recovery Act (RCRA) and the United Nations Environmental Programme (UNEP) Report entitled Ad-Hoc Technical Advisory Committee on ODS Destruction Technologies. The Agency received and has reviewed several comments on the possibility of a destruction exemption provision for the labeling rule. Those comments supported the inclusion of a destruction exemption, similar to that given for transformation. The commenters reasoned that the destruction exemption was justified because destruction of ozone-depleting substances prevents emissions of those substances into the atmosphere.

E. Related Requirements of RCRA and the Proposed Hazardous Organic Neshaps (HON)

In addition to the requirements of Title VI of the Clean Air Act as amended, certain controlled substances are also regulated, under certain circumstances, by the Resource Conservation and Recovery Act (RCRA, 42 USC 6901 et seq.) and would be regulated under the proposed Hazardous Organic NESHAPs (HON, 57 FR 62608). The RCRA regulations would cover those controlled substances that are considered to be hazardous constituents in the waste stream (eg., carbon tetrachloride bound for incineration). The proposed HON addresses air emissions of hazardous air pollutants, a category into which carbon tetrachloride, methyl chloroform, and methyl bromide fall. The following discussion outlines the coordination among the RCRA and proposed HON regulations and the proposed destruction exemption provision of the labeling regulations.

1. Resource Conservation and Recovery Act (RCRA) Standards

The RCRA regulations currently require that industries that incinerate waste covered by the regulations must meet "at stacks" destruction efficiency (DE) standards of 99.99 percent. The proposed accelerated phaseout regulations would grant full credit for the destruction of controlled substances when they are destroyed in compliance with RCRA regulations 40 CFR 343(a) and 40 CFR 266.104. The proposed accelerated phaseout rule indicated that the Agency will grant 100 percent production allowances for companies that achieve 99.99 percent efficiency in the destruction of class I substances instead of only 99.99 percent in allowances, because, otherwise, a company would never be able to obtain credit for the full amount of the chemical used, and would eventually be unable to obtain sufficient volumes to operate.

The only substances that are covered under both RCRA as "hazardous constituents" and under Title VI of the Clean Air Act as controlled substances are methyl chloroform (MCF) and carbon tetrachloride (CTC). The remaining controlled substances are regulated under RCRA only when they are blended with hazardous wastes, such as when used solvents are incinerated. The incineration technologies approved by the Parties have been shown to be capable of achieving the 99.99 percent DE required by RCRA; however, the Parties do not specifically require that each of the technologies achieve such an efficiency. The Parties supported the recommendations of the Ad-Hoc Technical Committee on Destruction Technologies to require Code of Good Housekeeping procedures to be applied throughout a destruction facility.

2. Proposed Hazardous Organic NESHAP (HON) Regulations

Under some situations controlled substances are not covered by RCRA regulations, but may be covered by the HON regulations to be promulgated under section 112 of the Clean Air Act. The Agency published a proposed HON rule on December 31, 1992 (57 FR 62608), proposing that companies be required to control air emissions occurring in chemical manufacturing

processes. The HON regulates approximately 400 manufacturing processes associated with the Synthetic Organic Manufacturing Industry (SOCMI), as well as 7 non-SOCMI source categories. Section 112 of the Clean Air Act contains lists of 189 hazardous air pollutants (HAPS) of which a portion are known to be emitted by the above-mentioned industries. Of those listed under section 112, the only substances controlled under Title VI of the CAA are methyl chloroform (MCF), carbon tetrachloride (CCL4) and methyl bromide (proposed to be listed as a class I substance in the accelerated phaseout rule). The HON covers five kinds of emission points within such facilities where these substances are emitted, including process vents, wastewater streams, transfer operations, storage tanks, and equipment leaks. The Agency proposed that each emissions source would require a "reference control technology" with specific applicability criteria, such as a 98 percent control efficiency for incinerators on process vents. The HON would establish performance standards for operating the control technologies, as well as criteria for the design of the control equipment. The Agency proposed that when organic HAPS are released through process vent sources, companies may route these emissions to a gaseous/fume oxidation incinerator for destruction. The Agency has proposed that such incinerators may operate with a destruction efficiency of 98 percent.

In the proposal for the accelerated phaseout, the Agency proposed that when regulations promulgated under section 112 of the Clean Air Act apply to the destruction of a controlled substance, and RCRA regulations do not apply, and the 98 percent destruction efficiency is achieved by incinerators to which emissions of controlled substances are routed, the Agency would grant the full allotment of allowances to replace chemicals that are destroyed under the conditions of the HON. In situations where section 112 regulations apply, but an achieved destruction efficiency is less than what the HON proposes, the Agency proposed to issue allowances only for the portion actually destroyed.

F. Proposed Amendments to the Final Labeling Regulations—Products Exempt from Labeling Requirements Where Manufacturers Use Protocol approved Destruction Technologies

The ultimate goal of Title VI of the CAA is to minimize depletion of stratospheric ozone. A destruction exemption, which would recognize, and provide an incentive for, the elimination of emissions of controlled substances through the use of approved destruction technologies, is therefore consistent with the goals of Title VI. This exemption is one method of reducing risks of ozone depletion. The current labeling regulations provide an exemption from the labeling requirements if a controlled substance used to manufacture a product is transformed, such that the controlled substance no longer poses a threat to the ozone layer; similarly, the same result comes about if a controlled substance used in the manufacture of a product is destroyed. The controlled substance is not emitted in either case and no environmental harm occurs through exempting such products from labeling.

EPA today is proposing that for any products manufactured with a class I or class II substance, if that substance is destroyed according to any applicable legal or regulatory requirements, using one of the five technologies approved by the Parties to the Protocol, the product would be exempt from the labeling requirements. The intent of today's proposal is to provide a destruction exemption parallel to the destruction provision in the accelerated phaseout proposal. If the destruction provision in the final accelerated phaseout differs substantially from that which is proposed, EPA will need to revisit the destruction exemption proposed today in order to maintain consistency between the rules.

For purposes of today's proposed destruction exemption from the labeling requirements, the Agency proposes that only where a substance is destroyed to a DE of 98 percent or greater, using one of the five approved destruction technologies, will the labeling exemption apply. This differs from the approach used in the accelerated phaseout proposal, under which producers of controlled substances are granted credit for that percentage of the controlled substance actually destroyed (if destroyed at a DE of less than 98 percent). This approach is not being used in the labeling context because, while under the proposed accelerated phaseout it is possible to grant credit for that portion actually destroyed, under the labeling rule a label is either placed on a product or it is not. Therefore, the Agency needs to determine a threshold at which labeling is exempted. It is consistent then, for EPA to provide a labeling exemption only for those products manufactured with controlled substances that are "completely" destroyed. A new definition of "completely destroy," which means to destroy to 98 percent or greater destruction efficiency, will be included in the labeling rule through today's proposed amendment.

Furthermore, where the destruction of a controlled substance is regulated under RCRA, the regulated party must achieve a destruction efficiency of 99.99 percent, destroying any controlled substances using one of the five approved technologies and complying with applicable RCRA regulations as they relate to destruction of ozone-depleting substances, in order to qualify for the exemption from labeling. If the destruction of a controlled substance not regulated under RCRA but is regulated under the HON, the regulated party must achieve a destruction efficiency of 98 percent, as well as meet any other applicable standards imposed by the HON that relate to destruction of ozone-depleting substances, destroying any controlled substances using one of the five approved technologies, in order to qualify for the exemption from labeling. If the final HON requires a destruction efficiency of greater than 98 percent, EPA will need to revisit the minimum destruction efficiency of 98 percent in today's proposed rule, in order to provide consistency with the regulation of hazardous air pollutants.

The Agency is aware that state air quality permit laws may establish efficiency standards for emissions of controlled substances where no Federal regulations exist to cover them. In addition, state laws may be more stringent than comparable Federal regulations. In either case, the Agency expects companies that are regulated under such state laws governing the control of emissions of controlled substances in industrial processes, to be in full compliance in order to qualify for the destruction exemption.

Those companies that are not covered by either RCRA regulations or the HON, and are not otherwise covered by state or local laws more stringent than the comparable Federal regulations, must follow the Code of Good Housekeeping Practices, as described in the UNEP Ad-Hoc Technical Advisory Committee on ODS Destruction Technologies, as well as the whole of Chapter 5 of that report, in addition to meeting the 98 percent DE, using one of the five approved destruction technologies.

The Agency requests comment on its proposal to require companies that are neither regulated by RCRA nor the HON to adhere to the performance standards of the UNEP report of the Ad-Hoc Technical Advisory Committee on ODS Destruction Technologies, while meeting a destruction efficiency of 98 percent or greater, in order to obtain an exemption from the labeling requirements.

The regulatory language of this rulemaking requires that parties taking advantage of this destruction exemption must be in compliance with regulations and requirements applicable to such destruction.

The UNEP Ad-Hoc Technical Advisory Committee on ODS Destruction Technologies recommends that atmospheric releases of controlled substances shall be monitored at all facilities with air emission discharges. For controlled substances, this report recommends that flow meters or continuously recording weighing equipment for individual containers should be used. At a minimum, containers should be weighed "full" and "empty" to establish quantities destroyed.

While there are no recordkeeping requirements specifically associated with the destruction exemption from labeling, EPA proposed in the accelerated phaseout regulations (58 FR 15013), companies relying on the destruction provisions of that rule must maintain records of destruction. For those companies, these same records will be consulted in inspecting eligibility for the destruction exemption from labeling. For manufacturers that do not receive production or consumption allowances, records required under other relevant regulations that determine the amount destroyed, the destruction efficiency, and the performance standards of operation must be made available to EPA upon request. EPA requests comment on its requirement that records maintained under the phaseout regulations, as well as those maintained under other applicable regulations be made available to the Agency in determining eligibility for the labeling exemption. The Agency also requests comment as to the adequacy of these recordkeeping requirements for purposes of this proposal. Comments on the possibility that a facility taking advantage of this destruction exemption may not be covered by RCRA regulations, the HON, or the accelerated phaseout of ozone-depleting substances rule are also requested.

EPA also requests comment generally on the destruction exemption from the labeling requirements. EPA will reopen the comment period if the final accelerated phaseout rule changes materially from the proposal relative to destruction.

III. Labeling Requirements of Containers of Waste

A. Current Requirements for Containers of Controlled Substance Waste and Wastes Containing Trace Amounts of Controlled Substances

EPA indicated in the final labeling regulations that a person handling containers of waste that contain class I or class II substances destined for incineration would benefit from the specific chemical information in the warning statement when handling. Though the label does not specifically address handling practices of such substances, it would inform technicians handling the containers of chemicals and would encourage them to dispose of them or recycle them correctly. In addition, containers of waste can be introduced into interstate commerce and must then be labeled as "containing" a controlled substance.

Under its current rule, EPA also requires that containers of such waste materials destined to be recycled or reclaimed bear the warning statement to ensure that the technician of a reclamation facility is aware of the substances contained in order to exercise proper caution. Reclaimed substances are also resold by the reclaimer, and thus are to be labeled upon their introduction into interstate commerce.

The Agency did not require that empty containers that once contained a controlled substance and are subsequently recycled and incorporated into another product bear a label. EPA also permits the removal of a label on a container that no longer contains a controlled substance. If such a container is subsequently charged with a class I or class II substance, a label would be required. Also, the final rule excluded containers, such as trucks, railroad cars, or crates, used to transport a "product containing" or "container containing" from the labeling requirements, because only the immediate container holding the controlled substance must be labeled.

B. Today's Proposal Regarding Labeling Requirements of Containers of Regulated Waste

Since the publication of the final regulations, EPA has received new information from the regulated community regarding the labeling requirements for containers of waste. The Agency required labeling of waste in the final rule because it believed that the labeling information is important to waste handlers and recycling and reclamation facilities. In addition, by requiring waste to be labeled, EPA attempted to encourage industry to minimize the amount of controlled substances in the waste stream and ultimately in the upper stratosphere. For this reason, the preamble to the current rule states that all amounts, including trace quantities of controlled substances in waste, trigger the labeling requirements. The regulated community has commented to EPA, addressing both the final rule and applicability determinations prepared by EPA on labeling of waste.

After reviewing many of the comments urging EPA to reconsider its policy on the labeling of waste, EPA agrees that a revision is necessary to its current position on labeling waste containing controlled substances, in order to better facilitate industry's compliance with the regulations. Written comments on the Agency's treatment of waste and the relevant applicability determinations are available in the Air Docket A–91–60. These comments are summarized below.

Numerous commenters stated that waste clearly does not fall under the definition of "product containing," as promulgated in the final labeling rule; therefore, commenters concluded that waste cannot be required to be labeled as such. EPA agrees. Containers of waste cannot be defined as products, because they are not manufactured from raw or recycled materials in order to perform a specific task, nor does waste encounter a point of sale to an ultimate consumer.

Others commented that a container of waste does not fit the definition of "container containing" in the regulations. For example, commenters expressed concern that in the current rule, a container, such as a bulk waste receptacle that holds a used "product containing" (i.e., an aerosol or scrap material), might require labeling. However, EPA believes that the controlled substance remaining in the product contained in the receptacle no longer serves a function, nor is it required to be transferred to another container in order to realize its intended use, as would normally be the case for "containers containing." EPA agrees that a container carrying a "product containing" which is ultimately disposed of or incinerated, such as a can of adhesive or foam scrap, does not fall within the definition of "container containing."

EPA also believes that containers of class I or class II waste do not fall under the definition of "container containing," in that the waste is not "intended to be transferred to another container, vessel or piece of equipment in order to realize its intended use." EPA's intention in including "intended use" in its

definition was to target items to be consumed, thus giving consumers information on which to base a purchase decision. Waste is neither purchased nor "used" and thus, does not fall into the category of items to be consumed. In order to make this clear, EPA is proposing a definition of "waste," for purposes of this rule, that includes items or substances discarded with the intent that they will serve no further useful purpose. The term discarded can include being deposited in a landfill, being destroyed in an incinerator or chemical process, or undergoing some other type of final waste handling. Consequently, waste that is going to be discarded would not be required to be labeled under this proposal.

EPA does believe, however, that containers of used or contaminated controlled substances, such as some refrigerants, methyl chloroform, carbon tetrachloride, other CFCs and HCFCs, and blends of controlled substances that are bound for recycling or reclamation do fall under the definition of "container containing." These substances will be transferred to realize their "intended use" and will later be used by consumers. Consequently, these containers trigger labeling and are not proposed to be exempt from such requirements under this amendment. Such quantities are easily identifiable and are often recycled or reclaimed for manufacture or use in new products which would in turn require the mandated warning statement. Therefore, EPA believes that the mandated warning statement is warranted on containers of contaminated (or used) controlled substances and blends of controlled substances when they are introduced into interstate commerce for purposes of recycling or reclamation.

Furthermore, the Agency believes that there is not a significant environmental benefit associated with labeling wastes of controlled substances. The final labeling rule lays out requirements that will affect consumers' decisions, and thus, manufacturers' production decisions upstream. A label applied to the product(s) manufactured with or containing a controlled substance will provide such information to the consumer. Duplicating efforts by labeling the waste from a product that no longer serves its useful purpose has no influence on purchasing or consumer decisions, since waste is neither purchased nor used. Since waste is not a consumer item, a waste handler, whose business it is to handle all types of unwanted materials, would not be dissuaded from accepting a certain waste because of its effect on the ozone layer.

Because of the demand for and the high cost of controlled substances, EPA further believes that those using controlled substances will recycle or reclaim rather than to discard them. Regulations promulgated pursuant to sections 608 and 609 of the Clean Air Act require recovery and recycling of refrigerants; efficient management of other uses of controlled substances would preclude discarding as a prudent option. In cases where these substances cannot be reused, recycled, or reclaimed, they are most often destroyed rather than deposited in a landfill or disposed in some other manner that would allow emissions of the substance. As hazardous wastes, carbon tetrachloride, methyl chloroform, and methyl bromide cannot be placed in a landfill. Additionally, no non-containerized liquid wastes can be placed in landfills.

The section 608 regulation mentioned above specifically addresses disposal of appliances containing refrigerants; compliance will be monitored via a variety of provisions in section 608. The proposed accelerated phaseout rule refers to the use of destruction technologies approved by the Parties to the Montreal Protocol in granting an exemption to the allowance program for production and consumption. Today's proposed amendment specifies that those persons using a controlled substance in their manufacturing process, but then destroying that substance using one of the five approved technologies, are exempt from labeling the product manufactured with the destroyed controlled substance. In both proposed rules, the actual disposal or destruction would not be regulated.

While it could be argued that requiring the labeling of waste provides valuable information about the contents of a waste to the handler, other regulations provide for similar information to be conveyed. For example, any waste considered to be hazardous (which includes carbon tetrachloride, methyl chloroform, and methyl bromide) must have its contents reported on the manifest required to accompany the waste under the Resource Conservation and Recovery Act (RCRA). Furthermore, EPA believes that the intent of the section 611 labeling provisions is to provide consumers with information upon which to make purchasing decisions, rather than to inform persons of contents for purposes of handling a substance, product or waste.

In summary, the Agency recognizes that waste should not be defined as a product under these regulations, nor should containers of waste be regarded as containers containing controlled substances. Consequently, EPA proposes to add a new § 82.106(b)(3), which provides exemptions from the labeling requirements, to include, "Waste containing controlled substances bound for discard." EPA emphasizes, however, that containers of used or contaminated controlled substances or of blends of these controlled substances that enter into interstate commerce and that are bound for recycling or reclamation are not proposed to be exempted, and thus would continue to require labeling. In order to provide clarity, EPA also proposes a definition of "waste" for purposes of this rulemaking, which would mean, "items or substances that are discarded with the intent that such items or substances will serve no further useful purpose." EPA requests comment on its proposal to exempt waste from the labeling requirements.

IV. Labeling Requirements for Spare Parts To Be Used Solely for Repair

Section 82.116 of the current labeling regulations exempts manufacturers who incorporate another product, manufactured with a class I substance and purchased from another manufacturer or supplier, from having to pass through the label from the incorporated product to the final product. Section 82.118 goes on to state, however, that distributors, wholesalers, and retailers of labeled products are required to pass through the labeling information. The current labeling requirements provide an exemption from labeling when repairs are made using components manufactured with a controlled substance or using a controlled substance in the repair itself. In an applicability determination made following the promulgation of the final rule, EPA clarified that the repair provision of the rule allows the repair of a product using a component manufactured with an ODS or using an ODS in the repair of the product without triggering labeling.

Subsequent to promulgation, the Agency has received new information regarding spare parts that are intended for repair purposes only. Evidently, many companies have up to several million spare parts in inventory that are purchased from vendors, and then sold piecemeal to persons who repair the original product. Due to the pass-through exemption for persons incorporating a product manufactured with a controlled substance that was purchased from a supplier, and due to the applicability determination

regarding repairs, the repair person would not be required to label the repaired product. To require companies that order spare parts in bulk from suppliers to pass through labeling information with each order—perhaps containing several hundred individual spare parts from numerous bulk shipments—is exceedingly burdensome to those companies purchasing and selling the spare parts. Typically, the bulk shipment will be labeled on a shipping crate or an invoice to indicate that the parts within that shipment were manufactured with a controlled substance. The company ordering the spare parts breaks down the shipment into bins, currently necessitating a label or labeling information to be generated for each individual part contained in that shipment. In most cases, a repair person purchases hundreds of various individual spare parts at a time from the company, making the pass-through of any labeling information extremely cumbersome and time-consuming.

Many of the original manufacturers of these spare parts are foreign manufacturers, exacerbating the burden of tracking the use of controlled substances in the manufacture of each spare part in inventory. Developing and maintaining inventories of these spare parts is extremely costly, often many times more costly than the sale price of the spare parts themselves.

EPA's decision not to require manufacturers incorporating products manufactured with controlled substances to comply with the labeling pass-through requirement was based in part on the overwhelming tracking burden imposed in determining which components were actually made using a controlled substance. A similar situation exists for those purchasing spare parts for repair purposes. Many distributors stock hundreds of thousands of spare parts to be sold to repair persons. The burden of tracking each part that is to then be sold to a person using that part for repair—which is exempted from the labeling requirements—becomes overwhelming and is without environmental benefit.

Furthermore, the repair person has specific requirements for a spare part that will work with the existing product to be repaired; consumer discretion on his or her part based on the use of an ODS is unlikely. Because the repair person is not required to pass through any labeling information in the repair of the product, requiring the labeling of spare parts themselves serves no environmental benefit. Additionally, numerous companies that stock spare parts for the repair of their products have themselves totally stopped using controlled substances and are currently encouraging suppliers to use safe alternatives in manufacturing spare parts that they purchase.

In light of the information above, EPA is today proposing that purchasers of spare parts manufactured with a controlled substance and purchased from a vendor for the sole purpose of repair, or distributed for purposes of repair only, not be required to pass through the labeling information. EPA wishes to emphasize that this exemption to the pass-through requirement does not apply to products containing a controlled substance or containers of controlled substances, nor does it apply to spare parts used to manufacture products. Manufacturers of spare parts made with controlled substances are still required to apply the appropriate labels. Moreover, importers and distributors moving the labeled shipments as packaged by the manufacturer must still pass through the labeling information.

EPA requests comments on its proposal to exempt from the label pass-through requirement those spare parts that are to be used for repair purposes.

V. Clarification of the Meaning of Products "Manufactured With"

The final rule discusses the applicability of the labeling requirements for products manufactured with controlled substances. Some confusion over when labeling is required for such products has emerged since the publication of the final rule. The following discussion should clarify such labeling questions.

In reviewing whether a product must be labeled, one must examine from two perspectives. Is labeling required because it is a product "containing" a controlled substance? If not, is labeling then required because it is a product "manufactured with" a controlled substance?

The final rule states that a controlled substance that is inadvertently produced or remaining as a residue from a chemical reaction, leaving trace quantities of that substance in the final product, does not trigger the labeling requirements. However, there may be cases where a product is exempt from being labeled a product "containing" (in this case as a result of trace quantities), but where a product may still require labeling because it is considered to be "manufactured with" that controlled substance.

The introduction of carbon tetrachloride as an explosion suppressant in the manufacture of certain chemicals serves as an example. The carbon tetrachloride is introduced, then withdrawn from the chemical product. Trace quantities of the carbon tetrachloride remain in the chemical; however, such quantities serve no useful purpose in the final product. As a result, the product is exempt from being labeled as a product containing carbon tetrachloride. However, because the carbon tetrachloride is introduced into the chemical product directly in the manufacturing process, actually having physical contact with the product, the product would need to be labeled as "manufactured with" carbon tetrachloride, unless other exemptions apply.

In order to be consistent with this view, EPA is proposing to revise the definition of "manufactured with". The final regulations currently state that a product is manufactured with a controlled substance if the manufacturer used a controlled substance directly in the product's manufacture, "but the product itself does not contain a controlled substance at the point of introduction into interstate commerce." To further clarify that trace quantities may actually be contained in a product manufactured with a controlled substance, EPA proposes to revise the definition of "manufactured with," to state that a product "does not contain more than trace quantities of the controlled substance * * *." Comment on this proposed revision is requested.

VI. Exemption for Trace Quantities

While the final labeling rule discussed the applicability of the labeling requirements for products containing trace quantities of controlled substances, some confusion over when labeling is required for such products has also arisen since the publication of the final rule.

The regulatory text in § 82.106, referring to the warning statement requirements, lists certain exemptions from these requirements. The first of these addresses "Products in which trace quantities of a controlled substance remain as a residue or impurity * * *." A trace quantity remaining in a product can only be contained within a chemical product; therefore, it is logical that this exemption specifically applies to products "containing" rather than products "manufactured with." Products that are manufactured using a controlled substance, but that contain only trace quantities of the substance, are not required to be labeled as a "product containing"; however, they are required to be labeled as a "product manufactured with." To clarify this point, EPA proposes to amend § 82.106(b)(1), which provides

exemptions from the labeling requirements, to read: "Products containing trace quantities of a controlled substance remaining as a residue or impurity due to a chemical reaction, and where the controlled substance serves no useful purpose in or for the product itself." However, if such a product was manufactured using the controlled substance, such product is required to be labeled as a "product manufactured with" the controlled substances.

There has also been some confusion as to whether a container containing a trace amount of a controlled substance must be labeled. EPA understands that to determine whether a container contains a trace amount of a controlled substance, where such a determination falls outside of normal procedures, may be difficult and costly. For example, a container of a non-controlled substance that may hold a trace amount of a controlled substance as an impurity of the manufacturing process would be subject to labeling under current labeling requirements. As a product, however, that same container would be exempt from the labeling requirements. In many cases, expensive testing must be conducted to determine if a trace quantity of the controlled substance is in fact contained in the container. Requiring the labeling of containers containing trace quantities of a controlled substance is inconsistent with the trace quantities exemption of the current labeling rule and with the intent of the Agency to require labeling of "containers of" controlled substances.

Consequently, EPA is today proposing to revise its regulations to make clear that containers containing trace quantities of controlled substances do not have to be labeled. EPA proposes to add a new § 82.106(b)(2) stating that containers containing trace quantities of a controlled substance, which remain as a residue or impurity, are exempt from the labeling requirements, and requests relevant comment.

VII. Labeling Requirements of Containers of 55 Gallons and Smaller Containing Controlled Substances

The final labeling regulations indicate that the use of supplemental printed material may be used to label containers of controlled substances that are larger than 55 gallon drums, as long as the information is viewed at the time of purchase or time of delivery, provided the purchase is not considered complete until delivery is accepted. EPA reasoned that such information, rather than the containers themselves, is usually viewed by the recipient of such containers. The regulations also indicated that the warning statement must be placed directly on containers of controlled substances that are smaller than 55 gallon drums.

Today, EPA proposes that supplemental printed material may also be used to convey the warning statement for containers that are 55 gallons and smaller. Since the publication of the regulations, numerous commenters have indicated that bulk shipments of 55 gallon drum containers are often documented in various printed materials, such as the RCRA Manifest or a Land Disposal Restriction Form which companies are required to develop under the RCRA Land Disposal Restrictions Program. Such a form tracks waste codes that EPA developed specifically for that program. EPA agrees that shipments of containers of 55 gallons or smaller containing bulk quantities of controlled substances or waste containers of controlled substances may be labeled on supplemental printed material as an alternative to the direct labeling of individual containers, as long as the warning statement is clearly legible and conspicuous in such materials and the materials accompany the containers or are available to the consumer/waste recipient at the time of purchase. Consequently, EPA is revising § 82.108(c) of its labeling regulation to strike "larger than a 55 gallon drum" from the provision allowing alternative placement of the warning statement on containers of controlled substances. EPA requests comment on its proposal to allow alternative placement of warning statements on 55 gallon or smaller containers.

VIII. Definition of Importer

For purposes of section 611, EPA today clarifies that importers of "products manufactured with controlled substances" are included in the definition of "importer." While the intent of the section 611 regulations was to cover imports of products manufactured with class I substances, the current definition does not explicitly include such a phrase. This came about as an oversight in transferring the definition from the phaseout regulations, where imports of containers and products containing controlled substances are regulated. Section 611 clearly mandates that "products manufactured with controlled substances" be labeled before they are introduced into interstate commerce. Therefore, for purposes of the labeling requirements and consistency with the statute, the definition of "importer" under section 611 is amended to include the phrase "products manufactured with."

IX. Certification Requirements for Reduced Use Exemption

In § 82.122, EPA stated that companies that reduced their use of CFC–113 and/or methyl chloroform (MCF) by 95 percent or greater over their 1990 usage level could certify the reduction in writing to EPA and be exempt from the labeling requirements. In addition to other requirements for inclusion in the written certification, the regulations require that persons certifying to EPA must state that they will not exceed 5 percent of their 1990 use following the certification; however, the statement conveyed was numerically and grammatically incorrect. It reads: "Persons certifying must also include a statement that indicates that their future annual use will not at no time exceed 95 percent of their 1990 usage" (p.8169).

EPA proposes to correct this section of the regulations to state that a company must certify to EPA that its future use will not exceed 5 percent of its 1990 usage without notifying the Agency. Such notification would immediately result in labeling of the company's products. This subpart (§ 82.122 (a)(4)) would thus read: "Persons certifying must also include a statement that indicates their future annual use will at no time exceed 5 percent of their 1990 usage."

X. Imports and Products Introduced In Bond at the U.S./Mexico Border

The final labeling regulations state that products or containers introduced "in bond" at the Mexico border are not considered to be "imports." However, the preamble states that such products or containers are being introduced into U.S. interstate commerce and are therefore subject to the labeling requirements.

Today, EPA proposes that all products and containers subject to the labeling requirements that are made or charged in Mexico and subsequently brought into the U.S. must be labeled at the border where they are being introduced into U.S. interstate commerce. In order to facilitate enforcement of this rule, the Agency only requires that warning labels be placed on regulated products and containers at the border by persons introducing them into U.S. interstate commerce, rather than at the manufacturing facility in Mexico. However, the importer may contract with the Mexican manufacturer to provide the applicable warning statement prior to shipping.

This change supersedes EPA's reference to products or containers admitted in bond in the final labeling rule, since for purposes of the labeling requirements, the regulated products and containers are in fact being treated as "imports." This change makes the definition of import in today's proposal somewhat different from that in the current phaseout regulations. For purposes of the phaseout regulations, it is appropriate to exempt such products of U.S. origin that are brought back into the U.S. from Mexico in bond from the definition of import because allowances have already been expended and additional consumption allowances should not be required to bring these products back into the U.S.

However, it is appropriate and consistent with the intent of section 611 to require labeling of these imported goods, since labeling is to occur regardless of whether the product is distributed domestically or imported. The Agency therefore proposes to strike from the definition of "import" in § 82.104(j) of the labeling regulation the exemption for bringing controlled substances, containers of, or products manufactured with, controlled substances into the U.S. from Mexico where such substance, container or product was admitted into Mexico in bond and is of U.S. origin.

In addition, EPA notes that the preamble to the final labeling rule contained an inaccuracy in describing an arrangement regarding products brought from Mexico into the United States inbond. The preamble stated that, "Under the Maquiladora Agreement, the United States and Mexico established a free-trade zone along a segment of the U.S./Mexico border." There is no formal agreement as such between the two countries in this regard; rather, an arrangement exists, primarily under Mexican law, whereby controlled substances crossing the border from the U.S. into Mexico "inbond" [under a bond ensuring that the substance will remain in Mexico only temporarily) will be returned to the U.S., without being subject to Mexican import tariffs. Similarly, the preamble to the final rule states that "products are permitted to be transported across [the Maquiladora] zone without any U.S. Customs restrictions being imposed." This statement is misleading in that U.S. Customs does assist EPA in monitoring compliance with and enforcing U.S. environmental laws that generally apply without distinction to Maquiladora products. The preamble to the final rule should therefore be read to reflect these corrections. EPA requests comments on these corrections.

XI. Incidental Uses of Controlled Substances

In the final regulations, the definition of "manufactured with" excludes the use of a controlled substance "[W]here the manufacturing equipment has had physical contact with a controlled substance in an intermittent manner, not as a routine part of the direct manufacturing process* * *" (See p.8165). The preamble gave as an example the occasional cleaning of an ink plate, where direct contact occurs only between the controlled substance and the manufacturing equipment, not between the controlled substance and the product itself (other than the first one or two products going through the equipment following equipment maintenance). However, the preamble, in addressing this point, specifically noted that this exclusion should also apply in the case of a controlled substance having intermittent contact with the product itself, such as a textile where direct contact occurs through spot cleaning of some individual textiles, but where direct contact is not a normal or usual occurrence in the manufacture of the product.

The Agency intended for the regulatory text to reflect the full discussion in the preamble to the final rule. Therefore, EPA today also proposes to except in the regulatory text intermittent uses of controlled substances which may involve an initial contact with the product itself, as well as with the equipment. Thus the exception shall read: "[W]here the manufacturing equipment or product has had physical contact with a controlled substance in an intermittent manner, not as a routine part of the direct manufacturing process* * *" EPA requests any comments in this regard.

XII. Request for Comments Regarding Plasma Etching

In the preamble of the final labeling rule, EPA states that "plasma etching is considered a process that entails transformation, and thus products manufactured using plasma etching need not be labeled, unless they are otherwise subject to the regulations." Since publication of the final rule, EPA has heard from one plasma etcher who has discovered that the plasma etching process may not necessarily transform all but trace quantities of controlled substances used in the process. At times, it is estimated that as much as 40 percent may not be transformed. Therefore, plasma etching in general may not fall under the definition of "transformation" in the final labeling rule.

Consequently, EPA requests comments on the whether plasma etching can be considered generally to constitute transformation under the final labeling rule definition, which states, "to use and entirely consume a class I or class II substance, except for trace quantities, by changing it into one or more substances not subject to this subpart in the manufacturing process of a product or chemical."

XIII. Additional Information

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1994), the Agency must determine whether the regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant" regulatory action as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

EPA has determined that this rule is not "significant" under the terms of Executive Order 12866; however, OMB requested the opportunity to review the proposal. The Agency prepared an analysis to assess the impact of the final labeling regulations promulgated on February 11, 1993 (see Regulatory Impact Analysis of the Rule Requiring Labeling of Products Containing or Manufactured With Ozone Depleting Substances, January 1993) which is available for review in the docket for the final labeling rule. This supplemental proposal does not impose any additional burdens as defined by E.O. 12866.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that Federal agencies examine the impacts of their regulations on small entities. Under 5 U.S.C. 604(a), whenever an agency is required to publish a general notice of

proposed rulemaking, it must prepare and make available for public comment an initial regulatory flexibility analysis (RFA). Such an analysis is not required if the head of an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, pursuant to 5 U.S.C. 605(b).

The Agency prepared a regulatory flexibility analysis, as part of the overall regulatory impact analysis (see p.40 of Regulatory Impact Analysis of the Rule Requiring Labeling of Products Containing or Manufactured With Ozone Depleting Substances, January 1993) for the February 11, 1993, regulations that these proposed regulations supplement. No additional RFA need be prepared for this proposal because the details of this amendment did not alter the original analysis.

C. Paperwork Reduction Act

An information collection request was prepared by EPA (ICR No. 2060–0259) for the February 11, 1993, final rule. The contents of this amendment do not alter that analysis. A copy of the ICR may be obtained by writing to the Information Policy Branch (PM–223), U.S. EPA, 401 M Street, SW., Washington, DC 20460 or by calling (202) 260–2740.

List of Subjects for 40 CFR Part 82

Environmental protection, Air pollution control, Chemicals, Chlorofluorocarbons, Destruction, Exports, Imports, Interstate commerce, Pass-through requirement, Reporting and recordkeeping requirements, Stratospheric ozone layer.

Dated: December 17, 1993.

Carol Browner,

Administrator.

Title 40, Code of Federal Regulations, part 82, is proposed to be amended to read as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7601; 42 U.S.C. 7671–7671(q).

2. Subpart E, 40 CFR 82.100–82.124, is revised to read as follows:

Subpart E—The Labeling of Products Using Ozone-Depleting Substances

Sec.

§ 82.100 Purpose.

The purpose of this subpart is to require warning statements on containers of, and products containing or manufactured with, certain ozone-depleting substances, pursuant to section 611 of the Clean Air Act, as amended.

§ 82.102 Applicability.

(a) In the case of substances designated as class I or class II substances as of February 11, 1993, the effective date of the requirements in this paragraph is May 15, 1993. In the case of any substance designated as a class I or class II substance after February 11, 1993, the effective date of the requirements in this paragraph of this section is either one year after the effective date of such designation or the date provided in the rulemaking designating such substance as a class I or class II substance, whichever comes first. On the effective date indicated in this paragraph, the requirements of this subpart shall apply to the following containers and products except as exempted under paragraph (c) of this section:

(1) All containers in which a class I or class II substance is stored or transported.

(2) All products containing a class I substance.

(3) All products directly manufactured with a process that uses a class I substance, unless otherwise exempted by this subpart or, unless the Administrator determines for a particular product that there are no substitute products or manufacturing processes for such product that do not rely on the use of a class I substance, that reduce overall risk to human health and the environment, and that are currently or potentially available. If the Administrator makes such a determination for a particular product, then the requirements of this subpart are effective for such product no later than January 1, 2015.

(b) Effective January 1, 2015 in any case, or one year after any determination between May 15, 1993 and January 1, 2015, by the Administrator for a particular product that there are substitute products or manufacturing processes for such product that do not rely on the use of a class I or class II substance, that reduce the overall risk to human health and the environment, and that are currently or potentially available, the requirements of this subpart shall apply to the following:

(1) All products containing a class II substance.

(2) All products manufactured with a process that uses a class II substance.

(c) The requirements of this subpart shall not apply to products manufactured prior to May 15, 1993, provided that the manufacturer submits documentation to EPA upon request showing that the product was manufactured prior to that date.

§ 82.104 Definitions.

(a) *Class I substance* means any substance designated as class I in 40 CFR part 82, appendix A to subpart A, including chlorofluorocarbons, halons, carbon tetrachloride and methyl chloroform and any other substance so designated by the Agency at a later date.

(b) *Class II substance* means any substance designated as class II in 40 CFR part 82, appendix A to subpart A, including hydrochlorofluorocarbons and any other substance so designated by the Agency at a later date.

(c) *Completely destroy* means to cause the expiration of a controlled substance by one of the five destruction processes approved by the Parties at a demonstrable destruction efficiency of 98 percent or more or a greater destruction efficiency if required under other applicable state and federal regulations.

(d) *Consumer* means a commercial or non-commercial purchaser of a product or container that has been introduced into interstate commerce.

(e) *Container* means the immediate vessel in which a controlled substance is stored or transported.

(f) *Container containing* means a container that physically holds a controlled substance within its structure that is intended to be transferred to another container, vessel or piece of equipment in order to realize its intended use.

(g) *Controlled substance* means a class I or class II ozone-depleting substance.

(h) *Destruction* means the expiration of a controlled substance that does not result in a commercially useful end product using one of the following controlled processes:

(1) Liquid injection incineration;
(2) Reactor cracking;
(3) Gaseous/fume oxidation;
(4) Rotary kiln incineration; or
(5) Cement kiln.

in a manner that complies at a minimum with the "Code of Good Housekeeping" of Chapter 5.5 of the UNEP report entitled, Ad-Hoc Technical Advisory Committee on ODS Destruction Technologies, as well as the whole of Chapter 5 from that report, or with more stringent requirements as applicable.

(i) *Distributor* means a person to whom a product is delivered or sold for purposes of subsequent resale, delivery or export.

(j) *Export* means the transport of virgin, used, or recycled class I or class II substances or products manufactured with or containing class I or class II substances from inside the United States or its territories to persons outside the United States or its territories, excluding United States military bases and ships for on-board use.

(k) *Exporter* means the person who contracts to sell class I or class II substances or products manufactured with or containing class I or class II substances for export or transfers such substances or products to his affiliate in another country.

(l) *Import* means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into any place subject to the jurisdiction of the United States whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States, with the exception of temporary off-loading of products manufactured with or containers containing class I or class II substances from a ship are used for servicing of that ship.

(m) *Importer* means any person who imports a controlled substance, a product containing a controlled substance, a product manufactured with a controlled substance, or any other chemical substance (including a chemical substance shipped as part of a mixture or article), into the United States. "Importer" includes the person primarily liable for the payment of any duties on the merchandise or an authorized agent acting on his or her behalf. The term also includes, as appropriate:

(1) The consignee;

(2) The importer of record listed on U.S. Customs Service forms for the import;

(3) The actual owner if an actual owner's declaration and superseding bond has been filed; or

(4) The transferee, if the right to draw merchandise in a bonded warehouse has been transferred.

(n) *Interstate commerce* means the distribution or transportation of any product between one state, territory, possession or the District of Columbia, and another state, territory, possession or the District of Columbia, or the sale, use or manufacture of any product in more than one state, territory, possession or District of Columbia. The entry points for which a product is introduced into interstate commerce are the release of a product from the facility in which the product was manufactured, the entry into a warehouse from which the domestic manufacturer releases the product for sale or distribution, and at the site of United States Customs clearance.

(o) *Manufactured with a controlled substance* means that the manufacturer of the product itself used a controlled substance directly in the product's manufacturing, but the product itself does not contain more than trace quantities of the controlled substance at the point of introduction into interstate commerce. The following situations are excluded from the meaning of the phrase "manufactured with" a controlled substance:

(1) Where a product has not had physical contact with the controlled substance; or

(2) Where the manufacturing equipment or the product has had physical contact with a controlled substance in an intermittent manner, not as a routine part of the direct manufacturing process;

(3) Where the controlled substance has been transformed, except for trace quantities; or

(4) Where the controlled substance has been completely destroyed.

(p) *Potentially available* means that adequate information exists to make a determination that the substitute is technologically feasible, environmentally acceptable and economically viable.

(q) *Principal display panel (PDP)* means the entire portion of the surface of a product, container or its outer packaging that is most likely to be displayed, shown, presented, or examined under customary conditions of retail sale. The area of the PDP is not limited to the portion of the surface covered with existing labeling; rather it includes the entire surface, excluding flanges, shoulders, handles, or necks.

(r) *Product* means an item or category of items manufactured from raw or recycled materials, or other products, which is used to perform a function or task.

(s) *Product containing* means a product including, but not limited to, containers, vessels, or pieces of equipment, that physically holds a controlled substance at the point of sale to the ultimate consumer which remains within the product.

(t) *Promotional printed material* means any informational or advertising material (including, but not limited to, written advertisements, brochures, circulars, desk references and fact sheets) that is prepared by the manufacturer for display or promotion concerning a product or container, and that does not accompany the product to the consumer.

(u) *Retailer* means a person to whom a product is delivered or sold, if such delivery or sale is for purposes of sale or distribution in commerce to consumers who buy such product for purposes other than resale.

(v) *Spare parts* means those parts that are supplied by a manufacturer to another manufacturer, distributor, or retailer, for purposes of replacing similar parts with such parts in the repair of a product.

(w) *Supplemental printed material* means any informational material (including, but not limited to, package inserts, fact sheets, invoices, material safety data sheets, procurement and specification sheets, or other material) which accompanies a product or container to the consumer at the time of purchase.

(x) *Transform* means to use and entirely consume a class I or class II substance, except for trace quantities, by changing it into one or more substances not subject to this subpart in the manufacturing process of a product or chemical.

(y) *Type size* means the actual height of the printed image of each capital letter as it appears on a label.

(z) *Ultimate consumer* means the first commercial or non-commercial purchaser of a container or product that is not intended for re-introduction into interstate commerce as a final product or as part of another product.

(aa) *Warning label* means the warning statement required by section 611 of the Act. The term warning statement shall be synonymous with warning label for purposes of this subpart.

(bb) *Waste* means, for purposes of this subpart, items or substances that are discarded with the intent that such items or substances will serve no further useful purpose.

(cc) *Wholesaler* means a person to whom a product is delivered or sold, if such delivery or sale is for purposes of sale or distribution to retailers who buy such product for purposes of resale.

§ 82.106 Warning statement requirements.

(a) *Required warning statements.* Unless otherwise exempted by this subpart, each container or product identified in § 82.102(a) or (b) shall bear the following warning statement, meeting the requirements of this subpart for placement and form:

WARNING: Contains [or Manufactured with, if applicable] [*insert name of substance*], a substance which harms public health and environment by destroying ozone in the upper atmosphere.

(b) *Exemptions from warning label requirement.* The following products need not bear a warning label:

(1) Products containing trace quantities of a controlled substance remaining as a residue or impurity due to a chemical reaction, and where the controlled substance serves no useful purpose in or for the product itself. However, if such product was manufactured using the controlled substance, the product is required to be labeled as a "product manufactured with" the controlled substance, unless otherwise exempted.

(2) Containers containing a controlled substance in which trace quantities of that controlled substance remain as a residue or impurity.

(3) Waste containing controlled substances or blends of controlled substances bound for discard.

(4) Products manufactured using methyl chloroform or CFC–113 by persons who can demonstrate and certify a 95% reduction in overall usage from their 1990 calendar year usage of methyl chloroform or CFC–113 as solvents during a twelve (12) month period ending within sixty (60) days of such certification or during the most recently completed calendar year. In calculating such reduction, persons may subtract from quantities used those quantities for which they possess accessible data that establishes the amount of methyl chloroform or CFC–113 transformed. Such subtraction must be performed for both the applicable twelve month period and the 1990 calendar year. If at any time future usage exceeds the 95% reduction, all products manufactured with methyl chloroform or CFC–113 as solvents by that person must be labeled immediately. No person may qualify for this exemption after May 15, 1994.

(5) Products intended only for export outside of the United States shall not be considered "products introduced into interstate commerce" provided such products are clearly designated as intended for export only.

(6) Products that are otherwise not subject to the requirements of this subpart that are being repaired, using a process that uses a controlled substance.

(7) Products, processes, or substitute chemicals undergoing research and development, by which a controlled substance is used. Such products must be labeled when they are introduced into interstate commerce.

(c) *Interference with other required labeling information.* The warning statement shall not interfere with, detract from, or mar any labeling information required on the labeling by federal or state law.

§ 82.108 Placement of warning statement.

The warning statement shall be placed so as to satisfy the requirement of the Act that the warning statement be "clearly legible and conspicuous." The warning statement is clearly legible and conspicuous if it appears with such prominence and conspicuousness as to render it likely to be read and understood by consumers under normal conditions of purchase. Such placement includes, but is not limited to, the following:

(a) *Display panel placement.* For any affected product or container that has a display panel that is normally viewed by the purchaser at the time of the purchase, the warning statement described in § 82.106 may appear on any such display panel of the affected product or container such that it is "clearly legible and conspicuous" at the time of the purchase. If the warning statement appears on the principal display panel or outer packaging of any such affected product or container, the warning statement shall qualify as "clearly legible and conspicuous," as long as the label also fulfills all other requirements of this subpart and is not obscured by any outer packaging, as required by paragraph (b) of this section. The warning statement need not appear on such display panel if either:

(1) The warning statement appears on the outer packaging of the product or container, consistent with paragraph (b) of this section, and is clearly legible and conspicuous; or

(2) The warning statement is placed in a manner consistent with paragraph (c) of this section.

(b) *Outer packaging.* If the product or container is normally packaged, wrapped, or otherwise covered when viewed by the purchaser at the time of the purchase the warning statement described in § 82.106 shall appear on any outer packaging, wrapping or other covering used in the retail display of the product or container, such that the warning statement is clearly legible and conspicuous at the time of the purchase. If the outer packaging has a display panel that is normally viewed by the purchaser at the time of the purchase, the warning statement shall appear on such display panel. If the warning statement so appears on such product's or container's outer packaging, it need not appear on the surface of the product or container, as long as the statement also fulfills all other requirements of this subpart. The warning statement need not appear on such outer packaging if either:

(1) The warning statement appears on the surface of the product or container, consistent with paragraph (a) of this section, and is clearly legible and conspicuous through any outer packaging, wrapping or other covering used in display; or

(2) The warning statement is placed in a manner consistent with paragraph (c) of this section.

(c) *Alternative placement.* The warning statement may be placed on a hang tag, tape, card, sticker, invoice, bill of lading, supplemental printed material, or similar overlabeling that is securely attached to the container, product, outer packaging or display case, or accompanies the product containing or manufactured with a controlled substance or a container containing class I or class II substances through its sale to the consumer or ultimate consumer. For prescription medical products that have been found to be essential for patient health by the Food and Drug Administration, the warning statement may be placed in supplemental printed material intended to be read by the prescribing physician, as long as the following statement is placed on the product, its packaging, or supplemental printed material intended to be read by the patient: "This product contains [insert name of substance], a substance which harms the environment by depleting ozone in the upper atmosphere." In any case, the warning statement must be clearly legible and conspicuous at the time of the purchase.

(d) *Products not viewed by the purchaser at the time of purchase.* Where the purchaser of a product cannot view a product, its packaging or alternative labeling such that the warning statement is clearly legible and conspicuous at the time of purchase, as specified under paragraph (a), (b), or (c) of this section, the warning statement may be placed in the following manner:

(1) Where promotional printed material is prepared for display or distribution, the warning statement may be placed on such promotional printed material such that it is clearly legible and conspicuous at the time of purchase; or

(2) The warning statement may be placed on the product, on its outer packaging, or on alternative labeling, consistent with paragraph (a), (b), or (c) of this section, such that the warning statement is clearly legible and conspicuous at the time of product delivery, if the product may be returned by the purchaser at or after the time of delivery or if the purchase is not complete until the time of delivery (e.g., products delivered C.O.D.).

§ 82.110 Form of label bearing warning statement.

(a) *Conspicuousness and contrast.* (1) The warning statement shall appear in conspicuous and legible type by typography, layout, and color with other printed matter on the label.

(2) The warning statement shall appear in sharp contrast to any background upon which it appears. Examples of combinations of colors which may not satisfy the proposed requirement for sharp contrast are: black letters on a dark blue or dark green background, dark red letters on a light red background, light red letters on a reflective silver background, and white letters on a light gray or tan background.

(b) *Name of substance.* The name of the class I or class II substance to be inserted into the warning statement shall be the standard chemical name of the substance as listed in 40 CFR part 82, appendix A to subpart A, except that:

(1) The acronym "CFC" may be substituted for "chlorofluorocarbon."

(2) The acronym "HCFC" may be substituted for "hydrochlorofluorocarbon."

(3) The term "1,1,1-trichloroethane" may be substituted for "methyl chloroform."

(c) *Combined statement for multiple class I substances.* If a container containing or a product contains or is manufactured with, more than one class I or class II substance, the warning statement may include the names of all of the substances in a single warning statement, provided that the combined statement clearly distinguishes which substances the container or product contains and which were used in the manufacturing process.

(d) *Format.* (1) The warning statement shall be blocked within a square or rectangular area, with or without a border.

(2) The warning statement shall appear in lines that are parallel to the surrounding text on the product's PDP, display panel, supplemental printed material or promotional printed material.

(e) *Type style.* The ratio of the height of a capital letter to its width shall be such that the height of the letter is no more than 3 times its width; the signal word "WARNING" shall appear in all capital letters.

(f) *Type size.* The warning statement shall appear at least as large as the type sizes prescribed by this paragraph. The type size refers to the height of the capital letters. A larger type size materially enhances the legibility of the statement and is desirable.

(1) *Display panel or outer packaging.* Minimum type size requirements for the warning statement are given in Table 1 and are based upon the area of the display panel of the product or container. Where the statement is on the outer packaging, as well as the display panel area, the statement shall appear in the same minimum type size as on the display panel.

TABLE 1

Area of Display Panel (sq. in.)	0–2	>2–5	>5–10	>10–15	>15–30	>30
*Type size (in.)**						
Signal word	3/64	1/16	3/32	7/64	1/8	5/32
Statement	3/64	3/64	1/16	3/32	3/32	7/64

> Means greater than.
* Minimum height of printed image of letters.

(2) *Alternative placement.* The minimum type size for the warning statement on any alternative placement which meets the requirements of § 82.108(c) is 3/32 inches for the signal word and 1/16 of an inch for the statement.

(3) *Promotional printed material.* The minimum type size for the warning statement on promotional printed material is 3/32 inches for the signal word and 1/16 of an inch for the statement, or the type size of any surrounding text, whichever is larger.

§ 82.112 Removal of label bearing warning statement.

(a) *Prohibition on removal.* Except as described in paragraph (b) or (c) of this section, any warning statement that accompanies a product or container introduced into interstate commerce, as required by this subpart, must remain with the product or container and any product incorporating such product or container, up to and including the point of sale to the ultimate consumer.

(b) *Incorporation of warning statement by subsequent manufacturers.* A manufacturer of a product that incorporates a product that is accompanied by a label bearing the warning statement may remove such label from the incorporated product if the information on such label is incorporated into a warning statement accompanying the manufacturer's product, or if, pursuant to paragraph (c) of this section, the manufacturer of the product is not required to pass through the information contained on or incorporated in the product's label.

(c) *Manufacturers that incorporate products manufactured with controlled substances.* A manufacturer that incorporates into its own product a component product that: (1) Was purchased from another manufacturer, (2) was manufactured with a process that uses a controlled substance(s), but (3) does not contain such substance(s), may remove such label from the incorporated product and need not apply a warning statement to its own product, if the manufacturer does not use a controlled substance in its own manufacturing process. A manufacturer that uses controlled substances in its own manufacturing process, and is otherwise subject to the regulations of this subpart, must label pursuant to § 82.106, but need not include information regarding the incorporated product on the required label.

(d) *Manufacturers, distributors, wholesalers, retailers that sell spare parts manufactured with controlled substances solely for repair.* Manufacturers, distributors, wholesalers, and retailers that purchase spare parts manufactured with a class I substance from another manufacturer or supplier, and sell such spare parts for the sole purpose of repair, are not required to pass through an applicable warning label if such products are removed from the original packaging provided by the manufacturer from whom the products are purchased. Manufacturers of the spare parts manufactured with controlled

substances must still label their products; furthermore, manufacturers, importers, and distributors of such products must pass through the labeling information as long as products remain assembled and packaged in the manner assembled and packaged by the original manufacturer. This exemption shall not apply if a spare part is later used for manufacture and/or for purposes other than repair.

§ 82.114 Compliance by manufacturers and importers with requirements for labeling of containers of controlled substances, or products containing controlled substances.

(a) *Compliance by manufacturers and importers with requirements for labeling of containers of controlled substances, or products containing controlled substances.* Each manufacturer of a product incorporating another product or container containing a controlled substance, to which § 82.102 (a)(1), or, (a)(2) or (b)(1) applies, that is purchased or obtained from another manufacturer or supplier, is required to pass through and incorporate the labeling information that accompanies such incorporated product in a warning statement accompanying the manufacturer's finished product. Each importer of a product, or container containing a controlled substance, to which § 82.102 (a)(1), (a)(2), or (b)(1) applies, including a component product or container incorporated into the product, that is purchased from a foreign manufacturer or supplier, is required to apply a label, or to ensure that a label has been properly applied, at the site of U.S. Customs clearance.

(b) *Reliance on reasonable belief.* The manufacturer or importer of a product that incorporates another product containing from another manufacturer or supplier may rely on the labeling information (or lack thereof) that it receives with the product, and is not required to independently investigate whether the requirements of this subpart are applicable to such purchased product or container, as long as the manufacturer reasonably believes that the supplier or foreign manufacturer is reliably and accurately complying with the requirements of this subpart.

(c) *Contractual obligations.* A manufacturer's or importer's contractual relationship with its supplier under which the supplier is required to accurately label, consistent with the requirements of this subpart, any products containing a controlled substance or containers of a controlled substance that are supplied to the manufacturer or importer, is evidence of reasonable belief.

§ 82.116 Compliance by manufacturers or importers incorporating products manufactured with controlled substances.

(a) *Compliance by manufacturers or importers incorporating products manufactured with controlled substances, or importing products manufactured with controlled substances.* Each manufacturer or importer of a product incorporating another product to which § 82.102 (a)(3), or, (b)(2) applies, that is purchased from another manufacturer or supplier, is not required to pass through and incorporate the labeling information that accompanies such incorporated product in a warning statement accompanying the manufacturer's or importer's finished product. Importers of products to which § 82.102 (a)(3) or (b)(2) applies are required to apply a label, or to ensure that a label has been properly applied at the site of U.S. Customs clearance.

(b) *Reliance on reasonable belief.* The importer of a product purchased or obtained from a foreign manufacturer or supplier, which product may have been manufactured with a controlled substance, may rely on the information that it receives with the purchased product, and is not required to independently investigate whether the requirements of this subpart are applicable to the purchased or obtained product, as long as the importer reasonably believes that there was no use of controlled substances by the final manufacturer of the product being imported.

(c) *Contractual obligations.* An importer's contractual relationship with its supplier under which the supplier is required to accurately label, consistent with the requirements of this subpart, any products manufactured with a controlled substance that are supplied to the importer, or to certify to the importer whether a product was or was not manufactured with a controlled substance is evidence of reasonable belief.

§ 82.118 Compliance by wholesalers, distributors and retailers.

(a) *Requirement of compliance by wholesalers, distributors and retailers.* All wholesalers, distributors and retailers of products or containers to which this subpart applies are required to pass through the labeling information that accompanies the product, except those purchasing from other manufacturers or suppliers spare parts manufactured with controlled substances and selling those parts for the demonstrable sole purpose of repair.

(b) *Reliance on reasonable belief.* The wholesaler, distributor or retailer of a product may rely on the labeling information that it receives with the product or container, and is not required to independently investigate whether the requirements of this subpart are applicable to the product or container, as long as the wholesaler, distributor or retailer reasonably believes that the supplier of the product or container is reliably and accurately complying with the requirements of this subpart.

(c) *Contractual obligations.* A wholesaler, distributor or retailer's contractual relationship with its supplier under which the supplier is required to accurately label, consistent with the requirements of this subpart, any products manufactured with a controlled substance that are supplied to the wholesaler, distributor or retailer is evidence of reasonable belief.

§ 82.120 Petitions.

(a) *Requirements for procedure and timing.* Persons seeking to apply the requirements of this regulation to a product containing a class II substance or a product manufactured with a class I or a class II substance which is not otherwise subject to the requirements, or to temporarily exempt a product manufactured with a class I substance, based on a showing of a lack of currently or potentially available alternatives, from the requirements of this regulation may submit petitions to: Labeling Program Manager, Stratospheric Protection Division, Office of Atmospheric Programs, U.S. Environmental Protection Agency, 6202–J, 401 M Street, SW., Washington, DC 20460. Such persons must label their products while such petitions are under review by the Agency.

(b) *Requirement for adequate data.* Any petition submitted under paragraph (a) of this section shall be accompanied by adequate data, as defined in § 82.120(c). If adequate data are not included by the petitioner, the Agency may return the petition and request specific additional information.

(c) *Adequate data.* A petition shall be considered by the Agency to be supported by adequate data if it includes all of the following:

(1) A part clearly labeled "Section I.A." which contains the petitioner's full name, company or organization name, address and telephone number, the product that is the subject of the petition, and, in the case of a petition to temporarily exempt a product manufactured with a class I substance

from the labeling requirement, the manufacturer or manufacturers of that product.

(2) For petitions to temporarily exempt a product manufactured with a class I substance only, a part clearly labeled "Section I.A.T." which states the length of time for which an exemption is requested.

(3) A part clearly labeled "Section I.B." which includes the following statement, signed by the petitioner or an authorized representative:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this petition and all attached documents, and that, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information.

(4) A part clearly labeled "Section I.C." which fully explains the basis for the petitioner's request that EPA add the labeling requirements to or remove them from the product which is the subject of the petition, based specifically upon the technical facility or laboratory tests, literature, or economic analysis described in paragraphs C(5), (6) and (7).

(5) A part clearly labeled "Section II.A." which fully describes any technical facility or laboratory tests used to support the petitioner's claim.

(6) A part clearly labeled "Section II.B." which fully explains any values taken from literature or estimated on the basis of known information that are used to support the petitioner's claim.

(7) A part clearly labeled "Section II.C." which fully explains any economic analysis used to support the petitioner's claim.

(d) *Criteria for evaluating petitions.* Adequate data in support of any petition to the Agency to add a product to the labeling requirement or temporarily remove a product from the labeling requirement will be evaluated based upon a showing of sufficient quality and scope by the petitioner of whether there are or are not substitute products or manufacturing processes for such product:

(1) That do not rely on the use of such class I or class II substance;

(2) That reduce the overall risk to human health and the environment; and

(3) That are currently or potentially available.

(e) *Procedure for acceptance or denial of petition.* (1) If a petition submitted under this section contains adequate data, as defined under paragraph (c) of this section, the Agency shall within 180 days after receiving the complete petition either accept the petition or deny the petition.

(2) If the Agency makes a decision to accept a petition to apply the requirements of this regulation to a product containing or manufactured with a class II substance, the Agency will notify the petitioner and publish a proposed rule in the **Federal Register** to apply the labeling requirements to the product.

(3) If the Agency makes a decision to deny a petition to apply the requirements of this regulation to a product containing or manufactured with a class II substance, the Agency will notify the petitioner and publish an explanation of the petition denial in the **Federal Register.**

(4) If the Agency makes a decision to accept a petition to temporarily exempt a product manufactured with a class I substance from the requirements of this regulation, the Agency will notify the petitioner and publish a proposed rule in the **Federal Register** to temporarily exempt the product from the labeling requirements. Upon notification by the Agency, such manufacturer may immediately cease its labeling process for such exempted products.

(5) If the Agency makes a decision to deny a petition to temporarily exempt a product manufactured with a class I substance from the requirements of this regulation, the Agency will notify the petitioner and may, in appropriate circumstances, publish an explanation of the petition denial in the **Federal Register.**

§ 82.122 Certification, recordkeeping, and notice requirements.

(a) *Certification.* (1) Persons claiming the exemption provided in § 82.106(b)(2) must submit a written certification to the following address: Labeling Program Manager, Stratospheric Protection Division, Office of Atmospheric Programs, 6202–J, 401 M Street, SW., Washington, DC 20460.

(2) The certification must contain the following information:

(i) The exact location of documents verifying calendar year 1990 usage and the 95% reduced usage during a twelve month period;

(ii) A description of the records maintained at that location;

(iii) A description of the type of system used to track usage;

(iv) An indication of which 12 month period reflects the 95% reduced usage, and;

(v) Name, address, and telephone number of a contact person.

(3) Persons who submit certifications postmarked on or before May 15, 1993, need not place warning labels on their products manufactured using CFC–113 or methyl chloroform as a solvent. Persons who submit certifications postmarked after May 15, 1993, must label their products manufactured using CFC–113 or methyl chloroform as a solvent for 14 days following such submittal of the certification.

(4) Persons certifying must also include a statement that indicates that their future annual use will not at no time exceed 95% of their 1990 usage.

(5) Certifications must be signed by the owner or a responsible corporate officer.

(6) If the Administrator determines that a person's certification is incomplete or that information supporting the exemption is inadequate, then products manufactured using CFC–113 or methyl chloroform as a solvent by such person must be labeled pursuant to § 82.106(a).

(b) *Recordkeeping.* Persons claiming the exemption under § 82.106(b)(2) must retain supporting documentation at one of their facilities.

(c) *Notice Requirements.* Persons who claim an exemption under § 82.106(b)(2) must submit a notice to the address in paragraph (a)(1) of this section within 30 days of the end of any 12 month period in which their usage of CFC–113 or methyl chloroform used as a solvent exceeds the 95% reduction from calendar year 1990.

§ 82.124 Prohibitions.

(a) *Warning statement*—(1) *Absence or presence of warning statement.* (i) Effective May 15, 1993, except as indicated in paragraph (a)(5) of this section, no container or product identified in § 82.102(a) may be introduced into interstate commerce unless it bears a warning statement that complies with the requirements of § 82.106(a) of this subpart, unless such labeling is not required under §§ 82.102(c), 82.106(b), 82.112 (c) or (d), 82.116(a), 82.118(a), or temporarily exempted pursuant to § 82.120.

(ii) On January 1, 2015, or any time between May 15, 1993 and January 1, 2015 that the Administrator determines for a particular product manufactured with or containing a class II substance that there are substitute products or manufacturing processes for such product that do not rely on the use of a class I or class II substance, that reduce the overall risk to human health and the environment, and that are currently or potentially available, no product identified in § 82.102(b) may be introduced into interstate commerce unless it bears a warning statement that complies with the requirements of § 82.106 of this subpart, unless such

labeling is not required under §§ 82.106(b), 82.112 (c) or (d), 82.116(a) or 82.118(a).

(2) *Placement of warning statement.* (i) On May 15, 1993, except as indicated in paragraph (a)(5) of this section, no container or product identified in § 82.102(a) may be introduced into interstate commerce unless it bears a warning statement that complies with the requirements of § 82.108 of this subpart, unless such labeling is not required under §§ 82.102(c), 82.106(b), 82.112 (c) or (d), 82.116(a), 82.118(a), or temporarily exempted pursuant to § 82.120.

(ii) On January 1, 2015, or any time between May 15, 1993 and January 1, 2015 that the Administrator determines for a particular product manufactured with or containing a class II substance that there are substitute products or manufacturing processes for such product that do not rely on the use of a class I or class II substance, that reduce the overall risk to human health and the environment, and that are currently or potentially available, no product identified in § 82.102(b) may be introduced into interstate commerce unless it bears a warning statement that complies with the requirements of § 82.108 of this subpart, unless such labeling is not required under §§ 82.106(b), 82.112 (c) or (d), 82.116(a) or 82.118(a).

(3) *Form of label bearing warning statement.* (i) Effective May 15, 1993, except as indicated in paragraph (a)(5) of this section, no container or product identified in § 82.102(a) may be introduced into interstate commerce unless it bears a warning statement that complies with the requirements of § 82.110 of this subpart, unless such labeling is not required pursuant to §§ 82.102(c), 82.106(b), 82.112 (c) or (d), 82.116(a), 82.118(a), or temporarily exempted pursuant to § 82.120.

(ii) On January 1, 2015, or any time between May 15, 1993 and January 1, 2015 that the Agency determines for a particular product manufactured with or containing a class II substance, that there are substitute products or manufacturing processes that do not rely on the use of a class I or class II substance, that reduce the overall risk to human health and the environment, and that are currently or potentially available, no product identified in § 82.102(b) may be introduced into interstate commerce unless it bears a warning statement that complies with the requirements of § 82.110 of this subpart, unless such labeling is not required pursuant to §§ 82.106(b), 82.112 (c) or (d), 82.116(a), or 82.118(a).

(4) On or after May 15, 1993, no person may modify, remove or interfere with any warning statement required by this subpart, except as described in § 82.112 of this subpart.

(5) In the case of any substance designated as a class I or class II substance after February 11, 1993, the prohibitions in paragraphs (a)(1)(i), (a)(2)(i), and (a)(3)(i) of this section shall be effective one year after the effective date of designation of such substance as a class I or class II substance or effective on the date provided in the rulemaking designating such substance as a class I or class II substance, whichever comes first.

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federal register

Thursday
December 30, 1993

Part IV

Department of the Interior

Bureau of Indian Affairs

Notice to Rank Juvenile Detention Facilities Construction and PONI Study Applications

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Notice to Rank Juvenile Detention Facilities Construction and PONI Study Applications

AGENCY: Bureau of Indian Affairs, Interior; Office of the Secretary, Interior.

ACTION: Notice.

SUMMARY: This notice is published to inform all American Indian tribes that the Department of the Interior, Office of Construction Management and the Bureau of Indian Affairs (BIA) Facilities Management & Construction Center and Division of Law Enforcement will complete the top 20 projects listed on two **Federal Register** Notices ranking applications for juvenile detention construction and Planning of New Institutions (PONI) studies. A new ranking process to govern the selection of all other applications for constructing new law enforcement facilities will be published. The BIA is proposing to add a new part 296 to title 25 of the Code of Federal Regulations to govern the priority ranking process for law enforcement facilities construction for funding consideration. The new rule provides an opportunity for Indian tribes and tribal organizations to apply for construction projects for adult or juvenile detention facilities, adult or juvenile holding facilities, police administration and operations facilities, and adult or juvenile residential facilities on the Bureau facilities inventory, whether owned or not owned by the Federal government that are operated and/or funded by the BIA. Tribes interested in new facilities will be subject to these regulations upon publication.

FOR FURTHER INFORMATION CONTACT: Warren LeBeau, BIA, Division of Law Enforcement, 1849 C Street, NW., MS 1308 MIB, Washington, DC 20240, (202) 208–5786.

SUPPLEMENTARY INFORMATION: The **Federal Register** Notice published on July 12, 1988, Ranking of Applications for Juvenile Detention Facilities for Indian Youth, No. 26320, ranked 46 applications for renovation and/or construction of juvenile detention facilities pursuant to Public Law 99–570, the Anti-Drug Act of 1986. A similar **Federal Register** Notice published on June 7, 1989, Ranking of Applicants for Planning of New Institutions, No. 24428, ranked 31 applications for ranking Planning of New Institutions (PONI) requests for renovation and/or construction of adult and/or juvenile detention facilities. This list became known as the "generic list." Based on these two notices, the BIA plans to finish the top ten projects on each notice.

Due to the length of time that has passed since the publication of the two **Federal Register** Notices and the independent progression of the top ranked projects, the BIA wanted to inform all tribes exactly what projects would be completed and which would be subject to the new regulations. This list addresses the work that has accumulated since 1989, and assures that all tribes which have received funding to initiate their projects will be considered top priority. The Cheyenne River Sioux Tribe's project was completed in FY 1993. The Ute Mountain Ute Tribe and the Mississippi Band of Choctaw Indians are ranked in the top ten of the two earlier lists. Therefore this ranking reflects 17 tribes with 19 projects to be completed before additional tribes can be placed on a new list for new detention centers. The order of projects are as follows:

1. Oglala Sioux Tribe
2. Navajo Nation—Tuba City
3. Navajo Nation—Chinle
4. Sac and Fox Nation of Oklahoma
5. Ute Mountain Ute Tribe
6. Gila River Indian Community
7. Salt River Pima/Maricopa Indian Community
8. Colville Confederated Tribes
9. Navajo Nation—Crownpoint
10. Navajo Nation—Kayenta
11. Navajo Nation—Shiprock
12. Mississippi Band of Choctaw Indians
13. Tohono O'odham Nation
14. Confederated Tribes of the Umatilla Indians
15. Eight Northern Pueblos
16. San Carlos Apache Tribe
17. Three Affiliated Tribes of Fort Berthold

Ada E. Deer,

Assistant Secretary—Indian Affairs.

[FR Doc. 93–31885 Filed 12–29–93; 8:45 am]

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federal register

Thursday
December 30, 1993

Part V

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Part 2, et al.
Federal Acquisition Regulation; Electronic Contracting; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 5, 8, 12, 13, 14, 15, 16, 49, 52, and 53

[FAR Case 91-104]

Federal Acquisition Regulation; Electronic Contracting

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation to remove any barriers to the use of Electronic Data Interchange (EDI) in Government contracting.

DATES: Comments should be submitted to the FAR Secretariat at the address shown below on or before February 28, 1994, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets, NW., Room 4037, Washington, DC 20405.

Please cite FAR case 91-104 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: Ms. Shirley Scott at (202) 501-0168 in reference to this FAR case. For general information, contact the FAR Secretariat, room 4037, GS Building, Washington, DC 20405 (202) 501-4755.

SUPPLEMENTARY INFORMATION:

A. Background

The proposed rule will clarify that electronic data interchange may be used, if authorized by the contracting officer, to accomplish any contracting action. Electronic data interchange (EDI) is the electronic transfer of formatted information between computers. The proposed rule incorporates a General Accounting Office Advisory Opinion (B-238449) which confirms that EDI transactions can create legally binding contractual obligations in accordance with 31 U.S.C. 1051.

B. Regulatory Flexibility Act

The proposed rule is expected to have a positive impact on small businesses within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it will encourage much broader use of EDI in Government contracting. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR parts will also be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 91-104), in correspondence.

This regulatory action was not subject to Office of Management and Budget review pursuant to Executive Order No. 12866 dated September 30, 1993.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed rule does not impose any information collection requirements which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 4, 5, 8, 12, 13, 14, 15, 16, 49, 52, and 53

Government procurement.

Dated: December 21, 1993.

Harry S. Rosinski,

Acting Director, Office of Federal Acquisition Policy.

Therefore, it is proposed that 48 CFR parts 2, 4, 5, 8, 12, 13, 14, 15, 16, 49, 52, and 53 be amended as set forth below:

1. The authority citation for 48 CFR parts 2, 4, 5, 8, 12, 13, 14, 15, 16, 49, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Section 2.101 is amended by adding, in alphabetical order, the definitions "In writing or written" and "Signature" to read as follows:

2.101 Definitions.

* * * * *

In writing or *written* means any worded or numbered expression which can be read, reproduced, and later communicated.

* * * * *

Signature means the discrete, verifiable symbol of an individual which, when affixed to a document with the knowledge and consent of the individual, is legally binding.

* * * * *

PART 4—ADMINISTRATIVE MATTERS

3. Section 4.101 is revised to read as follows:

4.101 Contracting officer's signature.

Only contracting officers shall sign contracts on behalf of the United States. The contracting officer's name and official title shall be typed, stamped, or printed on the contract. The contracting officer normally signs the contract after it has been signed by the contractor. The contracting officer shall ensure that the signer(s) have authority to bind the contractor (see specific requirements in 4.102 of this subpart.

4.201 [Amended]

4. Section 4.201 is amended in paragraph (a) by removing the parenthetical "(see 4.101(b))."; in paragraph (b)(1) by removing the parenthetical "(stamped "DUPLICATE ORIGINAL," see 4.101(b))"; and in paragraph (d) by revising the parenthetical to read "(see 30.601(b))".

5 and 6. Subpart 4.3, consisting of sections 4.300 and 4.301, is added to read as follows:

Subpart 4.3—Electronic Data Interchange

4.300 Definitions.

Electronic data interchange (EDI) is the electronic transfer of formatted information between computers.

4.301 Policy.

(a) EDI is authorized for any action governed by the FAR, unless specifically prohibited by agencies. The use of terms commonly associated with paper transactions (e.g., "copy", "document", "page", "printed", and "stamped") shall not be interpreted to restrict the use of EDI.

(b) Before using EDI in solicitations or contract awards, agencies shall ensure that—

(1) Its intended use will meet the requirements of the FAR or will be supplemented by other media (e.g., paper, microfilm, magnetic disk, etc.) for the purpose of meeting the requirements;

(2) The EDI system provides security features commensurate with the sensitivity of the information being transferred for all levels of protection (secret, confidential, proprietary data, source selection information, etc.). The information shall be protected to the same extent the paper equivalent is required to be protected;

(3) The reliability and availability of the EDI system are commensurate with the risks associated with system failure,

and that, if necessary, backup systems are in place;

(4) The rights and responsibilities of all parties involved in the EDI process are clearly defined and agreed upon; and

(5) EDI actions are accomplished in accordance with applicable Federal Information Processing Standards.

7. Section 4.802 is amended by adding paragraph (f) to read as follows:

4.802 Contract files.

* * * * *

(f) Agencies may retain contract files in any medium (paper, electronic, microfilm, etc.) or any combination of media, as long as the requirements of this subpart are satisfied.

PART 5—PUBLICIZING CONTRACT ACTIONS

8. Section 5.207 is amended by adding paragraph (c)(2)(xvi) to read as follows:

5.207 Preparation and transmittal of synopses.

* * * * *

(c) * * *

(2) * * *

(xvi) If the solicitation will be made available to interested parties through electronic data interchange, provide any information necessary to obtain and respond to the solicitation electronically.

* * * * *

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

8.404–1 [Amended]

9. Section 8.404–1 is amended in the first sentence of paragraph (a) by adding "facsimile, or electronic data interchange," after the word "mailgram,".

10. Section 8.405–2 is amended by revising the first sentence of the introductory paragraph to read as follows:

8.405–2 Order placement.

Ordering offices may use Optional Form 347, an agency-prescribed form, or an electronic data interchange transaction format to order items from schedules and shall place orders directly with the contractor within the limitations specified in each schedule.

* * *

* * * * *

PART 12—CONTRACT DELIVERY OR PERFORMANCE

11. Section 12.103 is amended by adding a sentence to the end of paragraph (e) to read as follows:

12.103 Supplies or services.

* * * * *

(e) * * * If the contract or notice of award is to be transmitted electronically, as provided in subpart 4.3, no days shall be added to the offered delivery data for purposes of evaluation.

PART 13—SMALL PURCHASE AND OTHER SIMPLIFIED PURCHASE PROCEDURES

12. Section 13.204 is amended by revising paragraph (e)(1) to read as follows:

13.204 Purchases under Blanket Purchase Agreements.

* * * * *

(e) * * *

(1) Purchases under BPA's generally should be made orally or via electronic data interchange. When purchases are accomplished orally, written communications may be used to ensure that the Government and the vendor agree concerning the transaction.

* * * * *

13.501 [Amended]

13. Section 13.501 is amended in paragraph (g) by removing the last sentence.

14. Section 13.502 is amended by revising the first sentence of paragraph (c) to read as follows:

13.502 Unpriced purchase orders.

* * * * *

(c) Unpriced purchase orders shall be issued in writing. * * *

15. Section 13.506 is revised to read as follows:

13.506 Unsigned electronic purchase orders.

(a) An unsigned electronic purchase order (EPO) may be issued when the following conditions are present:

(1) Its use is more advantageous to the Government than any other small purchase technique;

(2) It is acceptable to the supplier;

(3) It is approved by the contracting officer;

(4) It does not require written acceptance by the supplier; and

(5) The purchasing office retains all contract administration functions.

(b) When an unsigned EPO is used—

(1) Appropriate clauses shall be incorporated by reference;

(2) Administrative information that is not needed by the supplier shall be placed only on copies intended for internal distribution;

(3) The same distribution shall be made of the unsigned EPO as is made of signed purchase orders; and

(4) No purchase order form is required.

(c) An unsigned EPO may be unpriced if it meets the conditions in 13.502.

PART 14—SEALED BIDDING

14.202–1 [Amended]

16. Section 14.202–1 is amended in paragraph (b)(6) by removing the word "mailing" and inserting "transmittal" in its place.

17. Section 14.203–1 is revised to read as follows:

14.203–1 Transmittal to prospective bidders.

Invitations for bids or presolicitation notices shall be transmitted as specified in 14.205, and shall be provided to others in accordance with 5.102. When a contracting office is located in the United States, any solicitation sent to a prospective bidder located at a foreign address shall be sent by electronic data interchange or international air mail if security classification permits.

14.205–1 [Amended]

18. Section 14.205–1 is amended in the first sentence of paragraph (c) by removing the word "mailed" and inserting "transmitted" in its place.

19. Section 14.303 is amended by revising the first and second sentences of paragraph (a) to read as follows:

14.303 Modification or withdrawal of bids.

(a) Bids may be modified or withdrawn by any method authorized in the solicitation, if notice is received in the office designated in the solicitation not later than the exact time set for opening of bids. Unless proscribed by agency regulations, a telegraphic modification or withdrawal of a bid received in such office by telephone from the receiving telegraph office shall be considered. * * *

* * * * *

20. Section 14.304–1 is amended by revising paragraph (a)(2) to read as follows:

14.304–1 General.

* * * * *

(a) * * *

(2) It was transmitted by any method authorized in the solicitation, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

* * * * *

21. Section 14.401 is amended by revising the second sentence of paragraph (a) to read as follows:

14.401 Receipt and safeguarding of bids.

(a) * * * Except as provided in paragraph (b) of this section, the bids shall be opened or viewed, and shall remain in a locked bid box, a safe, or in a secured, restricted-access electronic bid box. * * *

* * * * *

22. Section 14.402–3 is amended by revising paragraph (a)(1) to read as follows:

14.402–3 Postponement of openings.

(a) * * *

(1) The contracting officer has reason to believe that the bids of an important segment of bidders have been delayed for causes beyond their control and without their fault or negligence (e.g., flood, fire, accident, weather conditions, strikes, or Government equipment blackout or malfunction when bids are due); or

* * * * *

23. Section 14.406–2 is amended in the first sentence of paragraph (b) by removing the word "Correction" and inserting "For other than electronic data interchange (EDI) transmitted bids, correction" in its place; and by adding paragraph (c) to read as follows:

14.406–2 Apparent clerical mistakes.

* * * * *

(c) Correction of EDI bids shall be effected by including in the electronic solicitation file the original bid, the verification request, and the bid verification.

PART 15—CONTRACTING BY NEGOTIATION

24. Section 15.410 is amended by removing the first and second sentences of paragraph (b) and adding, in their place, three new sentences to read as follows:

15.410 Amendment of solicitations before closing date.

* * * * *

(b) The contracting officer shall determine if the closing date needs to be changed when amending a solicitation. If the time available before closing is insufficient, prospective offerors or quoters shall be notified by electronic data interchange, telegram, or telephone of an extension of the closing date. Telephonic and telegraphic notices shall be confirmed in the written amendment to the solicitation. * * *

* * * * *

PART 16—TYPES OF CONTRACTS

25. Section 16.506 is amended by revising paragraph (c) to read as follows:

16.506 Ordering.

* * * * *

(c) Orders may be placed via electronic data interchange (EDI) transactions when permitted under the contract.

* * * * *

PART 49—TERMINATION OF CONTRACTS

26. Section 49.102 is amended in the introductory text of paragraph (a) by adding a new third sentence to read as follows:

49.102 Notice of termination.

(a) * * * When the notice is transmitted via electronic data interchange, the notice shall request notification of receipt by electronic means. * * *

* * * * *

27. Section 49.109–7 is amended in paragraph (b) by adding the words "or via EDI" after the parenthetical phrase "(return receipt requested)" and a sentence at the end of the paragraph to read as follows:

49.109–7 Settlement by determination.

* * * * *

(b) * * * If the notice is transmitted via EDI, the notice shall request notification of receipt by electronic means.

* * * * *

28. Section 49.601–2 is amended by revising the third sentence of the introductory paragraph to read as follows:

49.601–2 Letter notice.

* * * This notice shall be sent by certified mail, return receipt requested, or by electronic data interchange, with notification of receipt to be transmitted electronically. * * *

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

29. Section 52.212–1 is amended in the heading of the clause by revising the date, by adding in paragraph (b) a new sentence following the fourth sentence, and removing "(R 7–104.92(b) 1974 APR)", "(R 1–1.316–5)", and "(R 1–1.316–4(c))" following "(End of clause)" to read as follows:

52.212–1 Time of delivery.

* * * * *

Time of Delivery (Date)

* * * * *

(b) * * * If the contract or notice of award is to be transmitted electronically, no days will be added to the offered delivery date.

* * *

* * * * *

30. Section 52.212–2 is amended in the heading of the clause by revising the date, by adding in paragraph (b) a new sentence following the fourth sentence, and removing "(R 7–104.92(c) 1974 APR)", "(R 1–1.316–5(c))" and "(R 1–1.316–4(c))" following "(End of clause)" to read as follows:

52.212–2 Desired and required time of delivery.

* * * * *

Desired and Required Time of Delivery (Date)

* * * * *

(b) * * * If the contract or notice of award is to be transmitted electronically, no days will be added to the offered delivery date.

* * *

* * * * *

31. Section 52.214–5 is amended in the heading of the provision by revising the date and adding paragraph (d) to read as follows:

52.214–5 Submission of bids.

* * * * *

Submission of Bids (Date)

* * * * *

(d) Bids, modifications, and withdrawals transmitted via electronic data interchange will not be considered unless authorized in the solicitation.

32. Section 52.214–7 is amended by revising the date of the provision and paragraph (a)(2), removing the last sentence of paragraph (g) and inserting two sentences in its place, and adding paragraph (h) to read as follows:

52.214–7 Late submissions, modifications, and withdrawals of bids.

* * * * *

Late Submissions, Modifications, and Withdrawals of Bids (Date)

(a) * * *

(2) Was transmitted by a method authorized in the solicitation, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

* * * * *

(g) * * * If the solicitation authorizes transmission via electronic data interchange (EDI), bids may be withdrawn by electronic notice received at any time before the exact time set for receipt of bids. A bid may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for receipt of bids, the identity of the person requesting withdrawal is established and the person signs either a receipt for the bid or, for EDI transactions, the Government's acknowledgement that the bid has been withdrawn.

(h) If electronic transmission of bids is authorized in the solicitation, paragraphs (a)(1), (a)(3), (c), and (e) of this provision do not apply to such bids.

33. Section 52.214–23 is amended in the heading of the provision by revising the date, paragraphs (a)(2) and (c), and adding paragraph (g) to read as follows:

52.214–23 Late submissions, modifications, and withdrawals of technical proposals under two-step sealed bidding.

* * * * *

Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (Date)

(a) * * *

(2) Was transmitted by a method authorized in the solicitation, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation;

* * * * *

(c) Technical proposals may be withdrawn by written notice or telegram (including mailgram) received at any time before the exact time set for receipt of bids under step two. If the solicitation authorizes facsimile bids, technical proposals may be withdrawn via facsimile received at any time before the exact time set for receipt of bids under step two, subject to the conditions specified in the provision entitled "Facsimile Bids." If the solicitation authorizes transmission via electronic data interchange (EDI), technical proposals may be withdrawn by electronic notice received at any time before the exact time set for receipt of bids under step two. Technical proposals may be withdrawn in person by the submitter or the submitter's authorized representative if, before the exact time set for receipt of bids in step two, the identity of the person requesting withdrawal is established and that person signs either a receipt for the technical proposal or, for EDI transactions, the Government's acknowledgement that the technical proposal has been withdrawn.

* * * * *

(g) If electronic transmission of technical proposals is authorized in the solicitation, paragraphs (a)(1), (a)(3), (b), (d), and (f) of this provision do not apply to such technical proposals.

34. Section 52.214–32 is amended in the heading of the provision by revising the date, and by revising paragraphs (a) and (e) to read as follows:

52.214–32 Late submissions, modifications, and withdrawals of bids (overseas).

* * * * *

Late Submissions, Modifications, and Withdrawals of Bids (Overseas) (Date)

(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and it was transmitted by a method authorized in the solicitation, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation.

* * * * *

(e) Bids may be withdrawn by written notice or telegram (including mailgram) received at any time before the exact time set for receipt of bids. If the solicitation authorizes facsimile bids, bids may be withdrawn via facsimile received at any time before the exact time set for receipt of bids, subject to the conditions specified in the provision entitled "Facsimile Bids." If the solicitation authorizes transmission via electronic data interchange (EDI), bids may be withdrawn by electronic notice received at any time before the exact time set for receipt of bids. A bid may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for receipt of bids, the identity of the person requesting withdrawal is established and the person signs either a receipt for the bid or, for EDI transactions, the Government's acknowledgment that the bid has been withdrawn.

35. Section 52.214–33 is amended in the heading of the provision by revising the date and paragraphs (a)(1) and (c) to read as follows:

52.214–33 Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (Overseas).

* * * * *

Late Submissions, Modifications, and Withdrawals of Technical Proposals Under Two-Step Sealed Bidding (Overseas) (Date)

(a) * * *

(1) Was transmitted by a method authorized in the solicitation, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

* * * * *

(c) Technical proposals may be withdrawn by written notice or telegram (including mailgram) received at any time before the exact time set for receipt of bids under step two. If the solicitation authorizes facsimile bids, technical proposals may be withdrawn via facsimile received at any time before the exact time set for receipt of bids under step two, subject to the conditions specified in the provision entitled "Facsimile Bids." If the solicitation authorizes transmission via electronic data interchange (EDI), technical proposals may be withdrawn by electronic notice received at any time before the exact time set for receipt of bids under step two. Technical proposals may be withdrawn in person by the submitter or the submitter's authorized representative if, before the exact time set for receipt of bids in step two, the identity of the person requesting withdrawal is established and that person signs either a receipt for the technical proposal or, for EDI transactions, the Government's acknowledgment that the technical proposal has been withdrawn.

* * * * *

36. Section 52.215–9 is amended in the provision heading by revising the date, redesignating paragraph (d) as (e), and adding a new paragraph (d) to read as follows:

52.215–9 Submission of Offers.

* * * * *

Submission of Offers (Date)

* * * * *

(d) Electronic data interchange transmitted offers, modifications, and withdrawals will not be considered unless authorized in the solicitation.

* * * * *

37. Section 52.215–10 is amended in the heading of the provision by revising the date, by revising paragraphs (a)(2) and (h), and adding paragraph (i) to read as follows:

52.215–10 Late Submissions, Modifications, and Withdrawals of Proposals.

* * * * *

Late Submissions, Modifications, and Withdrawals of Proposals (Date)

* * * * *

(a) * * *

(2) Was transmitted by a method authorized in the solicitation, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation;

* * * * *

(h) Proposals may be withdrawn by written notice or telegram (including mailgram) received at any time before award. If the solicitation authorizes facsimile proposals, proposals may be withdrawn via facsimile received at any time before award, subject to the conditions specified in the provision entitled "Facsimile Proposals." If the solicitation authorizes transmission via electronic data interchange (EDI), proposals may be withdrawn by electronic notice received at any time before award. Proposals may be withdrawn in person by an offeror or an authorized representative if, before award, the representative's identity is made known and the representative signs either a receipt for the proposal or, for EDI transactions, the Government's acknowledgment that the proposal has been withdrawn.

(i) If electronic transmission of proposals is authorized in the solicitation, paragraphs (a)(1), (a)(3), (d), and (f) of this provision do not apply to such proposals.

38. Section 52.215–36 is amended in the heading of the provision by revising the date and paragraphs (a)(1) and (f) to read as follows:

52.215–36 Late Submissions, Modifications, and Withdrawals of Proposals (Overseas).

* * * * *

Late Submissions, Modifications, and Withdrawals of Proposals (Overseas) (Date)

(a) * * *

(1) Was transmitted by a method authorized in the solicitation, and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; or

* * * * *

(f) Proposals may be withdrawn by written notice or telegram (including mailgram) received at any time before award. If the solicitation authorizes facsimile proposals, proposals may be withdrawn via facsimile at any time before award, subject to the conditions specified in the provision entitled "Facsimile Proposals." If the solicitation authorizes transmission via electronic data interchange (EDI), proposals may be withdrawn by electronic notice received at any time before award. Proposals may be withdrawn in person by an offeror or an authorized representative if, before award, the representative's identity is made known and the representative signs either a receipt for the proposal or, for EDI transactions, the Government's acknowledgment that the proposal has been withdrawn.

PART 53—FORMS

39. Section 53.105 is amended by adding paragraph (c) to read as follows:

53.105 Computer generation.

* * * * *

(c) Transactions accomplished by electronic data interchange involve the transmission of data using standard transaction sets. When necessary to reduce electronic transactions to FAR prescribed standard or optional form paper equivalents, agencies may computer-generate any standard or optional form in accordance with paragraph (a) of this section.

[FR Doc. 93-31594 Filed 12-29-93; 8:45 am]

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federal register

Thursday
December 30, 1993

Part VI

Department of Education

34 CFR Part 668
Student Assistance General Provisions; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 668

Student Assistance General Provisions

AGENCY: Department of Education.

ACTION: Notice of revised effective date; final regulations.

SUMMARY: In the **Federal Register** of July 23, 1993, the Secretary amended the Student Assistance General Provisions regulations, 34 CFR part 668, by adding paragraphs (c) and (d) to § 668.8 and by adding § 668.9. (58 FR 39618–39623). The Secretary added these provisions to eliminate an abusive practice under the student financial assistance programs authorized under title IV of the Higher Education Act of 1965, as amended (title IV, HEA programs). The Secretary is delaying the effective date of these amendments to July 1, 1994 as a result of a statutory change to the Higher Education Act of 1965, as amended (HEA).

EFFECTIVE DATE: July 1, 1994. Sections 668.8 (c) and (d) and 668.9 take effect for award years that begin on or after July 1, 1994 and, for the Federal Family Education Loan (FFEL) programs, for periods of enrollment beginning on or after July 1, 1994.

Under the Federal Pell Grant Program, if a student enrolls in a payment period that is scheduled to begin before July 1, 1994 and end on or after July 1, 1994, and the student's institution places that payment period in the 1994–95 award year under 34 CFR 690.64, the institution must calculate the student's Federal Pell Grant for that payment period using §§ 668.8 (c) and (d) and 668.9.

With respect to the FFEL programs, loan amounts for loan applications certified for periods of enrollment beginning on or after July 1, 1994 must be calculated using §§ 668.8 (c) and (d) and 668.9.

When §§ 668.8 (c) and (d) and 668.9 become effective, these provisions will govern the determination of program eligibility and calculation of the amount of title IV, HEA program assistance that may be awarded to any student enrolled in an eligible program for award years beginning with award year 1994–95.

FOR FURTHER INFORMATION CONTACT: Mr. Greg Allen, U.S. Department of Education, 400 Maryland Avenue, SW., room 4318, Regional Office Building 3, Washington, DC 20202. Telephone (202) 708–7888. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 6 p.m. Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: When the regulatory amendments were published in the **Federal Register** of July 23, 1993, they became effective 45 days after that date, on September 7, 1993. However, the Secretary indicated that those provisions would not apply for approximately six months, i.e. until January 1, 1994, with regard to educational programs that institutions offered to students prior to September 7, 1993.

On July 23, 1993, as a result of changes made to the Higher Education Act of 1965, as amended (HEA), by the Higher Education Amendments of 1992, Pub. L. 102–325, the Secretary believed that section 482(c) of the HEA, which describes the effective date of regulations governing programs authorized under title IV of the HEA, did not apply to those regulatory amendments. However, section 482(c) was recently amended by the Higher Education Technical Amendments of 1993, Public Law 103–208. As a result, section 482(c) explicitly provides for the first time that the provisions of section 482(c) apply to part G of title IV of the HEA. Accordingly, the Secretary believes that under amended section 482(c), §§ 668.8 (c) and (d) and 668.9 become effective on July 1, 1994, and therefore, the Secretary delays the effective date of these provisions to July 1, 1994. (The other regulatory changes made in the July 23, 1993 **Federal Register** publication were merely technical clarifying changes that qualify as "interpretative rules" not subject to section 482(c) of the HEA.)

Waiver of Rulemaking

Because the Secretary is delaying the effective date of these provisions as a result of a statutory requirement, the Secretary finds, in accordance with 5 U.S.C. 553(b)(B), that the solicitation of public comment on this change in the effective date would be impracticable and contrary to the public interest.

(Catalog of Federal Domestic Assistance Numbers: 84.007 Federal Supplemental Educational Opportunity Grant Program; 84.032 Federal Stafford Loan Program; 84.032 Federal PLUS Program; 84.032 Federal Supplemental Loans for Students Program; 84.033 Federal Work-Study Program; 84.038 Federal Perkins Loan Program; 84.063 Federal Pell Grant Program; 84.069 State Student Incentive Grant Program; 84.268 Federal Direct Student Loan Program; and 84.272 National Early Intervention Scholarship and Partnership Program. Catalog of Federal Domestic Assistance Number for the Presidential Access Scholarship Program has not been assigned.)

Dated: December 23, 1993.

Richard W. Riley,

Secretary of Education.

[FR Doc. 93–31823 Filed 12–29–93; 8:45 am]

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Part VII

Department of Labor

Mine Safety and Health Administration

30 CFR Parts 56 and 57
Safety Standards for Explosives at Metal and Nonmetal Mines; Final Rule

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 56 and 57

RIN 1219-AA17

Safety Standards for Explosives at Metal and Nonmetal Mines

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: This final rule revises and clarifies the stayed provisions of the Mine Safety and Health Administration's (MSHA) safety standards for explosives at metal and nonmetal mines which were promulgated on January 18, 1991, (56 FR 2070). The final rule defines "barrier," "blast site," "magazine," and "storage facility," and addresses the storage of packaged blasting agents; the location of explosive material storage facilities; vehicles transporting explosive material; primer protection; loading and blasting; double trunklines in nonelectric initiation systems; excessive temperatures; and burning explosive material. For the convenience of the reader, MSHA has published the full text of the explosives standards for metal and nonmetal mines in this document.

EFFECTIVE DATE: This document is effective December 30, 1993, except for each amendatory instruction 4 of parts 56 and 57 which is effective January 31, 1994.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations and Variances, MSHA, (703) 235-1910.

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act

The final rule contains no information collection paperwork requirements subject to the Paperwork Reduction Act of 1980.

II. Rulemaking Background

On January 18, 1991, MSHA published a final rule in the **Federal Register** (56 FR 2070) revising its safety standards for explosives at metal and nonmetal mines. The regulation set safety measures to address explosive hazards that may be present when persons use or work near explosive material at metal and nonmetal mines. For instance, the regulation prohibited certain actions to avoid premature detonations. It also specified correct procedures to be followed when working with explosive material. These standards were scheduled to take effect on March 19, 1991. However, on March 7, 1991, after further review of information received regarding several provisions of the final rule, MSHA extended the effective date until May 20, 1991 (56 FR 9626).

On April 10, 1991, MSHA stayed until further notice the effective date of several provisions of the final rule and reopened the rulemaking record (56 FR 14470). The stayed provisions were: The definition of the term "blast site" in §§ 56/57.6000; the first sentence of paragraph (b) of §§ 56/57.6130 on explosive material storage facilities; paragraph (a)(1) of §§ 56/57.6131 on location of explosive material storage facilities and appendix I to Subpart E—MSHA Tables of Distances; paragraph (b) of §§ 56/57.6306 on loading and blasting; and paragraph (a) of §§ 56/57.6501 on nonelectric initiation systems. The Agency received numerous comments from the industry requesting that the final rule be reconsidered. Based on these comments, on May 17, 1991, MSHA stayed the effective date of the final rule until July 16, 1991 (56 FR 22825).

On July 15, 1991, the Agency extended the stay of the effective date of the final rule until September 13, 1991 (56 FR 32091). This extension of the effective date did not affect the April 10, 1991 stay.

In order to conduct supplemental rulemaking on the issues raised in the provisions stayed on April 10, 1991, as well as in other provisions of the rule listed below, the Agency issued a one-year, partial administrative stay of the final rule on September 12, 1991 (56 FR 46500). Included within this one-year administrative stay were those provisions stayed on April 10, 1991, (56 FR 14470) and the following provisions in 30 CFR parts 56 and 57: §§ 56/57.6202(a)(1) on vehicles; §§ 56/57.6304 (b) on primer protection; §§ 56/57.6306 (a), and (c) through (g) on loading and blasting; §§ 56/57.6902 (b) on excessive temperatures; and §§ 56/57.6903 on burning explosive material. The remaining standards of the January 18, 1991, final rule became effective on November 1, 1991.

The one-year administrative stay was scheduled to expire on October 1, 1992, however on September 24, 1992, (57 FR 44256), MSHA extended the administrative stay until July 1, 1993. The final standards under the stay were re-proposed for public comment on October 16, 1992 (57 FR 47524). A public hearing was held on April 15, 1993 (58 FR 14492) in Washington, DC. The rulemaking record closed on May 7, 1993. Thereafter, the Agency determined that an additional extension of the partial administrative stay was necessary in order to re-examine the rulemaking record, and all testimony submitted at the public hearing. Accordingly, on June 7, 1993 (58 FR 31908), MSHA extended the administrative stay until December 31, 1993.

These final eight standards for explosives at metal and nonmetal mines in this final rule are based on full consideration of the entire rulemaking record regarding these issues, including materials discussed or relied upon in the January 1991 final regulation, as well as the October 16, 1992 proposal, the public hearing record, and all written comments and exhibits received.

To serve the interests of the mining community, MSHA has republished the full text of subpart E of 30 CFR parts 56 and 57 as they will read January 31, 1994.

III. Discussion and Summary of the Final Rule

A. General Discussion

Historically, hazards associated with the storage, transportation, and use of explosive materials have been a leading cause of serious injuries and fatalities in metal and nonmetal mines. Precautions to safeguard against these hazards are an essential part of any effective mine safety program. The final rule provisions found in 30 CFR parts 56 and 57, subpart E, in effect since November 1, 1991, focus upon hazards associated with using or working near explosive materials at metal and nonmetal mines. The supplemental standards in this final rule clarify and more fully address the recognized precautions and procedures necessary to avert the hazards common to handling explosive materials. Upon the promulgation of this final rule, the mining community will have a unified set of safety regulations for the storage, transport, and use of explosive material at metal and nonmetal mines.

B. Deletions

As mentioned in the September 12, 1991, (56 FR 46500) revision and republication of the final rule, several then existing regulations were reinstated to respond to the hazards left unaddressed by the stayed final rule provisions. These reinstated provisions were scheduled to expire on December 31, 1993 (58 FR 31908) but now will expire on January 31, 1994. The following provisions found in 30 CFR parts 56 and 57 will be removed on the effective date of this final rule: §§ 56/57.6140 on location of magazines; §§ 56/

57.6220 on maintenance and operation of transport vehicles; §§ 56/57.6320 on blasthole charging; §§ 56/57.6330 on protection of personnel at blast site; §§ 56/57.6331 on burning charges; § 57.6375 on loading and blast site restrictions; and § 57.6382 on blasting in shafts or winzes.

This final rule deletes the definition of "magazine" in existing §§ 56/57.2 and replaces it with a new definition within subpart E. In addition, the MSHA Tables of Distances in appendix I to subpart E are also deleted from the final rule. MSHA has cross referenced the Table of Distances for Storage of Explosive Materials, and the Table of Separation Distances of Ammonium Nitrate and Blasting Agents from Explosives or Blasting Agents found in the Bureau of Alcohol, Tobacco, and Firearms (BATF) storage regulations in subpart K of 27 CFR §§ 55.218 and 55.220. MSHA will continue to enforce these tables on behalf of the BATF in accordance with the guidelines contained in the BATF/MSHA Interagency Agreement, published on April 15, 1980 (45 FR 25564). So that both mine operators and miners are fully aware of these requirements, MSHA will make the tables available at any MSHA Metal and Nonmetal Safety and Health district office. A copy of these tables will be mailed out with this final rule.

This final rule also removes paragraph (a) of §§ 56/57.6501 on the use of double trunklines or loop systems for nonelectric initiation systems. The remaining paragraphs in §§ 56/57.6501 are redesignated to reflect the removal of paragraph (a).

C. Section-by-Section Analysis

The following section-by-section analysis explains the final rule and its effect on existing standards. The standards in part 56 apply to all surface metal and nonmetal mines; those in part 57 apply to underground and surface areas of underground metal and nonmetal mines.

"Definitions"

Sections 56/57.6000 Definitions

"Blast site." The term, "blast site," describes the area where safety precautions must be taken during the loading of blastholes. In contrast to the "blast area," the "blast site" is considerably smaller in size. The intention underlying the "blast site" concept is the protection of miners engaged in blasthole loading and miners engaged in other non-blasting activities close to the loading process.

As published in the 1991 regulation and stayed on April 10, 1991, the "blast site" definition in §§ 56/57.6000 was:

> The area where explosive material is handled during loading, including the perimeter formed by the blastholes and 50 feet (15.2 meters) in all directions from loaded holes. The 50-foot (15.2-meter) requirement also applies in all directions along the full depth of the hole.

In § 57.6000 of the 1991 regulation, the "blast site" definition for underground areas included the additional sentence:

> In underground mines, 15 feet (4.6 meters) of solid rib or pillar can be substituted for the 50-foot (15.2-meter) distance.

MSHA's surface and underground "blast site" definition was modeled after the consensus industry definition of "blast site" published by the Institute of Makers of Explosives (IME) in its Safety Library Publication No. 12, "Glossary of Commercial Explosives Industry Terms," January 1985.

Many commenters objected to the Agency's "blast site" definition in the 1991 regulation stating that the application of the 50-foot distance (15.2-meter) requirement of the blast site definition to §§ 56/57.6306(b), loading and blasting, was too restrictive and would have eliminated currently accepted mining methods, such as vertical crater retreat mining (VCR). VCR mining is a horizontal, flat-back variation of sublevel stoping using spherical crater charges to break the ore. Blasting is carried out at the base of vertical holes, making horizontal cuts and advancing upward. (Mitchell, S.T., 1981, "Vertical Crater Retreat Stoping as applied at the Homestake Mine." Design and Operation of Caving and Sublevel Stoping Mines, Chapter 44, D.R. Stewart, ed., SME–AIME, New York, pp. 609–626).

Another objection was that the application of the definition would severely affect the mining cycle in some mines by precluding necessary activities such as surveying, gas checks, and reopening plugged holes, from occurring at the blast site. Other commenters objected to the 50-foot (15.2-meter) requirement claiming that it was unnecessary and unreasonable in that it provided no additional level of safety for miners.

Some commenters indicated that they saw no need for a provision which would prohibit mucking operations even if loaded holes were close by. Other commenters indicated that the solid pillar alternative for underground mines did not provide enough flexibility, urging instead the use of broken rock or rubble.

On November 1, 1991, MSHA issued a program policy letter (No. P91–IV–1), to notify the mining community of its intention to define "blast site" consistent with the mining industry's traditional understanding of the term. "Blast site" was defined to mean "the area where explosive materials are being loaded, including the area where loading is completed or partially completed."

The current definition, however, does not fully address the hazard resulting from the unintended excursion onto the blast site by a mine vehicle engaged in activities other than loading and blasting. Nor does the current definition provide any safety buffer or zone between the "area where explosive materials are being loaded" and, for example, the area where mucking and other activities occur Accordingly, on October 16, 1992, (57 FR 47524) the Agency proposed a new definition of "blast site" based upon the best available evidence.

In acknowledgment that some mines could not feasibly comply with the 50-foot (15.2-meter) blast site requirement because of the mine configuration, the 1992 proposal provided an alternative method of compliance that permitted a minimum distance of 30 feet (9.1 meters) instead of the 50-foot (15.2-meter) requirement if the perimeter of loaded holes was demarcated with a berm or barrier. MSHA intended the berm or barrier to serve primarily to warn miners working or passing by the blast site. In defining the term "berm," the Agency referenced §§ 56/57.9000 of subpart H—Loading, Hauling, and Dumping. There, the term "berm" is defined as "a pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle's passage over the bank of the roadway." In the preamble to the 1992 proposal, the Agency defined the term "barrier" as a material object or objects that separates, keeps apart, or demarcates (Webster's New International Dictionary, 3rd ed., 1966).

As indicated above, the 50-foot (15.2-meter) distance requirement is derived from the definition of "blast site" stated in the January 1985, IME Safety Library Publication No. 12, "Glossary of Commercial Explosives Industry Terms." IME, the principal trade association for the commercial explosives industry, provides technical information and recommendations concerning explosive materials. Its members both make and use explosive materials. Often the mine operator will contract with an explosive manufacturer to purchase both explosives and

contractor services to handle the blasting operations. Because IME's wealth of knowledge of the use and handling of explosives, MSHA has based both its 1991 regulation and its 1992 proposal on the "blast site" concept found in IME's 1985 and 1991 literature.

Commenters overwhelmingly suggested the deletion of the term "berm" from the proposed "blast site" definition to avoid confusion with the term "berm" found in subpart H of parts 56 and 57. These commenters pointed out that because the intent of the Agency was to demarcate the blast site and not to impede vehicular traffic in the regular manner that "berms" are used on haulage roads, the term "barrier" should be defined in the final rule to permit the use of movable warning objects.

MSHA agrees and has deleted the term "berm" from the final rule. The final rule does clarify what is required to demarcate a blast site by defining the term "barrier" as "a material object, or objects that separates, keeps apart, or demarcates in a conspicuous manner such as cones, a warning sign, or tape."

Some commenters requested that the Agency clarify that unloaded blastholes are not part of the blast site. MSHA does not intend for unloaded blastholes to be a part of the blast site unless they are within the 50-foot (15.2-meter) or 30-foot (9.1-meter) perimeter established by the requirement.

Some commenters suggested that an alternative to the 50-foot (15.2-meter) requirement for underground mines (§ 57.6000) be considered by the Agency to accommodate alternative mining methods, such as the block-caving system (BCS), used at some mines. Specifically, these commenters stated that the application of the 50-foot (15.2-meter) requirement in the blast site definition to §§ 56/57.6306(b), loading and blasting, would reduce productivity and increase operating costs by eliminating access to production blocks.

BCS is a method of caving in which a thick block of ore is partly cut off from surrounding blocks by a series of drifts, one above the other, or by boundary shrinkage stopes. The ore block is then undercut by removing a slice of ore or a series of slices separated by small pillars underneath it. The isolated, unsupported block of ore breaks and caves under its own weight. The broken ore is drawn off from below, and as the caved mass moves downward, due to continued drawing of broken ore from below, it is broken further by pressure and attrition. The overlying capping caves and follows the broken ore downward. (Thrush, Paul W. A Dictionary of Mining, Minerals, and Related Terms, First Edition, U.S. Government Printing Office, Washington, D.C., 1968, pp. 114).

In response to these commenters' concerns, the final rule allows the use of at least 6 feet (1.8 meters) of solid rib or pillar, including concrete reinforcement of at least 10 inches (254 millimeters), with overall dimensions of not less than 6 feet (1.8 meters), in underground mines using a block-caving or similar system.

MSHA believes that the final rule in all cases will provide miners with adequate health and safety protection against the hazards arising from their presence near blast sites. Moreover, the mining cycle will continue uninterrupted because the 6-foot (1.8-meter) alternative distance requirement should not affect access to mine production blocks. All the distance requirements of the final rule assure that neither miners nor their vehicles will interfere or unintentionally make contact with the explosive materials used at the blast site. Also, the final rule minimizes the possibility of injury to miners from a premature detonation and should reduce the likelihood that miners' activities such as drilling or mucking could cause a premature detonation.

"Magazine." The 1991 regulation did not include a definition for the term "magazine." Under existing §§ 56/57.2, magazine is "a facility for the storage of explosives, blasting agents, or detonators." Because some commenters expressed confusion with respect to the use and meaning of the terms "magazine" and "storage facility" in the 1991 regulation, MSHA clarified the meaning of the term in its November 1, 1991, program policy letter (No. P91-IV-1). In that letter, "magazine" was defined as "a Bureau of Alcohol, Tobacco, and Firearms (BATF) Type 1 or Type 2 storage facility."

It appeared to some commenters that MSHA used "magazine" and "storage facility" synonymously, and they questioned how these terms differed. Several commenters stated that the magazine requirements of §§ 56/57.6132 prohibited the use of BATF Type 4 storage facilities, citing paragraph (a)(3) of the standard which requires magazines to be bullet-resistant. Because BATF Type 4 storage facilities are not required to be bullet-resistant, commenters believed that MSHA's use of "magazine" in the 1991 regulation departed from the BATF definition. This was not MSHA's intent.

In response to these commenters' concerns, MSHA is defining the term "magazine" in §§ 56/57.6000 consistent with the 1992 proposed rule as "a bullet-resistant, theft-resistant, fire-resistant, weather-resistant, ventilated facility for the storage of explosives and detonators (BATF Type 1 or Type 2 facility)." The proposed definition was substantively the same as MSHA's policy letter definition but replaced the references to BATF Type 1 and 2 storage facilities with the BATF Type 1 and 2 construction criteria.

BATF defines "magazine" in 27 CFR 55.11 as "[a]ny building or structure, other than an explosives manufacturing building, used for storage of explosive materials." In 27 CFR 55.207 and 55.208, BATF lists the construction requirements for Type 1 and Type 2 magazines, respectively. BATF provisions specify that these two types of facilities must be "bullet-resistant, fire-resistant, weather-resistant, theft-resistant, and ventilated."

Sections 56/57.6132 of MSHA's 1991 regulation list the construction criteria required for all magazines. Sections 56/57.6132 require a magazine to be structurally sound, noncombustible or the exterior covered with fire resistant material, bullet-resistant, made of non-sparking material on the inside, ventilated to control dampness and excessive heating, posted with appropriate Department of Transportation (DOT) placards or other appropriate warning signs. In addition, magazines are required to be kept clean and dry, unlighted or lighted by devices that are specifically designed for use in magazines and that do not create a fire or explosion hazard, unheated or heated only with devices that do not create a fire or explosion hazard, locked when unattended, and used exclusively for the storage of explosive material except for essential non-sparking equipment used for the operation of the magazine. Metal magazines have additional specific construction requirements. Also, all magazines must have electrical switches and outlets located on the outside of the magazine.

The term "magazine" appears in existing §§ 56/57.6100, separation of stored explosive material; §§ 56/57.6130, explosive material storage facilities; and §§ 56/57.6132, magazine requirements. Throughout these sections, MSHA's intent is to distinguish the circumstances under which a magazine and storage facility are used. For example, paragraph (a) of §§ 56/57.6130 requires that detonators and explosives, not blasting agents, be stored in magazines; while paragraph (b) states that blasting agents may be stored either "in a magazine or other facility" but "[f]acilities other than magazines used to store blasting agents shall

contain only blasting agents." As used, "magazine" refers to a type of storage facility for highly sensitive explosive materials such as explosives and detonators which are subject to sympathetic detonation. Because blasting agents are not as highly sensitive as detonators and explosives, blasting agents need not be stored in a magazine or a facility that meets the construction criteria of §§ 56/57.6132. Accordingly, a "magazine" is a structure that has additional and more rigorous construction requirements than a "storage facility" in general.

In summary, MSHA's definition of the term "magazine" is consistent with BATF regulations. In fact, the Agency's definition of "magazine" is modeled after BATF's definition except that it explicitly lists within the definition the construction criteria required for magazines used for the storage of explosive materials.

"Storage facility." "Storage facility" was not previously defined by MSHA but the Agency considered that it was commonly understood in the mining community. As previously stated commenters generally found MSHA's use of "storage facility" in the 1991 regulation confusing. In response, MSHA defined "storage facility" in a policy letter (No. P91–IV–1), dated November 1, 1991, to mean "a BATF Type 4 or Type 5 storage facility." In order to clarify those provisions which addressed the storage of explosive materials, the Agency defined 'storage facility' in §§ 56/57.6000 of the 1992 proposal, to mean "the entire class of structures used to store explosive materials. A 'storage facility' used to store blasting agents corresponds to a BATF Type 4 or 5 storage facility."

A few commenters objected to the use of the term "storage facility." These commenters found the use of the term "storage facility" confusing in that it precluded the storage of non-mass detonating detonators as permitted by 27 CFR part 55, subpart K of the BATF regulations. They suggested deleting the term "storage facility" to be consistent with BATF regulations.

MSHA has considered all written comments submitted and all testimony presented on the proposed definition. The Agency's final rule retains the definition of "storage facility" because it is necessary to clarify the use of this term in other existing explosives standards. MSHA's final rule conforms to BATF's construction criteria and as such, the definitions found in this final rule are consistent with BATF regulations. The final standard does not prohibit the use of BATF Type 4 facilities and does not require that such facilities be bullet-resistant.

As stated above, BATF does not have a definition for the term "storage facility" and currently uses the term "magazine" to describe the entire class of structures used to store explosive materials. As a result, the terms "storage facility" and "magazine" are used by BATF synonymously. However, BATF's regulations require that all explosives be stored in a magazine, the type of magazine being determined by the characteristics of the stored product (27 CFR 55.203). For example, BATF Type 1 facilities are permanent magazines used for the storage of high explosives; BATF Type 2 facilities are mobile and portable indoor and outdoor magazines used for the storage of high explosives; BATF Type 4 facilities are magazines used for the storage of low explosives, blasting agents and non-mass detonating detonators; BATF Type 5 facilities are magazines used for the storage of blasting agents. The BATF provisions specify that Type 1 and Type 2 magazines must be "bullet-resistant, fire-resistant, theft-resistant, and ventilated" (27 CFR 55.207). MSHA's final rule uses the same criteria. However, in the final rule MSHA uses the term "magazine" to correspond to BATF's use of Type 1 and Type 2 facilities, while it uses the term "storage facility" to correspond to BATF's use of Type 4 and Type 5 facilities. MSHA's final rule does not require BATF Type 4 storage facilities to be bullet-resistant. The only storage facilities that need to be bullet-resistant are magazines (BATF Type 1 and 2 facilities) used for the storage of highly sensitive explosive material such as explosives and detonators which are subject to sympathetic detonation. However, MSHA's definition of "magazine" does not prevent the use of magazines to store the full range of explosive materials.

Several existing explosives standards apply to storage facilities in general, for example, §§ 56/57.6101 on areas around explosive material storage facilities, §§ 56/57.6131(a)(2) on location of explosive material storage facilities, and §§ 56/57.6800 on maintenance of storage facilities. As used in these standards, "storage facility" refers to both magazines and other structures used to store explosive material. In contrast, §§ 56/57.6130(c) addresses particularly those storage facilities used to store bulk blasting agents and no other kind of explosive material.

In summary, MSHA believes that the definition of "storage facility" as clarified by this final rule, provides mine operators and miners with objective criteria, consistent with BATF, relative to storage requirements for the entire range of explosive materials. Further, MSHA believes that this definition is based on experience in the mining community and is therefore necessary to improve health and safety of miners.

"Storage-Surface and Underground"

Sections 56/57.6130 Explosive Material Storage Facilities

Sections 56/57.6130 address the storage requirements for all types of explosive material, including blasting agents. The 1991 regulation, as well as the 1992 proposal evolved from the former §§ 56/57.6001 which required detonators and explosives other than blasting agents to be stored in magazines. Only the first sentence of paragraph (b) of the 1991 regulation was stayed.

Paragraph (b) specified the storage facility requirements for packaged blasting agents. Among other provisions, it required that the magazines or storage facilities for packaged blasting agents be ventilated. This new ventilation requirement was based on data indicating that the possibility of dampness and excessive heat build-up in unventilated facilities create a hazard, thus increasing the likelihood of product deterioration and combustible atmospheres. The supporting data are found in: (1) United States Bureau of Mines, "Evaluation of Surface Storage Facilities for Explosives, Blasting Agents, and Other Explosive Materials," "§ 5.5 Flammable Atmospheres in AN-FO Drop Trailers," page 52 (June 1, 1983); and (2) United States Bureau of Alcohol, Tobacco, and Firearms, "ATF—Explosives Law and Regulations," page 14 (June 1990) (Defining "explosive materials" expansively to include all items listed in chapter 27, § 55.23 of the "Code of Federal Regulations"). "Ventilation" is discussed on page 39 of the BATF publication which states: "Ventilation is to be provided to prevent dampness and heating of stored explosive materials."

Most commenters objected to the ventilation requirement of the 1991 regulation stating that it would require ventilation of mobile storage facilities such as drop trailers. These commenters noted that drop trailers are not ventilated when built and that BATF and DOT do not require and more importantly do not allow ventilation of mobile transport vehicles. Additionally, these commenters stated that requiring ventilation of drop trailers could damage the integrity of the storage vehicles.

The preamble to the 1991 regulation indicates that paragraph (b) applies to drop trailers when used to store packaged blasting agents. Typically, drop trailers are used both to transport and to store explosive material, and the explosive material distributors often allow the purchaser/operator to use the distributor's drop trailer as a temporary storage facility. Once the trailer is empty, the distributor removes it from mine property.

Some drop trailers, however, become permanent storage facilities. When this happens, it is MSHA's experience that the stored explosive material is not always used in the order in which it is stored, for example, stored longest used first. The result is that some of the blasting agents functionally deteriorate before being used. Product deterioration, in turn, may result in misfires which pose the hazard of unintended detonation when the unexploded blasting agents are subjected to impacts during the mucking or crushing process. The 1991 regulation, however, made no distinction between drop trailers used as permanent storage facilities and those used as temporary storage facilities. The ventilation requirement was to apply to both types of drop trailers.

The 1992 proposal retained the 1991 regulation language but exempted from paragraph (b) appropriately licensed, road-worthy vehicles used both to transport and to store blasting agents. Any former mobile vehicle which was not licensed by the appropriate authorities as road-worthy, however, remained subject to the requirements of paragraph (b). Under the proposal, the appropriate licensing entity may be Federal, State, or local and the license must be a current one. MSHA's proposed rule recognized that the hazards to be guarded against were more likely to arise where drop trailers were used as permanent storage facilities. The regulation also reflected commenters' concerns regarding the problems of ventilating mobile vehicles owned by the distributor and used at the mine site for temporary storage. In addition, the 1992 proposed rule reflected the Agency's lack of definitive data supporting the need to ventilate such trailers.

Commenters supported MSHA's proposed standard, and the final rule retains the ventilation requirement of paragraph (b). The final rule will not reduce the protection provided to miners because the nature of the hazards encountered in transit and storage differ. During transit, there is little opportunity for excessive heat build-up and product deterioration because increased air circulation cools the moving vehicle. Ventilation of mobile drop trailers may pose a potential hazard because sparks and other sources of fire encountered on the open road could enter into the cargo space and thereby detonate the explosive material.

In contrast, the opportunity for heat build-up and product deterioration are much greater in a permanent storage facility which is unventilated. Accordingly, this final rule requires ventilation for all permanent storage facilities used to store packaged blasting agents to adequately protect miners. This requirement is consistent with BATF regulations.

Sections 56/57.6131 Location of Explosive Material Storage Facilities

Sections 56/57.6131(a)(1) of the 1991 regulation addressed the placement of explosive material storage facilities and magazines on mine property. This standard was derived from former §§ 56/57.6020, "Magazine requirements," which was a comprehensive standard regarding construction, location, and housekeeping criteria for surface magazines. Paragraph (a) of former §§ 56/57.6020, reinstated and renumbered as §§ 56/57.6140, "Magazine location," provides that "[m]agazines shall be located in accordance with the current American Table of Distances for storage of explosives." This provision, however, does not govern the distances between explosive material storage facilities and occupied buildings on mine property; rather, it governs the distances between explosive material storage facilities and structures, roads, and inhabited buildings off mine property.

In the 1991 regulation, MSHA intended to enhance safety for miners on mine property by requiring operators to comply with MSHA-created tables of separation distances which would have applied on mine property. Stayed §§ 56/57.6131(a)(1) specified that explosive material storage facilities to be located in accordance with the distances and markers specified in the MSHA tables. These tables incorporated the pertinent parts of the IME "American Table of Distances" (ATD), February 1986, and the National Fire Protection Association's "Recommended Separation Distances of Ammonium Nitrate and Blasting Agents from Explosives or Blasting Agents (NFPA 495–1990, appendix B). Currently, MSHA enforces the ATD on behalf of BATF under the BATF/MSHA Interagency Agreement.

The 1991 rule also included performance language which would allow storage facilities without sufficient area at the mine site to comply with appendix I to be located so that the forces generated by a storage facility explosion would not create a hazard to occupants in mine buildings or to physical structures on mine property such as dams or electric substations. The only change MSHA made to the ATD and NFPA tables' separation distances was in the categories of structures and equipment that were to be located away from explosive storage facilities.

The Agency received many comments objecting to MSHA's application of the separation distances to structures on mine property as opposed to its intended application to structures off of mine property. Many commenters objected, stating that MSHA failed to gather necessary technical data to support the selected distances or the cited hazards (for example, dangers associated with explosions near mine openings, electrical substations, dams, ventilation fans). Other commenters believed that compliance with the new MSHA tables would force placement of storage facilities for explosive materials unnecessarily and even dangerously close to non-mine structures and roads. Moreover, a significant portion of the metal and nonmetal industry, with its diversified methods of mining could not feasibly comply with the regulation. Also, these commenters remarked that relocation costs would be wholly out of proportion to any incremental benefit to safety.

IME, the originator of the ATD, specifically objected to MSHA's application of the ATD because the organization never intended nor conducted any tests for usage of the distances with respect to occupied structures on mine property. Another criticism of the stayed provision was that for the first time MSHA would enforce distance requirements on mine property, whereas before MSHA only cited violations of the separation distances on behalf of BATF, and then only with respect to structures, roads, and inhabited buildings off mine property. Commenters further stated that MSHA's version of the ATD would cause confusion and, thereby, diminish miner safety.

Upon careful consideration of the safety and hazard data, operators' compliance costs, and issues of feasibility and enforcement, MSHA proposed to delete the requirement of §§ 56/57.6131(a)(1) in its 1992 proposal. The safety and hazard data collected over the last twenty years indicate that there have been few unplanned detonations of magazines or explosive

material storage facilities and even fewer such detonations that have resulted in injury or death to miners. MSHA requested that commenters submit any supporting data for retaining the tables in the new final rule. However, the Agency received no comments in response to this request.

The majority of commenters supported MSHA's proposed deletion of paragraph (a)(1) of §§ 56/57.6131; however, one commenter suggested that MSHA retain its tables of distances or in the alternative provide guidance as to what BATF regulations it intended to enforce.

MSHA's technical personnel recently visited a number of mining operations in order to gather more information pertaining to compliance problems of the industry with regard to this regulation. MSHA concurs with commenters' views that application of the separation distances to occupied buildings and structures on mine property would cause a number of operators to go to considerable expense to relocate explosive material storage facilities within the mine site when the Agency cannot demonstrate supporting data or appreciable benefit at this time. Therefore, MSHA's final rule deletes the MSHA-created table of distances and revises paragraph (a)(1) of §§ 56/57.6131. Revised paragraph (a)(1) of §§ 56/57.6131 of this final rule requires operators to locate certain facilities on mine property in a manner so that the forces generated by a storage facility explosion would not create a hazard to occupants in mine buildings and would not damage dams or electric substations. In addition, existing paragraph (a)(2) requires operators to locate these facilities at a sufficient distance from powerlines so that the powerlines, if damaged, would not contact the storage facility. This last requirement provides assurance that energized powerlines, when severed by an accident or a storm, will not cause a fire at the storage facility or introduce an electrical current which could cause detonation of its contents. MSHA appreciates that this standard uses performance language and each facility will have to be evaluated on a case-by-case basis. Examples of factors which the Agency contemplates considering are the types and quantity of explosive materials, the period of time which explosives are stored in the storage facility, and the space restrictions of the particular mine site.

Operators should note that MSHA will continue to enforce the ATD on behalf of BATF in accordance with the guidelines contained in the BATF/MSHA Interagency Agreement, published on April 15, 1980 (45 FR 25564) with respect to objects and people located or travelling off mine property. MSHA has cross referenced the BATF's regulations in this final rule solely for the purpose of informing operators of the BATF's requirements with regard to storage facilities. So that both mine operators and miners are fully aware of these requirements, MSHA will make the tables available at any MSHA Metal and Nonmetal Safety and Health district office. A copy of these tables will be mailed out with this final rule.

Paragraph (b) of §§ 56/57.6131, currently in effect, provides notice that operators should be aware of the BATF regulations in title 27 CFR part 55 which are applicable to explosive material storage facilities. This paragraph addresses inadvertent damage to a magazine and detonation of its explosive material content caused by flyrock from a blast or by electrical sources generated from severed powerlines. The requirement that storage facilities be located outside of the blast area is a new provision to address accidents, fatalities and injuries that have occurred in recent years from flyrock.

"Transportation"

Sections 56/57.6202 Vehicles

MSHA stayed §§ 56/57.6202(a)(1) of the 1991 regulation. However, the rest of the standard which addresses the hazard of an unplanned detonation of explosive material during transport on mine property became effective on November 1, 1991. Paragraph (a)(1) focuses on the structural integrity of the cargo space and the overall maintenance of the vehicle. Explosive material being transported on mine property may detonate as a result of vehicle fires, vehicle accidents, or vehicle construction with inappropriate materials.

Many operators convert older, less reliable mine vehicles into explosive material transport vehicles thereby increasing the hazard of an unplanned detonation of explosive material during transport. To address this hazard, stayed paragraph (a)(1) of the 1991 regulation required that vehicles transporting explosive material be "structurally sound and well-maintained." Some commenters found the terms "structurally sound" and "well-maintained" vague and requested that MSHA clarify its intent.

In response to these commenters' concerns, MSHA proposed to revise this provision by adding the requirement that vehicles carrying explosive materials be maintained in good condition. The proposed provision also referred the operator to the mandatory performance criteria of subpart M—Machinery and Equipment, §§ 56/57.1400 *et seq.* Subpart M addresses the maintenance requirements for all self-propelled mobile equipment.

Commenters supported the language of the proposed standard. However, one commenter stated that the preamble discussion of the term "good condition" was too restrictive. This commenter stated that operators should have the flexibility to maintain the vehicles in a condition that provides safety to miners. It was this commenter's opinion that requiring compliance with Federal, State, and local licensing requirements could greatly inhibit the operator's ability to provide a safe mine-worthy vehicle because of the disparity of laws from state to state. The Agency believes that such disparity does not exist in regard to the basic safety requirements set by states.

The final rule is identical to the proposal. The phrase "good condition" is derived from former §§ 56/57.6046, which was reinstated and renumbered as §§ 56/57.6220, which required that vehicles containing explosives or detonators be maintained in good condition and operated at a safe speed in accordance with all safe operating practices. MSHA intends the term "good condition" to mean that the vehicle is road-worthy which means that it would pass the licensing requirements of Federal, State, and local authorities for over-the-road use. It also must be repaired and maintained in accordance with the requirements of subpart M of §§ 56/57.1400 so as to be free of any hazards that may pose a danger to miners. With this clarification in the final rule's preamble, the Agency believes that it has eliminated any confusion.

"Use"

Sections 56/57.6304 Primer Protection

MSHA stayed paragraph (b) of §§ 56/57.6304 which prohibits the dropping of cartridges of explosive materials exceeding 4 inches (100 millimeters) in diameter directly on a primer unless the blasthole was filled with or under water The hazard addressed is that associated with the practice of dropping large cartridges of explosives or blasting agents directly onto primers, causing impact accidents or misfires as the result of the separation of the primer components. The language of the 1991 regulation contradicted the preamble because it permitted cartridges of 4 inches (100 millimeters) in diameter to be dropped, whereas the preamble

correctly reflected MSHA's intent that cartridges 4 inches (100 millimeters) and larger not be dropped. The 1992 proposal corrected the oversight to reflect MSHA's long standing position that cartridges with diameters of 4 inches (100 millimeters) or larger pose an unreasonable risk of unplanned detonation when dropped directly onto primers.

Additionally, the 1992 proposal clarified that the drop loading of slit packages or slit bags of prill or water gel on the primer would be permitted because the Agency did not have any evidence to suggest that this industry practice was unsafe. MSHA specifically requested comments and any information regarding this practice.

In response, many commenters requested that MSHA insert the qualifier "rigid" before "cartridges" to identify the type of cartridges that cannot be dropped on the primer in order to protect the primer from impact. Other commenters recommended that MSHA allow the practice of drop loading slit packages or slit bags of prill or water gel or emulsions on the primer where the blasthole is filled with or under water since these types of cartridges are not considered rigid. Finally, some commenters requested that MSHA modify the standard to replace the term "filled with or under water" with "sufficient depth of water" because the depth of water needed to protect the primer may vary depending upon the dimensions of the blasthole.

MSHA agrees with the commenters and has revised the final standard to reflect these concerns by adding the term "rigid" to clarify what type of cartridges are not allowed to be dropped on the primer. Additionally, the standard has been amended to replace the phrase "filled with or under water" with "sufficient depth of water." The Agency acknowledges that the depth of water needed to protect the primer would vary depending upon the parameters of the particular blasthole. These changes do not diminish miner safety because they only clarify the language of the 1991 regulation and the Agency's intent.

MSHA received numerous comments on the practice of drop loading slit packages or slit bags of prill or water gel directly on the primer. Commenters agreed with MSHA's proposed standard as written and suggested that the Agency amend the standard to add the requirement that slit packages of prill, water gel or emulsions are considered non-rigid and, as such, may be dropped on the primer. The final standard allows the drop loading of such materials because the Agency does not have any evidence that this industry practice involves a hazard of detonating the primer.

Sections 56/57.6306 Loading and Blasting

This standard is a consolidation of several former and new provisions, and addresses the precautions to be taken during the loading and blasting process. As discussed in this preamble under the definition of "blast site," commenters found the application of the "blast site" definition to paragraph (b) of the 1991 regulation too restrictive. Thus, MSHA stayed the entire standard pending this rulemaking.

The final rule replaces standards which were renumbered and reinstated by MSHA to address loading and blasting hazards until promulgation of this final rule. Former §§ 56/57.6094 on blasthole charging were renumbered as §§ 56/57.6320; former §§ 56/57.6160 on protection of personnel at blast site were renumbered as §§ 56/57.6330; former § 57.6175 on loading and blast site restrictions was renumbered as § 57.6375; and former § 57.6182 on blasting in shafts or winzes was renumbered as § 57.6382.

Each paragraph of §§ 56/57.6306 of the 1991 regulation addressed different hazards encountered in the entire loading and blasting cycle. After re-examining each provision, the Agency determined that the provisions which warranted revision were paragraphs (b) on activity restrictions during loading and blasting; (c) on the period of time allowed to begin and end the loading process; and (e) on the period of time allowed between the end of loading and the start of blasting. MSHA did not find a basis for revising the substance of paragraph (a) on vehicle excursions onto explosive material; (d) on the removal of personnel from the blast area; (f) on barring entry to the blast area; and (g) on post-blast inspections. For clarity, however, MSHA did make non-substantive word deletions or editorial revisions to paragraphs (a), (d), (f) and (g). MSHA specifically requested comments on all the proposed changes.

Consistent with the 1992 proposal, MSHA is deleting the term "otherwise" from paragraph (a) for clarity and conciseness. Paragraph (a) ensures proper treatment of explosive material and initiating systems. Explosive material can be prematurely detonated if struck by moving vehicles or contacted by electrically-powered equipment. Commenters endorsed this proposed change.

The Agency proposed to revise paragraph (b) in response to considerable objections from the mining industry about the prohibition of activities at the blast site. MSHA proposed to delete the term "occasional," which appeared in the 1991 regulation before the term "haulage," and to continue to permit haulage activity near the base a highwall being loaded if no other haulage access existed and has done so in this final rule. Haulage under this condition is occasional. MSHA's proposal also added a statement to permit surveying, stemming, and reopening of holes at the blast site if reasonable care is exercised. MSHA expressly authorized these activities because they are closely related to the loading and blasting process and restricting them from the blast site would be unreasonable. The final rule allows these activities at the blast site. Thus, where necessary, operators could perform haulage, stemming, reopening of holes, and surveying activities at the blast site so long as they undertake precautions to minimize the risk of coming into contact with explosive material.

MSHA specifically requested comments on additional non-blasting activities that could be safely undertaken at the blast site. In response, commenters wanted MSHA to allow sampling as an activity that may be safely performed within the blast site. Commenters also requested that MSHA clarify the sentence "haulage activity is permitted near the base of the highwall provided no other haulage access exists." These commenters were concerned that in instances where the only access road is located within the blast site, production would come to a complete halt pending completion of the loading and blasting process.

Some commenters requested that the Agency clarify what MSHA considered to be "near the base of the highwall." The term "near" is considered by the Agency to be anything closer than the 50-foot (15.2-meter) requirement found in the definition of "blast site" in §§ 56/57.6000. Additionally, if the blast site consists of the alternative 30 feet (4.6 meters), the blast site must be demarcated with a barrier to inform workers and miners of the danger of approaching the blast site.

After careful consideration of all comments and testimony received, MSHA is amending paragraph (b) to include sampling of geology as an activity that may be performed safely within the blast site. The Agency believes that sampling of geology does not pose a hazard because vehicles used for this purpose are not driven through the blast site. Thus, safety is not compromised by permitting this particular activity to take place within

the blast site. Currently, MSHA does not have any evidence suggesting that such industry practice is unsafe.

Numerous comments were received on paragraph (c) of the 1991 regulation which required that loading be a continuous operation with certain exceptions to avoid the hazard of prolonged sleeping of explosive material. This provision on blasthole charging was an outgrowth of former §§ 56/57.6094, reinstated and renumbered as §§ 56/57.6320 pending promulgation of this final regulation. The former standards required blasting to occur within 72 hours of loading the hole unless prior approval from MSHA was obtained.

Commenters, however, objected to the 1991 requirement that loading be "continuous except for emergency situations, shift changes, and up to two consecutive idle shifts." These commenters suggested this provision be replaced with a 72-hour requirement similar to that of the old regulation. Commenters stated that the two-shift limitation was both too restrictive and vague, suggesting that a "shift" varied in duration at each mine site. Furthermore, the two-shift limitation did not take into consideration the occurrence of atmospheric conditions such as lightning or weather inversions as well as other uncontrollable occurrences that necessitate a delay in the loading process.

In the 1992 proposal, MSHA proposed to replace the two-shift limitation with the former 72-hour rule thus allowing a period of 72 hours to begin and end the loading process which had to be continuous. The proposal also addressed circumstances beyond the operator's control such as unfavorable weather conditions, large equipment failure, or other emergency situations that might necessitate an interruption in the loading process. If an interruption in the loading process would exceed the 72-hour period, the proposal required that operators notify the appropriate MSHA District Office of the nature and cause of the delay.

Although some commenters agreed with the standard as proposed, others found the 72-hour requirement arbitrary and suggested its deletion. Specifically, these commenters stated that because the Agency already required that loading be continuous, there was no need for the 72-hour requirement. Moreover, they questioned whether the Agency had any supporting data to demonstrate that the notification requirement would enhance safety. The Agency has found the commenters position persuasive and has not included the 72-hour notification requirement in the final rule. This change does not lessen safety because paragraph (c) of the final rule continues to require that the loading process be continuous, thus avoiding misfires and other hazards associated with the deterioration of explosives stemming from their placement in boreholes for an extended period of time.

The final rule also does not include the term "emergency" as proposed to clarify that only circumstances beyond the operator's control justify an interruption in the loading process. For example, normal time lapses for shift changes are not beyond the operator's control and therefore, are not to be considered as a justification for interruption of the loading process.

Proposed paragraph (d) addresses when persons must leave the blast area for their safety. This paragraph was not intended to prevent persons from performing activities necessary in the connection of the surface blasting circuits. The Agency proposed no substantive changes to paragraph (d) of the 1991 regulation. However, in the 1992 proposal, MSHA did suggest replacing the term "hook-up" with the term "connection" to clarify the standard. Commenters supported the proposed changes and they are made in the final rule.

Paragraph (e) of the 1991 regulation addresses the need to initiate blasts "without undue delay." In contrast to the hazard addressed in paragraph (c), this provision applied to the time period between the end of loading and the start of blasting. Once all the circuits have been connected, conditions at the blast site reach their maximum potential to cause injury or death if a partial detonation occurs. MSHA's intent, as discussed in the preamble of the 1991 regulation, was to have the loaded circuits connected and fired as soon as practicable.

Commenters found paragraph (e) to be too restrictive and vague. For example, some commenters stated that the phrase "undue delay" provided little guidance as to the time allowable and suggested that the phrase would result in uneven enforcement. Other commenters found the provision unresponsive to the occurrence of unanticipated conditions which necessitate interruption and delay.

MSHA's 1992 proposed rule clarified the meaning of "undue delay" to respond to commenters' concerns. The proposal would have required that operators notify the appropriate MSHA District Office if the delay between the completion of the connection of circuits and the start of blasting would exceed 72 hours. The proposed addition provided that circumstances beyond the operator's control such as unfavorable weather conditions, large equipment failure, or other emergency situations might warrant an interruption in firing the blasts. This notice exception was intended to apply to those circumstances over which the operator had no control and which the operator had not caused in the first instance. MSHA intended that such notice be the result of good faith efforts of the operator who attempted to adhere to the 72-hour requirement but for the reasons cited could not commence firing the blasts.

The majority of commenters supported the standard as proposed. However, a few commenters requested the deletion of the 72-hour notification requirement of paragraph (e) because they were confused by the 72-hour notification requirement of paragraph (c). Proposed paragraph (e) would have required that operators notify the appropriate MSHA District Office if the delay between the end of loading and the start of blasting would exceed 72 hours. At the April 15, 1993 public hearing, MSHA stated that notification is required only in those instances when for some unforeseeable circumstance the firing of the blast would take place more than 72 hours after the connection of the circuits. The Agency explained that this requirement is necessary because once all the circuits have been connected, conditions at the blast site reach their maximum potential to cause injury or death if a partial detonation occurs. After the Agency's intent was made clear at the public hearing, commenters supported the 72-hour notification requirement as proposed. Accordingly, paragraph (e) of the final rule is identical to the proposal with an additional clarification. The final rule deletes the term "emergency" from the paragraph to clarify that only circumstances beyond the operator's control may justify a delay in the firing of the blast.

MSHA proposed no changes for paragraphs (f) and (g) and the final rule requires that operators institute specific safety measures immediately prior to and after the blasting process. Paragraph (f) requires ample warning, clear escape routes from the blast area, and all access to the blast area to be protected against entry. The standard provides that access to the blast area be guarded by persons, or barricaded. Numerous accidents have occurred from the failure to clear or guard the blast area. Paragraph (g) requires post-blast examinations to minimize hazards to persons who will perform subsequent work in the area. It should be noted, however, that in the

1992 proposal, paragraph (g) was edited for clarity. Accordingly, paragraphs (f) and (g) of the final rule are the same as the proposal.

"Nonelectric Blasting-Surface and Underground"

Sections 56/57.6501 Nonelectric Initiation Systems

Under the 1991 regulation, this section consolidated several former provisions which addressed misfire hazards encountered in nonelectric initiating systems. The only portion of §§ 56/57.6501 stayed was paragraph (a), a new requirement. Paragraph (a) was derived from the double trunkline or loop system requirement of former §§ 56/57.6163, concerning detonating cord blasting, and §§ 56/57.6164, concerning trunklines. The double trunkline or loop system is a procedure or system to reduce the potential for cut-offs and resultant misfires.

In the 1991 regulation, MSHA required a double trunkline or loop system to be used with newer types of nonelectric initiation systems, such as shock tube, to ensure multiple initiation paths, so that a cut-off of one lead would not disable the blasting sequence. MSHA believed that the components of several nonelectric initiating systems then on the market had a tendency to fragment and interrupt blasting.

Many commenters submitted responses and data opposing this new requirement stating that MSHA could not substantiate the double trunkline or loop system requirement. One commenter asserted that paragraph (a) substantially increased the exposure of miners to the hazards associated with being present on a loaded blast site due to the time required to hook-up the system. Other commenters stated that such systems would be prohibitively costly and, therefore, were not economically feasible.

After staying paragraph (a) of the 1991 regulation, MSHA carefully reviewed all comments and data received. As a result, the Agency proposed to delete paragraph (a) in the 1992 proposal. The Agency found no persuasive statistical data to support the double trunkline or loop system requirement when using shock tube, and therefore, mandated its use only under existing paragraph (c)(2) which requires a double trunkline or loop system when using detonating cord in multiple row blasting.

Some commenters agreed with the Agency's proposed deletion of paragraph (a) and stated that its deletion would not diminish miner safety. Other commenters suggested the retention of paragraph (a) stating that the double trunkline or loop system is a more reliable system.

MSHA's final rule deletes paragraph (a) as proposed and redesignates the remaining paragraphs of §§ 56/57.6501. Although failure rates of complex shot layouts can be reduced through arrangements such as the double trunkline system, the Agency has no persuasive statistical data to substantiate its need. Therefore, the final rule deletes this requirement as proposed.

"General Requirements"

Sections 56/57.6902 Excessive Temperatures

Hot holes are boreholes with temperatures higher than ambient temperatures. When explosives are loaded into these hot boreholes unplanned detonations may occur due to the elevated temperatures in the hot boreholes (usually exceeding 120 to 130 °C), concentration of sulfides, availability of air, moisture, and bacteria.

Sections 56/57.6902 of the 1991 regulation address the placement of explosive materials inside hot holes where heat could cause premature detonation. Paragraph (b) specifically requires the use of "special precautions" when blasting sulfide ores. In response to commenters' requests for clarification of the phrase "special precautions," MSHA stayed paragraph (b) of the 1991 regulation.

MSHA clarified its intent regarding the meaning of "special precautions" in its 1992 proposal. Proposed paragraph (b) specified three special precautions that must be undertaken prior to the placement of explosive material inside sulfide-bearing boreholes. The first precaution listed required that the temperature of the blasthole be measured before the introduction of explosive material. MSHA believes that it is a safe and reasonable practice to measure the temperature of any hole suspected of being hot before loading because extreme temperatures inside the hole may set off detonators and explosives placed inside.

The second precaution of proposed paragraph (b) required that once the holes were loaded, initiation of the blast had to proceed within 12 hours after the last hole had been loaded. In blasting sulfide ores, limiting the time explosive material sits in hot holes after loading and before blasting minimizes the risks of premature detonation.

The third proposed precaution required the operator to take any other precautions as deemed necessary to prevent the hazard of premature detonation. These other "special precautions" for use when blasting sulfide ores may include one or more of the following: Using ANFO or other ammonium nitrate-based explosive products containing inhibitors; using plastic hole liners or bagged explosive material; when stemming, using material that is other than drill cuttings; avoiding loading some hot holes entirely if feasible; eliminating the use of a detonator in the hole and priming the detonating cord with a booster; and loading holes in suspected hot areas last and firing promptly. The Agency encourages and expects operators to use as many safety procedures and special precautions as warranted.

The majority of commenters suggested that MSHA clarify the language used in paragraph (b) to reflect the Agency's intent that the stemming activity referred to in proposed paragraph (b) did not apply to any blasthole that used stemming. In addition, other commenters requested that the "special precautions" list found in the preamble to the 1992 proposal also be included in the standard. Finally, a commenter requested that the Agency change the 12-hour requirement in proposed paragraph (b)(2) to 24 hours stating that 24 hours is a safe period for the detonation of suspected reactive blastholes.

Paragraph (b) of the final rule is promulgated as proposed with some editorial changes made for clarity and conciseness. After carefully reviewing all comments and testimony submitted, the Agency determined that the addition of a "special precautions" list in the standard itself is not appropriate. MSHA believes that including the list in the regulation may limit other types of special precautions that could be necessary to prevent the hazard of premature detonation. Additionally, the Agency believes that changing the 12-hour requirement of paragraph (b)(2) to 24 hours would diminish the safety of miners because it increases the time that explosives are left inside the hot holes. This, in turn, may result in premature detonations which are extremely hazardous.

The presence of pyrite and of other sulfides in sulfide-bearing boreholes can cause problems during the loading process because of the relative ease with which most of these sulfides weather and oxidize at ambient conditions, in the presence of air and moisture. When a combination of sulfide minerals that includes pyrite is present, many reactions take place. Most of these reactions are highly exothermic; meaning that they are formed with the evolution of heat. Because of the poor

thermal conductivity of the associated strata, when the resultant heat is dissipated, the strata heat up. The increased temperatures pose a blasting hazard. When explosives are loaded into hot boreholes they can deteriorate if left in place for an extended time before they are set off. Unplanned explosions and detonations are the undesirable end results. Moreover, if the amount of pyrite present in the borehole is relatively high and it oxidizes at a fast rate, the mine operator should be aware that an unplanned detonation might occur if the time from loading to firing is sufficient for temperatures in the borehole to rise above 120 to 130 °C.

For the reasons stated above the final rule retains proposed paragraph (b). Because of the hazards associated with premature detonations, the Agency encourages mine operators to use detonators that are more resistant to heat whenever possible.

Sections 56/57.6903 Burning Explosive Material

Sections 56/57.6903 address actions to be taken with burning explosives at the blast site both on the surface and underground. The standard was stayed on September 12, 1991, in response to concerns that the standard would unnecessarily prohibit fighting fires in combustible ore body mines. The provision was derived from former §§ 56/57.6161, which were reinstated and renumbered as §§ 56/57.6331, "burning charges." Those standards prohibit persons from remaining in the area where explosive material was suspected of burning. An incomplete detonation in a blasthole can lead to the slow burning of explosives in that hole. IME recommended and MSHA agreed, as stated in the preamble of the 1991 regulation, that these locations should not be approached for at least one hour after the burning has stopped. In the case of fire in situations involving a quantity of explosive materials, such as a haulage or bulk loading vehicle, evacuation to one-half mile in all directions was recommended by IME (1990 Emergency Response Guidebook, Department of Transportation, P5800.4—Guide 46).

The comments received on this provision reflected a general approval of MSHA's treatment of the hazards associated with burning explosives at the blast site. Some commenters, however, remarked that any burning or suspected burning subsequent to a blast at mines with combustible ore bodies is more likely to be burning ore bodies rather than burning explosive material. Commenters stated that if such burning were left unattended, the result would be uncontrollable fire and mine ore body loss. These commenters requested that the standard expressly allow necessary personnel to remain to fight fires where combustible ore bodies are involved. In an attempt to address this particular situation, the preamble of the 1991 regulation stated that a request for a petition for modification was the best avenue to address the unique situation of fires in mines with combustible ore bodies. The 1991 regulation did not permit any exception to the evacuation requirement.

After the publication of the 1991 regulation, the Agency received numerous comments requesting that the Agency reconsider its position. These commenters stated that a petition for modification would not be as efficient a method to address the special circumstance of fires in combustible ore bodies because of the imminent risk of losing the whole mine if a fire were to occur. In response to these commenters, MSHA proposed in the 1992 proposal an exception to the personnel evacuation requirement. However, upon further review of additional comments submitted, MSHA has concluded that the proposed personnel evacuation requirement has no current application as there are no active oil shale mines.

Accordingly, the final standard retains the language of the 1991 regulation. In the event that oil shale mining is resumed, the Agency will address this unique situation on a case-by-case basis through the petition for modification process. The Agency believes that by retaining the language of the 1991 regulation and addressing the unique situation of oil shale mines through the petition for modification process, the safety of miners is not compromised and the needs of the industry are met.

IV. Executive Order 12866 and the Regulatory Flexibility Act

In accordance with Executive Order 12866 and the Regulatory Flexibility Act, this combined Regulatory Impact Analysis (RIA) and Regulatory Flexibility Analysis indicates that the final rule will not result in major cost increases nor have an effect of $100 million or more on the economy. Also, a substantial number of small mines are not affected significantly.

MSHA has found that this final rule reduces the cost of compliance without diminishing miner safety. The primary reason for and benefit of these changes to the existing standards is to clarify compliance responsibilities, to provide some alternative compliance options, and to increase compliance.

MSHA has determined that this final rule eliminates the compliance cost projected for §§ 56/57.6501 because it eliminates the specific requirement that double trunklines or loop systems be used in specified nonelectric initiation systems. The final rule is performance-oriented and allows the operator to determine the appropriateness of using such systems. In addition, the revision of §§ 56/57.6130 allows certain types of trailers used for the temporary storage of explosive material to remain unvented, which will result in some minimal cost savings. MSHA calculates that the changes in these two standards reduces the projected annual compliance cost of the 1991 regulation by about $290,000, which is due to the change in §§ 56/57.6501.

The change to the definition of "blast site," provides an alternative method of compliance. This also clarifies the intent of existing §§ 56/57.6306 as to the activities allowed to be performed within the blast site. In general, the addition of definitions for "magazine," and "storage facilities, as well as the addition of specific clarifying language in §§ 56/57.6131, §§ 56/57.6202, §§ 56/57.6304, §§ 56/57.6306, §§ 56/57.6902 and §§ 56/57.6903, will not change significantly the typical compliance costs of these provisions, and does not reduce miner safety in comparison with the existing rule. Increased flexibility and clarity, however, can reduce costs by allowing the mine operator to use the most cost-effective method of compliance. For example, more flexibility in the types of activities allowed within the blast site and an alternative for defining the perimeter of the blast site, potentially can save compliance costs especially at small mines where the mining cycle may have fewer options for alternate activities. These cost savings will be small and limited to certain specific mines.

List of Subjects in 30 CFR Parts 56 and 57

Explosives, Metal and nonmetal mining, Mine safety and health.

Dated: December 22, 1993.

Richard L. Brechbiel,

Acting Assistant Secretary for Mine Safety and Health.

Parts 56 and 57, subchapter N, chapter I, title 30 of the Code of Federal Regulations is amended as follows:

PART 56—[AMENDED]

1. The authority citation for part 56 is revised to read as follows:

Authority: 30 U.S.C. 811, 956, 961.

2. The expiration date published in the Federal Register of June 7, 1993 (58 FR 31908), for §§ 56.6140, 56.6220, 56.6320, 56.6330, and 56.6331 is extended to January 31, 1994.

3. The delay of effectiveness published in the Federal Register of June 7, 1993 (58 FR 31908), for the definition of "blast site" in § 56.6000, the first sentence in § 56.6130(b), and §§ 56.6131(a)(1), 56.6202(a)(1), 56.6304(b), 56.6306, 56.6501(a), 56.6902(b), 56.6903 and appendix I to subpart E, is delayed until January 31, 1994.

4. Effective January 31, 1994, subpart E of part 56 is revised to read as follows:

Subpart E—Explosives

Subpart E—Explosives

§ 56.6000 Definitions.

The following definitions apply in this subpart.

Attended. Presence of an individual or continuous monitoring to prevent unauthorized entry or access.

Barrier. A "material object, or objects that separates, keeps apart, or demarcates in a conspicuous manner such as cones, a warning sign, or tape."

Blast area. The area in which concussion (shock wave), flying material, or gases from an explosion may cause injury to persons. In determining the blast area, the following factors shall be considered:

(1) Geology or material to be blasted.
(2) Blast pattern.
(3) Burden, depth, diameter, and angle of the holes.
(4) Blasting experience of the mine.
(5) Delay system, powder factor, and pounds per delay.
(6) Type and amount of explosive material.
(7) Type and amount of stemming.

Blast site. The area where explosive material is handled during loading, including the perimeter formed by the loaded blastholes and 50 feet (15.2 meters) in all directions from loaded holes. A minimum distance of 30 feet (9.1 meters) may replace the 50-foot (15.2-meter) requirement if the perimeter of loaded holes is demarcated with a barrier. The 50-foot (15.2-meter) and alternative 30-foot (9.1-meter) requirements also apply in all directions along the full depth of the hole.

Blasting agent. Any substance classified as a blasting agent by the Department of Transportation in 49 CFR 173.114a(a). This document is available at any MSHA Metal and Nonmetal Safety and Health district office.

Detonating cord. A flexible cord containing a center core of high explosives which may be used to initiate other explosives.

Detonator. Any device containing a detonating charge used to initiate an explosive. These devices include electric or nonelectric instantaneous or delay blasting caps and delay connectors. The term "detonator" does not include detonating cord. Detonators may be either "Class A" detonators or "Class C" detonators, as classified by the Department of Transportation in 49 CFR 173.53, and 173.100. This document is available at any MSHA Metal and Nonmetal Safety and Health district office.

Emulsion. An explosive material containing substantial amounts of oxidizers dissolved in water droplets, surrounded by an immiscible fuel.

Explosive. Any substance classified as an explosive by the Department of Transportation in 49 CFR 173.53, 173.88, and 173.100. This document is available at any MSHA Metal and Nonmetal Safety and Health district office.

Explosive material. Explosives, blasting agents, and detonators.

Flash point. The minimum temperature at which sufficient vapor is released by a liquid to form a flammable vapor-air mixture near the surface of the liquid.

Igniter cord. A fuse that burns progressively along its length with an external flame at the zone of burning, used for lighting a series of safety fuses in a desired sequence.

Laminated partition. A partition composed of the following material and minimum nominal dimensions: ½-inch-thick plywood, ½-inch-thick gypsum wallboard, ⅛-inch-thick low carbon steel, and ¼ inch thick plywood, bonded together in that order. Other combinations of material may be used, such as plywood, wood, or gypsum wallboard as insulators, and steel or wood as structural elements, provided that the partition is equivalent to a laminated partition for both insulation and structural purposes as determined by appropriate testing. The Institute of Makers of Explosives (IME) 22 container or compartment, described in IME Safety Library Publication 22 (Jan. 1985), meets the criteria of a laminated partition. This document is available at

any MSHA Metal and Nonmetal Safety and Health district office.

Loading. Placing explosive material either in a blasthole or against the material to be blasted.

Magazine. A bullet-resistant, theft-resistant, fire-resistant, weather-resistant, ventilated facility for the storage of explosives and detonators (BATF Type 1 or Type 2 facility).

Misfire. The complete or partial failure of explosive material to detonate as planned. The term also is used to describe the explosive material itself that has failed to detonate.

Multipurpose dry-chemical fire extinguisher. An extinguisher having a rating of at least 2–A:10–B:C and containing a nominal 4.5 pounds or more of dry-chemical agent.

Primer. A unit, package, or cartridge of explosives which contains a detonator and is used to initiate other explosives or blasting agents.

Safety switch. A switch that provides shunt protection in blasting circuits between the blast site and the switch used to connect a power source to the blasting circuit.

Slurry. An explosive material containing substantial portions of a liquid, oxidizers, and fuel, plus a thickener.

Storage facility. The entire class of structures used to store explosive materials. A "storage facility" used to store blasting agents corresponds to a BATF Type 4 or 5 storage facility.

Water gel. An explosive material containing substantial portions of water, oxidizers, and fuel, plus a cross-linking agent.

Storage

§ 56.6100 Separation of stored explosive material.

(a) Detonators shall not be stored in the same magazine with other explosive material.

(b) When stored in the same magazine, blasting agents shall be separated from explosives, safety fuse, and detonating cord to prevent contamination.

§ 56.6101 Areas around explosive material storage facilities.

(a) Areas surrounding storage facilities for explosive material shall be clear of rubbish, brush, dry grass, and trees for 25 feet in all directions, except that live trees 10 feet or taller need not be removed.

(b) Other combustibles shall not be stored or allowed to accumulate within 50 feet of explosive material. Combustible liquids shall be stored in a manner that ensures drainage will occur away from the explosive material storage facility in case of tank rupture.

§ 56.6102 Explosive material storage practices.

(a) Explosive material shall be—

(1) Stored in a manner to facilitate use of oldest stocks first;

(2) Stored according to brand and grade in such a manner as to facilitate identification; and

(3) Stacked in a stable manner but not more than 8 feet high.

(b) Explosives and detonators shall be stored in closed nonconductive containers except that nonelectric detonating devices may be stored on nonconductive racks provided the case-insert instructions and the date-plant-shift code are maintained with the product.

§ 56.6130 Explosive material storage facilities.

(a) Detonators and explosives shall be stored in magazines.

(b) Packaged blasting agents shall be stored in a magazine or other facility which is ventilated to prevent dampness and excessive heating, weather-resistant, and locked or attended. Drop trailers do not have to be ventilated if they are currently licensed by the Federal, State, or local authorities for over-the-road use. Facilities other than magazines used to store blasting agents shall contain only blasting agents.

(c) Bulk blasting agents shall be stored in weather-resistant bins or tanks which are locked, attended, or otherwise inaccessible to unauthorized entry.

(d) Facilities, bins or tanks shall be posted with the appropriate United States Department of Transportation placards or other appropriate warning signs that indicate the contents and are visible from each approach.

§ 56.6131 Location of explosive material storage facilities.

(a) Storage facilities for any explosive material shall be—

(1) Located so that the forces generated by a storage facility explosion will not create a hazard to occupants in mine buildings and will not damage dams or electric substations; and

(2) Detached structures located outside the blast area and a sufficient distance from powerlines so that the powerlines, if damaged, would not contact the magazines.

(b) Operators should also be aware of regulations affecting storage facilities in 27 CFR part 55, in particular, §§ 55.218 and 55.220. This document is available at any MSHA Metal and Nonmetal Safety and Health district office.

§ 56.6132 Magazine requirements.

(a) Magazines shall be—

(1) Structurally sound;

(2) Noncombustible or the exterior covered with fire-resistant material;

(3) Bullet resistant;

(4) Made of nonsparking material on the inside;

(5) Ventilated to control dampness and excessive heating within the magazine;

(6) Posted with the appropriate United States Department of Transportation placards or other appropriate warning signs that indicate the contents and are visible from each approach, so located that a bullet passing through any of the signs will not strike the magazine;

(7) Kept clean and dry inside;

(8) Unlighted or lighted by devices that are specifically designed for use in magazines and which do not create a fire or explosion hazard;

(9) Unheated or heated only with devices that do not create a fire or explosion hazard;

(10) Locked when unattended; and

(11) Used exclusively for the storage of explosive material except for essential nonsparking equipment used for the operation of the magazine.

(b) Metal magazines shall be equipped with electrical bonding connections between all conductive portions so the entire structure is at the same electrical potential. Suitable electrical bonding methods include welding, riveting, or the use of securely tightened bolts where individual metal portions are joined. Conductive portions of nonmetal magazines shall be grounded.

(c) Electrical switches and outlets shall be located on the outside of the magazine.

§ 56.6133 Powder chests.

(a) Powder chests (day boxes) shall be—

(1) Structurally sound, weather-resistant, equipped with a lid or cover, and with only nonsparking material on the inside;

(2) Posted with the appropriate United States Department of Transportation placards or other appropriate warning signs that indicate the contents and are visible from each approach;

(3) Located out of the blast area once loading has been completed;

(4) Locked or attended when containing explosive material; and

(5) Emptied at the end of each shift with the contents returned to a magazine or other storage facility, or attended.

(b) Detonators shall be kept in separate chests from explosives or

blasting agents, except if separated by 4 inches of hardwood, laminated partition, or equivalent.

Transportation

§ 56.6200 Delivery to storage or blast site areas.

Explosive material shall be transported without undue delay to the storage area or blast site.

§ 56.6201 Separation of transported explosive material.

Detonators shall not be transported on the same vehicle or conveyance with other explosives except as follows:

(a) Detonators in quantities of more than 1000 may be transported in a vehicle or conveyance with explosives or blasting agents provided the detonators are—

(1) Maintained in the original packaging as shipped from the manufacturer; and

(2) Separated from the explosives or blasting agents by 4 inches of hardwood, laminated partition, or equivalent. The hardwood, laminated partition, or the equivalent shall be fastened to the vehicle or conveyance.

(b) Detonators in quantities of 1000 or fewer may be transported with explosives or blasting agents provided the detonators are—

(1) Kept in closed containers; and

(2) Separated from the explosives or blasting agents by 4 inches of hardwood, laminated partition, or equivalent. The hardwood, laminated partition, or equivalent shall be fastened to the vehicle or conveyance.

§ 56.6202 Vehicles.

(a) Vehicles containing explosive material shall be—

(1) Maintained in good condition and shall comply with the requirements of subpart M of this part;

(2) Equipped with sides and enclosures higher than the explosive material being transported or have the explosive material secured to a nonconductive pallet;

(3) Equipped with a cargo space that shall contain the explosive material (passenger areas shall not be considered cargo space);

(4) Equipped with at least two multipurpose dry-chemical fire extinguishers or one such extinguisher and an automatic fire suppression system;

(5) Posted with warning signs that indicate the contents and are visible from each approach;

(6) Occupied only by persons necessary for handling the explosive material;

(7) Attended or the cargo compartment locked, except when parked at the blast site and loading is in progress; and

(8) Secured while parked by having—

(i) The brakes set;

(ii) The wheels chocked if movement could occur; and

(iii) The engine shut off unless powering a device being used in the loading operation.

(b) Vehicles containing explosives shall have—

(1) No sparking material exposed in the cargo space; and

(2) Only properly secured nonsparking equipment in the cargo space with the explosives.

(c) Vehicles used for dispensing bulk explosive material shall—

(1) Have no zinc or copper exposed in the cargo space; and

(2) Provide any enclosed screw-type conveyors with protection against internal pressure and frictional heat.

§ 56.6203 Locomotives.

Explosive material shall not be transported on a locomotive. When explosive material is hauled by trolley locomotive, covered, electrically insulated cars shall be used.

§ 56.6204 Hoists.

(a) Before explosive material is transported in hoist conveyances, the hoist operator shall be notified.

(b) Explosive material transported in hoist conveyances shall be placed within a container which prevents shifting of the cargo that could cause detonation of the container by impact or by sparks. The manufacturer's container may be used if secured to a nonconductive pallet. When explosives are transported, they shall be secured so as not to contact any sparking material.

(c) No explosive material shall be transported during a mantrip.

§ 56.6205 Conveying explosives by hand.

Closed, nonconductive containers shall be used to carry explosives and detonators to and from blast sites. Separate containers shall be used for explosives and detonators.

Use

§ 56.6300 Control of blasting operations.

(a) Only persons trained and experienced in the handling and use of explosive material shall direct blasting operations and related activities.

(b) Trainees and inexperienced persons shall work only in the immediate presence of persons trained and experienced in the handling and use of explosive material.

§ 56.6301 Blasthole obstruction check.

Before loading, blastholes shall be checked and, wherever possible, cleared of obstructions.

§ 56.6302 Explosive material protection.

(a) Explosives and blasting agents shall be kept separated from detonators until loading begins.

(b) Explosive material shall be protected from impact and temperatures in excess of 150 °F when taken to the blast site.

§ 56.6303 Initiation preparation.

(a) Primers shall be made up only at the time of use and as close to the blast site as conditions allow.

(b) Primers shall be prepared with the detonator contained securely and completely within the explosive or contained securely and appropriately for its design in the tunnel or cap well.

(c) When using detonating cord to initiate another explosive, a connection shall be prepared with the detonating cord threaded through, attached securely to, or otherwise in contact with the explosive.

§ 56.6304 Primer protection.

(a) Tamping shall not be done directly on a primer.

(b) Rigid cartridges of explosives or blasting agents that are 4 inches (100 millimeters) in diameter or larger shall not be dropped on the primer except where the blasthole contains sufficient depth of water to protect the primer from impact. Slit packages of prill, water gel, or emulsions are not considered rigid cartridges and may be drop loaded.

§ 56.6305 Unused explosive material.

Unused explosive material shall be moved to a protected location as soon as practical after loading operations are completed.

§ 56.6306 Loading and blasting.

(a) Vehicles and equipment shall not be driven over explosive material or initiating systems in a manner which could contact the material or system, or create other hazards.

(b) Once loading begins, the only activities permitted within the blast site shall be those activities directly related to the blasting operation and the activities of surveying, stemming, sampling of geology, and reopening of holes provided that reasonable care is exercised. Haulage activity is permitted near the base of the highwall being loaded provided no other haulage access exists.

(c) Loading shall be continuous except where adverse circumstances such as unfavorable atmospheric

conditions, large equipment failure, or circumstances beyond the operator's control necessitate an interruption in loading.

(d) In electric blasting prior to connecting to the power source and in nonelectric blasting prior to attaching an initiating device, all persons shall leave the blast area except persons in a blasting shelter or other location that protects them from concussion (shock wave), flying material, and gases.

(e) When loading is completed and circuits are connected, the blasts shall be fired without undue delay unless adverse circumstances such as unfavorable atmospheric conditions, large equipment failure, or circumstances beyond the operator's control necessitate delay. If the time between the connection of circuits and the firing of the blast will exceed 72 hours, the operator shall notify the appropriate MSHA District Office before the 72 hours has elapsed.

(f) Before firing a blast—

(1) Ample warning shall be given to allow all persons to be evacuated;

(2) Clear exit routes shall be provided for persons firing the round; and

(3) All access routes to the blast area shall be guarded or barricaded to prevent the passage of persons or vehicles.

(g) No work shall resume in the blast area until a post-blast examination addressing potential blast-related hazards has been conducted by a person with the ability and experience to perform the examination.

§ 56.6307 Drill stem loading.

Explosive material shall not be loaded into blastholes with drill stem equipment or other devices that could be extracted while containing explosive material. The use of loading hose, collar sleeves, or collar pipes is permitted.

§ 56.6308 Initiation systems.

Initiation systems shall be used in accordance with the manufacturer's instructions.

§ 56.6309 Fuel oil requirements for ANFO.

(a) Liquid hydrocarbon fuels with flash points lower than that of No. 2 diesel oil (125° F) shall not be used to prepare ammonium nitrate-fuel oil, except that diesel fuels with flash points no lower than 100° F may be used at ambient air temperatures below 45° F.

(b) Waste oil, including crankcase oil, shall not be used to prepare ammonium nitrate-fuel oil.

§ 56.6310 Misfire waiting period.

When a misfire is suspected, persons shall not enter the blast area—

(a) For 30 minutes if safety fuse and blasting caps are used; or

(b) For 15 minutes if any other type detonators are used.

§ 56.6311 Handling of misfires.

(a) Faces and muck piles shall be examined for misfires after each blasting operation.

(b) Only work necessary to remove a misfire and protect the safety of miners engaged in the removal shall be permitted in the affected area until the misfire is disposed of in a safe manner.

(c) When a misfire cannot be disposed of safely, each approach to the area affected by the misfire shall be posted with a warning sign at a conspicuous location to prohibit entry, and the condition shall be reported immediately to mine management.

(d) Misfires occurring during the shift shall be reported to mine management not later than the end of the shift.

§ 56.6312 Secondary blasting.

Secondary blasts fired at the same time in the same work area shall be initiated from one source.

§ 56.6313 Blast site security.

Areas in which loading is suspended or loaded holes are awaiting firing shall be attended, barricaded and posted, or flagged against unauthorized entry.

Electric Blasting

§ 56.6400 Compatibility of electric detonators.

All electric detonators to be fired in a round shall be from the same manufacturer and shall have similar electrical firing characteristics.

§ 56.6401 Shunting.

Except during testing—

(a) Electric detonators shall be kept shunted until connected to the blasting line or wired into a blasting round;

(b) Wired rounds shall be kept shunted until connected to the blasting line; and

(c) Blasting lines shall be kept shunted until immediately before blasting.

§ 56.6402 Deenergized circuits near detonators.

Electrical distribution circuits within 50 feet of electric detonators at the blast site shall be deenergized. Such circuits need not be deenergized between 25 to 50 feet of the electric detonators if stray current tests, conducted as frequently as necessary, indicate a maximum stray current of less than 0.05 amperes through a 1-ohm resistor as measured at the blast site.

§ 56.6403 Branch circuits.

(a) If electric blasting includes the use of branch circuits, each branch shall be equipped with a safety switch or equivalent method to isolate the circuits to be used.

(b) At least one safety switch or equivalent method of protection shall be located outside the blast area and shall be in the open position until persons are withdrawn.

§ 56.6404 Separation of blasting circuits from power source.

(a) Switches used to connect the power source to a blasting circuit shall be locked in the open position except when closed to fire the blast.

(b) Lead wires shall not be connected to the blasting switch until the shot is ready to be fired.

§ 56.6405 Firing devices.

(a) Power sources shall be capable of delivering sufficient current to energize all electric detonators to be fired with the type of circuits used. Storage or dry cell batteries are not permitted as power sources.

(b) Blasting machines shall be tested, repaired, and maintained in accordance with manufacturer's instructions.

(c) Only the blaster shall have the key or other control to an electrical firing device.

§ 56.6406 Duration of current flow.

If any part of a blast is connected in parallel and is to be initiated from powerlines or lighting circuits, the time of current flow shall be limited to a maximum of 25 milliseconds. This can be accomplished by incorporating an arcing control device in the blasting circuit or by interrupting the circuit with an explosive device attached to one or both lead lines and initiated by a 25-millisecond delay electric detonator.

§ 56.6407 Circuit testing.

A blasting galvanometer or other instrument designed for testing blasting circuits shall be used to test the following:

(a) Continuity of each electric detonator in the blasthole prior to stemming and connection to the blasting line.

(b) Resistance of individual series or the resistance of multiple balanced series to be connected in parallel prior to their connection to the blasting line.

(c) Continuity of blasting lines prior to the connection of electric detonator series.

(d) Total blasting circuit resistance prior to connection to the power source.

Nonelectric Blasting

§ 56.6500 Damaged initiating material.

A visual check of the completed circuit shall be made to ensure that the components are properly aligned and connected. Safety fuse, igniter cord, detonating cord, shock or gas tubing, and similar material which is kinked, bent sharply, or damaged shall not be used.

§ 56.6501 Nonelectric initiation systems.

(a) When the nonelectric initiation system uses shock tube—

(1) Connections with other initiation devices shall be secured in a manner which provides for uninterrupted propagation;

(2) Factory-made units shall be used as assembled and shall not be cut except that a single splice is permitted on the lead-in trunkline during dry conditions; and

(3) Connections between blastholes shall not be made until immediately prior to clearing the blast site when surface delay detonators are used.

(b) When the nonelectric initiation system uses detonating cord—

(1) The line of detonating cord extending out of a blasthole shall be cut from the supply spool immediately after the attached explosive is correctly positioned in the hole;

(2) In multiple row blasts, the trunkline layout shall be designed so that the detonation can reach each blasthole from at least two directions;

(3) Connections shall be tight and kept at right angles to the trunkline;

(4) Detonators shall be attached securely to the side of the detonating cord and pointed in the direction in which detonation is to proceed;

(5) Connections between blastholes shall not be made until immediately prior to clearing the blast site when surface delay detonators are used; and

(6) Lead-in lines shall be manually unreeled if connected to the trunklines at the blast site.

(c) When the nonelectric initiation system uses gas tube, continuity of the circuit shall be tested prior to blasting.

§ 56.6502 Safety fuse.

(a) The burning rate of each spool of safety fuse to be used shall be measured, posted in locations which will be conspicuous to safety fuse users, and brought to the attention of all persons involved with the blasting operation.

(b) When firing with safety fuse ignited individually using handheld lighters, the safety fuse shall be of lengths which provide at least the minimum burning time for a particular size round, as specified in the following table.

TABLE E–1—SAFETY FUSE—MINIMUM BURNING TIME

Number of holes in a round	Minimum burning time
1	2 minutes.[1]
2–5	2 minutes 40 seconds.
6–10	3 minutes 20 seconds.
11–15	5 minutes.

[1] For example, at least a 36-inch length of 40-second-per-foot safety fuse or at least a 48-inch length of 30-second-per-foot safety fuse would have to be used to allow sufficient time to evacuate the area.

(c) Where flyrock might damage exposed safety fuse, the blast shall be timed so that all safety fuses are burning within the blastholes before any blasthole detonates.

(d) Fuse shall be cut and capped in dry locations.

(e) Blasting caps shall be crimped to fuse only with implements designed for that purpose.

(f) Safety fuse shall be ignited only after the primer and the explosive material are securely in place.

(g) Safety fuse shall be ignited only with devices designed for that purpose. Carbide lights, liquefied petroleum gas torches, and cigarette lighters shall not be used to light safety fuse.

(h) At least two persons shall be present when lighting safety fuse, and no one shall light more than 15 individual fuses. If more than 15 holes per person are to be fired, electric initiation systems, igniter cord and connectors, or other nonelectric initiation systems shall be used.

Extraneous Electricity

§ 56.6600 Loading practices.

If extraneous electricity is suspected in an area where electric detonators are used, loading shall be suspended until tests determine that stray current does not exceed 0.05 amperes through a 1-ohm resister when measured at the location of the electric detonators. If greater levels of extraneous electricity are found, the source shall be determined and no loading shall take place until the condition is corrected.

§ 56.6601 Grounding.

Electric blasting circuits, including powerline sources when used, shall not be grounded.

§ 56.6602 Static electricity dissipation during loading.

When explosive material is loaded pneumatically or dropped into a blasthole in a manner that could generate static electricity—

(a) An evaluation of the potential static electricity hazard shall be made and any hazard shall be eliminated before loading begins;

(b) The loading hose shall be of a semiconductive type, have a total of not more than 2 megohms of resistance over its entire length and not less than 1000 ohms of resistance per foot;

(c) Wire-countered hoses shall not be used;

(d) Conductive parts of the loading equipment shall be bonded and grounded and grounds shall not be made to other potential sources of extraneous electricity; and

(e) Plastic tubes shall not be used as hole liners if the hole contains an electric detonator.

§ 56.6603 Air gap.

At least a 15-foot air gap shall be provided between the blasting circuit and the electric power source.

§ 56.6604 Precautions during storms.

During the approach and progress of an electrical storm, blasting operations shall be suspended and persons withdrawn from the blast area or to a safe location.

§ 56.6605 Isolation of blasting circuits.

Lead wires and blasting lines shall be isolated and insulated from power conductors, pipelines, and railroad tracks, and shall be protected from sources of stray or static electricity. Blasting circuits shall be protected from any contact between firing lines and overhead powerlines which could result from the force of a blast.

Equipment/Tools

§ 56.6700 Nonsparking tools.

Only nonsparking tools shall be used to open containers of explosive material or to punch holes in explosive cartridges.

§ 56.6701 Tamping and loading pole requirements.

Tamping and loading poles shall be of wood or other nonconductive, nonsparking material. Couplings for poles shall be nonsparking.

Maintenance

§ 56.6800 Storage facilities.

When repair work which could produce a spark or flame is to be performed on a storage facility—

(a) The explosive material shall be moved to another facility, or moved at least 50 feet from the repair activity and monitored; and

(b) The facility shall be cleaned to prevent accidental detonation.

§ 56.6801 Vehicle repair.

Vehicles containing explosive material and oxidizers shall not be taken into a repair garage or shop.

§ 56.6802 Bulk delivery vehicles.

No welding or cutting shall be performed on a bulk delivery vehicle until the vehicle has been washed down and all explosive material has been removed. Before welding or cutting on a hollow shaft, the shaft shall be thoroughly cleaned inside and out and vented with a minimum ½-inch diameter opening to allow for sufficient ventilation.

§ 56.6803 Blasting lines.

Permanent blasting lines shall be properly supported. All blasting lines shall be insulated and kept in good repair.

General Requirements

§ 56.6900 Damaged or deteriorated explosive material.

Damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer.

§ 56.6901 Black powder.

(a) Black powder shall be used for blasting only when a desired result cannot be obtained with another type of explosive, such as in quarrying certain types of dimension stone.

(b) Containers of black powder shall be—

(1) Nonsparking;

(2) Kept in a totally enclosed cargo space while being transported by a vehicle;

(3) Securely closed at all times when—

(i) Within 50 feet of any magazine or open flame,

(ii) Within any building in which a fuel-fired or exposed-element electric heater is operating, or

(iii) In an area where electrical or incandescent-particle sparks could result in powder ignition; and

(4) Open only when the powder is being transferred to a blasthole or another container and only in locations not listed in paragraph (b)(3) of this section.

(c) Black powder shall be transferred from containers only by pouring.

(d) Spills shall be cleaned up promptly with nonsparking equipment. Contaminated powder shall be put into a container of water and shall be disposed of promptly after the granules have disintegrated, or the spill area shall be flushed promptly with water until the granules have disintegrated completely.

(e) Misfires shall be disposed of by washing the stemming and powder charge from the blasthole, and removing and disposing of the initiator in accordance with the requirement for damaged explosives.

(f) Holes shall not be reloaded for at least 12 hours when the blastholes have failed to break as planned.

§ 56.6902 Excessive temperatures.

(a) Where heat could cause premature detonation, explosive material shall not be loaded into hot areas, such as kilns or sprung holes.

(b) When blasting sulfide ores where hot holes occur that may react with explosive material in blastholes, operators shall—

(1) Measure an appropriate number of blasthole temperatures in order to assess the specific mine conditions prior to the introduction of explosive material;

(2) Limit the time between the completion of loading and the initiation of the blast to no more than 12 hours; and

(3) Take other special precautions to address the specific conditions at the mine to prevent premature detonation.

§ 56.6903 Buring explosive material.

If explosive material is suspected of burning at the blast site, persons shall be evacuated from the endangered area and shall not return for at least one hour after the burning or suspected burning has stopped.

§ 56.6904 Smoking and open flames.

Smoking and use of open flames shall not be permitted within 50 feet of explosive material except when separated by permanent noncombustible barriers. This standard does not apply to devices designed to ignite safety fuse or to heating devices which do not create a fire or explosion hazard.

PART 57—[AMENDED]

1. The authority citation for part 57 is revised to read as follows:

Authority: 30 U.S.C. 811, 956, 961.

2. The expiration date published in the **Federal Register** of June 7, 1993 (58 FR 31908), for §§ 57.6140, 57.6220, 57.6320, 57.6330, 57.6331, 57.6375, and 57.6382 is extended to January 31, 1994.

3. The delay of effectiveness published in the **Federal Register** of June 7, 1993 (58 FR 31908), for the definition of "blast site" in § 57.6000, the first sentence in § 57.6130(b), and §§ 57.6131(a)(1), 57.6202(a)(1), 57.6304(b), 57.6306, 57.6501(a), 57.6902(b), 57.6903 and appendix I to subpart E, is delayed until January 31, 1994.

4. Effective January 31, 1994, subpart E of part 57 is revised to read as follows

Subpart E—Explosives

Sec.

57.6000 Defintitions.

Storage—Surface and Underground

57.6100 Separation of stored explosive material.
57.6101 Area around explosive material storage facilities.
57.6102 Explosive material storage practices.

Storage—Surface Only

57.6130 Explosive material storage facilities.
57.6131 Location of explosive material storage facilities.
57.6132 Magazine requirements.
57.6133 Powder chests.

Storage—Underground Only

57.6160 Main facilities.
57.6161 Auxiliary facilities.

Transportation—Surface and Underground

57.6200 Delivery to storage or blast site areas.
57.6201 Separation of transported explosive material.
57.6202 Vehicles.
57.6203 Locomotives.
57.6204 Hoists.
57.6205 Conveying explosives by hand.

Use—Surface and Underground

57.6300 Control of blasting operations.
57.6301 Blasthole obstruction check.
57.6302 Explosive material protection.
57.6303 Initiation preparation.
57.6304 Primer protection.
57.6305 Unused explosive material.
57.6306 Loading and blasting.
57.6307 Drill stem loading.
57.6308 Initiation systems.
57.6309 Fuel oil requirements for ANFO.
57.6310 Misfire waiting period.
57.6311 Handling of misfires.
57.6312 Secondary blasting.
57.6313 Blast site security.

Electric Blasting—Surface and Underground

57.6400 Compatibility of electric detonators.
57.6401 Shunting.
57.6402 Deenergized circuits near detonators.
57.6403 Branch circuits.
57.6404 Separation of blasting circuits from power source.
57.6405 Firing devices.
57.6406 Duration of current flow.
57.6407 Circuit testing.

Nonelectric Blasting—Surface and Underground

57.6500 Damaged initiating material.
57.6501 Nonelectric initiation systems.
57.6502 Safety fuse.

Extraneous Electricity—Surface and Underground

57.6600 Loading practices.
57.6601 Grounding.

Subpart E—Explosives

§ 57.6000 Definitions.

The following definitions apply in this subpart.

Attended. Presence of an individual or continuous monitoring to prevent unauthorized entry or access. In addition, areas containing explosive material at underground areas of a mine can be considered attended when all access to the underground areas of the mine is secured from unauthorized entry. Vertical shafts shall be considered secure. Inclined shafts or adits shall be considered secure when locked at the surface.

Barrier. A "material object, or objects that separates, keeps apart, or demarcates in a conspicuous manner such as cones, a warning sign, or tape."

Blast area. The area in which concussion (shock wave), flying material, or gases from an explosion may cause injury to persons. In determining the blast area, the following factors shall be considered:

(1) Geology or material to be blasted.

(2) Blast pattern.

(3) Burden, depth, diameter, and angle of the holes.

(4) Blasting experience of the mine.

(5) Delay system, powder factor, and pounds per delay.

(6) Type and amount of explosive material.

(7) Type and amount of stemming.

Blast site. The area where explosive material is handled during loading, including the perimeter formed by the loaded blastholes and 50 feet (15.2 meters) in all directions from loaded holes. A minimum distance of 30 feet (9.1 meters) may replace the 50-foot (15.2-meter) requirement if the perimeter of loaded holes is demarcated with a barrier. The 50-foot (15.2-meter) and alternative 30-foot (9.1-meter) requirements also apply in all directions along the full depth of the hole. In underground mines, at least 15 feet (4.6 meters) of solid rib, pillar, or broken rock can be substituted for the 50-foot (15.2-meter) distance. In underground mines utilizing a block-caving system or similar system, at least 6 feet (1.8 meters) of solid rib or pillar, including concrete reinforcement of at least 10 inches (254 millimeters), with overall dimensions of not less than 6 feet (1.8 meters), may be substituted for the 50-foot (15.2-meter) distance requirement.

Blasting agent. Any substance classified as a blasting agent by the Department of Transportation in 49 CFR 173.114a(a). This document is available at any MSHA Metal and Nonmetal Safety and Health district office.

Detonating cord. A flexible cord containing a center core of high explosives which may be used to initiate other explosives.

Detonator. Any device containing a detonating charge used to initiate an explosive. These devices include electric or nonelectric instantaneous or delay blasting caps, and delay connectors. The term "detonator" does not include detonating cord. Detonators may be either "Class A" detonators or "Class C" detonators, as classified by the Department of Transportation in 49 FR 173.53, and 173.100. This document is available at any MSHA Metal and Nonmetal Safety and Health district office.

Emulsion. An explosive material containing substantial amounts of oxidizers dissolved in water droplets, surrounded by an immiscible fuel.

Explosive. Any substance classified as an explosive by the Department of Transportation in 49 CFR 173.53, 173.88, and 173.100. This document is available at any MSHA Metal and Nonmetal Safety and Health district office.

Explosive material. Explosives, blasting agents, and detonators.

Flash point. The minimum temperature at which sufficient vapor is released by a liquid to form a flammable vapor-air mixture near the surface of the liquid.

Igniter cord. A fuse that burns progressively along its length with an external flame at the zone of burning, used for lighting a series of safety fuses in a desired sequence.

Laminated partition. A partition composed of the following material and minimum nominal dimensions: ½-inch-thick plywood, ½-inch-thick gypsum wallboard, ⅛-inch-thick low carbon steel, and ¼-inch-thick plywood, bonded together in that order. Other combinations of materials may be used, such as plywood, wood or gypsum wallboard as insulators, and steel or wood as structural elements, provided that the partition is equivalent to a laminated partition for both insulation and structural purposes as determined by appropriate testing. The Institute of Makers of Explosives (IME) 22 container or compartment, described in IME Safety Library Publication 22 (Jan. 1985), meets the criteria of a laminated partition. This document is available at any MSHA Metal and Nonmetal Safety and Health district office.

Loading. Placing explosive material either in a blasthole or against the material to be blasted.

Magazine. A bullet-resistant, theft-resistant, fire-resistant, weather-resistant, ventilated facility for the storage of explosives and detonators (BATF Type 1 or Type 2 facility).

Misfire. The complete or partial failure of explosive material to detonate as planned. The term also is used to describe the explosive material itself that has failed to detonate.

Multipurpose dry-chemical fire extinguisher. An extinguisher having a rating of at least 2–A:10–B:C and containing a nominal 4.5 pounds or more of dry-chemical agent.

Primer. A unit, package, or cartridge or explosives which contains a detonator and is used to initiate other explosives or blasting agents.

Safety switch. A switch that provides shunt protection in blasting circuits between the blast site and the switch used to connect a power source to the blasting circuit.

Slurry. An explosive material containing substantial portions of a liquid, oxidizers, and fuel, plus a thickener.

Storage facility. The entire class of structures used to store explosive materials. A "storage facility" used to store blasting agents corresponds to a BATF Type 4 or 5 storage facility.

Water gel. An explosive material containing substantial portions of water, oxidizers, and fuel, plus a cross-linking agent.

Storage—Surface and Underground

§ 57.6100 Separation of stored explosive material.

(a) Detonators shall not be stored in the same magazine with other explosive material.

(b) When stored in the same magazine, blasting agents shall be

separated from explosives, safety fuse, and detonating cord to prevent contamination.

§ 57.6101 Areas around explosive material storage facilities.

(a) Areas surrounding storage facilities for explosive material shall be clear of rubbish, brush, dry grass, and trees for 25 feet in all directions, except that live trees 10 feet or taller need not be removed.

(b) Other combustibles shall not be stored or allowed to accumulate within 50 feet of explosive material. Combustible liquids shall be stored in a manner that ensures drainage will occur away from the explosive material storage facility in case of tank rupture.

§ 57.6102 Explosive material storage practices.

(a) Explosive material shall be—

(1) Stored in a manner to facilitate use of oldest stocks first;

(2) Stored according to brand and grade in such a manner as to facilitate identification; and

(3) Stacked in a stable manner but not more than 8 feet high.

(b) Explosives and detonators shall be stored in closed nonconductive containers except that nonelectric detonating devices may be stored on nonconductive racks provided the case-insert instructions and the date-plant-shift code are maintained with the product.

Storage—Surface Only

§ 57.6130 Explosive material storage facilities.

(a) Detonators and explosives shall be stored in magazines.

(b) Packaged blasting agents shall be stored in a magazine or other facility which is ventilated to prevent dampness and excessive heating, weather-resistant, and locked or attended. Drop trailers that are currently licensed by the Federal, State, or local authorities for over-the-road use do not have to be ventilated. Facilities other than magazines used to store blasting agents shall contain only blasting agents.

(c) Bulk blasting agents shall be stored in weather-resistant bins or tanks which are locked, attended, or otherwise inaccessible to unauthorized entry.

(d) Facilities, bins or tanks shall be posted with the appropriate United States Department of Transportation placards or other appropriate warning signs that indicate the contents and are visible from each approach.

§ 57.6131 Location of explosive material storage facilities.

(a) Storage facilities for any explosive material shall be—

(1) Located so that the forces generated by a storage facility explosion will not create a hazard to occupants in mine buildings and will not damage dams or electric substations; and

(2) Detached structures located outside the blast area and a sufficient distance from powerlines so that the powerlines, if damaged, would not contact the magazines.

(b) Operators should also be aware of regulations affecting storage facilities in 27 CFR part 55, in particular, §§ 55.218 and 55.220. This document is available at any MSHA Metal and Nonmetal Safety and Health district office.

§ 57.6132 Magazine requirements.

(a) Magazines shall be—

(1) Structurally sound;

(2) Noncombustible or the exterior covered with fire-resistant material;

(3) Bullet resistant;

(4) Made of nonsparking material on the inside;

(5) Ventilated to control dampness and excessive heating within the magazine;

(6) Posted with the appropriate United States Department of Transportation placards or other appropriate warning signs that indicate the contents and are visible from each approach, so located that a bullet passing through any of the signs will not strike the magazine;

(7) Kept clean and dry inside;

(8) Unlighted or lighted by devices that are specifically designed for use in magazines and which do not create a fire or explosion hazard;

(9) Unheated or heated only with devices that do not create a fire or explosion hazard;

(10) Locked when unattended; and

(11) Used exclusively for the storage of explosive material except for essential nonsparking equipment used for the operation of the magazine.

(b) Metal magazines shall be equipped with electrical bonding connections between all conductive portions so the entire structure is at the same electrical potential. Suitable electrical bonding methods include welding, riveting, or the use of securely tightened bolts where individual metal portions are joined. Conductive portions of nonmetal magazines shall be grounded.

(c) Electrical switches and outlets shall be located on the outside of the magazine.

§ 57.6133 Powder chests.

(a) Powder chests (day boxes) shall be—

(1) Structurally sound, weather-resistant, equipped with a lid or cover, and with only nonsparking material on the inside;

(2) Posted with the appropriate United States Department of Transportation placards or other appropriate warning signs that indicate the contents and are visible from each approach;

(3) Located out of the blast area once loading has been completed;

(4) Locked or attended when containing explosive material; and

(5) Emptied at the end of each shift with the contents returned to a magazine or other storage facility, or attended.

(b) Detonators shall be kept in separate chests from explosives or blasting agents, except if separated by 4-inches of hardwood, laminated partition, or equivalent.

Storage—Underground Only

§ 57.6160 Main facilities.

(a) Main facilities used to store explosive material underground shall be located—

(1) In stable or supported ground;

(2) So that a fire or explosion in the storage facilities will not prevent escape from the mine, or cause detonation of the contents of another storage facility;

(3) Out of the line of blasts, and protected from vehicular traffic, except that accessing the facility;

(4) At least 200 feet from work places or shafts;

(5) At least 50 feet from electric substations;

(6) A safe distance from trolley wires; and

(7) At least 25 feet from detonator storage facilities.

(b) Main facilities used to store explosive material underground shall be—

(1) Posted with warning signs that indicate the contents and are visible from any approach;

(2) Used exclusively for the storage of explosive material and necessary equipment associated with explosive material storage and delivery;

(i) Portions of the facility used for the storage of explosives shall only contain nonsparking material or equipment.

(ii) The blasting agent portion of the facility may be used for the storage of other necessary equipment.

(3) Kept clean, suitably dry, and orderly;

(4) Provided with unobstructed ventilation openings;

(5) Kept securely locked unless all access to the mine is either locked or attended; and

(6) Unlighted or lighted only with devices that do not create a fire or explosion hazard and which are specifically designed for use in magazines.

(c) Electrical switches and outlets shall be located outside the facility.

§ 57.6161 Auxiliary facilities.

(a) Auxiliary facilities used to store explosive material near work places shall be wooden, box-type containers equipped with covers or doors, or facilities constructed or mined-out to provide equivalent impact resistance and confinement.

(b) The auxiliary facilities shall be—

(1) Constructed of nonsparking material on the inside when used for the storage of explosives;

(2) Kept clean, suitably dry, and orderly;

(3) Kept in repair;

(4) Located out of the line of blasts so they will not be subjected to damaging shock or flyrock;

(5) Identified with warning signs or coded to indicate the contents with markings visible from any approach;

(6) Located at least 15 feet from all haulageways and electrical equipment, or placed entirely within a mined-out recess in the rib used exclusively for explosive material;

(7) Filled with no more than a one-week supply of explosive material;

(8) Separated by at least 25 feet from other facilities used to store detonators; and

(9) Kept securely locked unless all access to the mine is either locked or attended.

Transportation—Surface and Underground

§ 57.6200 Delivery to storage or blast site areas.

Explosive material shall be transported without undue delay to the storage area or blast site.

§ 57.6201 Separation of transported explosive material.

Detonators shall not be transported on the same vehicle or conveyance with other explosives except as follows:

(a) Detonators in quantities of more than 1000 may be transported in a vehicle or conveyance with explosives or blasting agents provided the detonators are—

(1) Maintained in the original packaging as shipped from the manufacturer; and

(2) Separated from the explosives or blasting agents by 4 inches of hardwood, laminated partition, or equivalent. The hardwood, laminated partition, or equivalent shall be fastened to the vehicle or conveyance.

(b) Detonators in quantities of 1000 or fewer may be transported with explosives or blasting agents provided the detonators are—

(1) Kept in closed containers; and

(2) Separated from the explosives or blasting agents by 4-inches of hardwood, laminated partition, or equivalent. The hardwood, laminated partition, or the equivalent shall be fastened to the vehicle or conveyance.

§ 57.6202 Vehicles.

(a) Vehicles containing explosive material shall be—

(1) Maintained in good condition and shall comply with the requirements of subpart M of this part;

(2) Equipped with sides and enclosures higher than the explosive material being transported or have the explosive material secured to a nonconductive pallet;

(3) Equipped with a cargo space that shall contain the explosive material (passenger areas shall not be considered cargo space);

(4) Equipped with at least two multipurpose dry-chemical fire extinguishers or one such extinguisher and an automatic fire suppression system;

(5) Posted with warning signs that indicate the contents and are visible from each approach;

(6) Occupied only by persons necessary for handling the explosive material;

(7) Attended or the cargo compartment locked at surface areas of underground mines, except when parked at the blast site and loading is in progress; and

(8) Secured while parked by having—

(i) The brakes set;

(ii) The wheels chocked if movement could occur; and

(iii) The engine shut off unless powering a device being used in the loading operation.

(b) Vehicles containing explosives shall have—

(1) No sparking material exposed in the cargo space; and

(2) Only properly secured nonsparking equipment in the cargo space with the explosives.

(c) Vehicles used for dispensing bulk explosive material shall—

(1) Have no zinc or copper exposed in the cargo space; and

(2) Provide any enclosed screw-type conveyors with protection against internal pressure and frictional heat.

§ 57.6203 Locomotives.

Explosive material shall not be transported on a locomotive. When explosive material is hauled by trolley locomotive, covered, electrically insulated cars shall be used.

§ 57.6204 Hoists.

(a) Before explosive material is transported in hoist conveyances—

(1) The hoist operator shall be notified; and

(2) Hoisting in adjacent shaft compartments, except for empty conveyances or counterweights, shall be stopped until transportation of the explosive material is completed.

(b) Explosive material transported in hoist conveyances shall be placed within a container which prevents shifting of the cargo that could cause detonation of the container by impact or by sparks. The manufacturer's container may be used if secured to a nonconductive pallet. When explosives are transported, they shall be secured so as not to contact any sparking material.

(c) No explosive material shall be transported during a mantrip.

§ 57.6205 Conveying explosives by hand.

Closed, nonconductive containers shall be used to carry explosives and detonators to and from blast sites. Separate containers shall be used for explosives and detonators.

Use—Surface and Underground

§ 57.6300 Control of blasting operations.

(a) Only persons trained and experienced in the handling and use of explosive material shall direct blasting operations and related activities.

(b) Trainees and inexperienced persons shall work only in the immediate presence of persons trained and experienced in the handling and use of explosive material.

§ 57.6301 Blasthole obstruction check.

Before loading, blastholes shall be checked and, wherever possible, cleared of obstructions.

§ 57.6302 Explosive material protection.

(a) Explosives and blasting agents shall be kept separated from detonators until loading begins.

(b) Explosive material shall be protected from impact and temperatures in excess of 150° F when taken to the blast site.

§ 57.6303 Initiation preparation.

(a) Primers shall be made up only at the time of use and as close to the blast site as conditions allow.

(b) Primers shall be prepared with the detonator contained securely and completely within the explosive or contained securely and appropriately for its design in the tunnel or cap well.

(c) When using detonating cord to initiate another explosive, a connection shall be prepared with the detonating cord threaded through, attached

securely to, or otherwise in contact with the explosive.

§ 57.6304 Primer protection.

(a) Tamping shall not be done directly on a primer.

(b) Rigid cartridges of explosives or blasting agents that are 4 inches (100 millimeters) in diameter or larger shall not be dropped on the primer except where the blasthole contains sufficient depth of water to protect the primer from impact. Slit packages of prill, water gel, or emulsions are not considered rigid cartridges and may be drop loaded.

§ 57.6305 Unused explosive material.

Unused explosive material shall be moved to a protected location as soon as practical after loading operations are completed.

§ 57.6306 Loading and blasting.

(a) Vehicles and equipment shall not be driven over explosive material or initiating systems in a manner which could contact the material or system, or create other hazards.

(b) Once loading begins, the only activities permitted within the blast site shall be those activities directly related to the blasting operation and the activities of surveying, stemming, sampling of geology, and reopening of holes provided that reasonable care is exercised. Haulage activity is permitted near the base of the highwall being loaded provided no other haulage access exists.

(c) Loading shall be continuous except where adverse circumstances such as unfavorable atmospheric conditions, large equipment failure, or circumstances beyond the operator's control necessitate an interruption in loading.

(d) In electric blasting prior to connecting to the power source and in nonelectric blasting prior to attaching an initiating device, all persons shall leave the blast area except persons in a blasting shelter or other location that protects them from concussion (shock wave), flying material, and gases.

(e) When loading is completed and circuits are connected, the blasts shall be fired without undue delay unless adverse circumstances such as unfavorable atmospheric conditions, large equipment failure, or circumstances beyond the operator's control necessitate delay. If the time between the connection of circuits and the firing of the blast will exceed 72 hours, the operator shall notify the appropriate MSHA District Office before the 72 hours has elapsed.

(f) Before firing a blast—

(1) Ample warning shall be given to allow all persons to be evacuated;

(2) Clear exit routes shall be provided for persons firing the round; and

(3) All access routes to the blast area shall be guarded or barricaded to prevent the passage of persons or vehicles.

(g) No work shall resume in the blast area until a post-blast examination addressing potential blast-related hazards has been conducted by a person with the ability and experience to perform the examination.

§ 57.6307 Drill stem loading.

Explosive material shall not be loaded into blastholes with drill stem equipment or other devices that could be extracted while containing explosive material. The use of loading hose, collar sleeves, or collar pipes is permitted.

§ 57.6308 Initiation systems.

Initiation systems shall be used in accordance with the manufacturer's instructions.

§ 57.6309 Fuel oil requirement for ANFO.

(a) Liquid hydrocarbon fuels with flash points lower than that of No. 2 diesel oil (125° F) shall not be used to prepare ammonium nitrate-fuel oil, except that diesel fuels with flash points no lower than 100° F may be used at ambient air temperatures below 45° F.

(b) Waste oil, including crankcase oil, shall not be used to prepare ammonium nitrate-fuel oil.

§ 57.6310 Misfire waiting period.

When a misfire is suspected, persons shall not enter the blast area—

(a) For 30 minutes if safety fuse and blasting caps are used; or

(b) For 15 minutes if any other type detonators are used.

§ 57.6311 Handling of misfires.

(a) Faces and muck piles shall be examined for misfires after each blasting operation.

(b) Only work necessary to remove a misfire and protect the safety of miners engaged in the removal shall be permitted in the affected area until the misfire is disposed of in a safe manner.

(c) When a misfire cannot be disposed of safely, each approach to the area affected by the misfire shall be posted with a warning sign at a conspicuous location to prohibit entry, and the condition shall be reported immediately to mine management.

(d) Misfires occurring during the shift shall be reported to mine management not later than the end of the shift.

§ 57.6312 Secondary blasting.

Secondary blasts fired at the same time in the same work area shall be initiated from one source.

§ 57.6313 Blast site security.

Areas in which loading is suspended or loaded holes are awaiting firing shall be attended, barricaded and posted, or flagged against unauthorized entry.

Electric Blasting—Surface and Underground

§ 57.6400 Compatibility of electric detonators.

All electric detonators to be fired in a round shall be from the same manufacturer and shall have similar electrical firing characteristics.

§ 57.6401 Shunting.

Except during testing—

(a) Electric detonators shall be kept shunted until connected to the blasting line or wired into a blasting round;

(b) Wired rounds shall be kept shunted until connected to the blasting line; and

(c) Blasting lines shall be kept shunted until immediately before blasting.

§ 57.6402 Deenergized circuits near detonators.

Electrical distribution circuits within 50 feet of electric detonators at the blast site shall be deenergized. Such circuits need not be deenergized between 25 to 50 feet of the electric detonators if stray current tests, conducted as frequently as necessary, indicate a maximum stray current of less than 0.05 amperes through a 1-ohm resistor as measured at the blast site.

§ 57.6403 Branch circuits.

(a) If electric blasting includes the use of branch circuits, each branch shall be equipped with a safety switch or equivalent method to isolate the circuits to be used.

(b) At least one safety switch or equivalent method of protection shall be located outside the blast area and shall be in the open position until persons are withdrawn.

§ 57.6404 Separation of blasting circuits from power source.

(a) Switches used to connect the power source to a blasting circuit shall be locked in the open position except when closed to fire the blast.

(b) Lead wires shall not be connected to the blasting switch until the shot is ready to be fired.

§ 57.6405 Firing devices.

(a) Power sources shall be capable of delivering sufficient current to energize

all electric detonators to be fired with the type of circuits used. Storage or dry cell batteries are not permitted as power sources.

(b) Blasting machines shall be tested, repaired, and maintained in accordance with manufacturer's instructions.

(c) Only the blaster shall have the key or other control to an electrical firing device.

§ 57.6406 Duration of current flow.

If any part of a blast is connected in parallel and is to be initiated from powerlines or lighting circuits, the time of current flow shall be limited to a maximum of 25 milliseconds. This can be accomplished by incorporating an arcing control device in the blasting circuit or by interrupting the circuit with an explosive device attached to one or both lead lines and initiated by a 25-millisecond delay electric detonator.

§ 57.6407 Circuit testing.

A blasting galvanometer or other instrument designed for testing blasting circuits shall be used to test the following:

(a) In surface operations—

(1) Continuity of each electric detonator in the blasthole prior to stemming and connection to the blasting line;

(2) Resistance of individual series or the resistance of multiple balanced series to be connected in parallel prior to their connection to the blasting line;

(3) Continuity of blasting lines prior to the connection of electric detonator series; and

(4) Total blasting circuit resistance prior to connection to the power source.

(b) In underground operations—

(1) Continuity of each electric detonator series; and

(2) Continuity of blasting lines prior to the connection of electric detonators.

Nonelectric Blasting—Surface and Underground

§ 57.6500 Damaged initiating material.

A visual check of the completed circuit shall be made to ensure that the components are properly aligned and connected. Safety fuse, igniter cord, detonating cord, shock or gas tubing, and similar material which is kinked, bent sharply, or damaged shall not be used.

§ 57.6501 Nonelectric initiation systems.

(a) When the nonelectric initiation system uses shock tube—

(1) Connections with other initiation devices shall be secured in a manner which provides for uninterrupted propagation;

(2) Factory-made units shall be used as assembled and shall not be cut except that a single splice is permitted on the lead-in trunkline during dry conditions; and

(3) Connections between blastholes shall not be made until immediately prior to clearing the blast site when surface delay detonators are used.

(b) When the nonelectric initiation system uses detonating cord—

(1) The line of detonating cord extending out of a blasthole shall be cut from the supply spool immediately after the attached explosive is correctly positioned in the hole;

(2) In multiple row blasts, the trunkline layout shall be designed so that the detonation can reach each blasthole from at least two directions;

(3) Connections shall be tight and kept at right angles to the trunkline;

(4) Detonators shall be attached securely to the side of the detonating cord and pointed in the direction in which detonation is to proceed;

(5) Connections between blastholes shall not be made until immediately prior to clearing the blast site when surface delay detonators are used; and

(6) Lead-in lines shall be manually unreeled if connected to the trunklines at the blast site.

(c) When nonelectric initiation systems use gas tube, continuity of the circuit shall be tested prior to blasting.

§ 57.6502 Safety fuse.

(a) The burning rate of each spool of safety fuse to be used shall be measured, posted in locations which will be conspicuous to safety fuse users, and brought to the attention of all persons involved with the blasting operation.

(b) When firing with safety fuse ignited individually using handheld lighters, the safety fuse shall be of lengths which provide at least the minimum burning time for a particular size round, as specified in the following table.

TABLE E–1—SAFETY FUSE—MINIMUM BURNING TIME

Number of holes in a round	Minimum burning time
1	[1] 2 minutes.
2–5	2 minutes 40 seconds.
6–10	3 minutes 20 seconds.
11–15	5 minutes.

[1] For example, at least a 36-inch length of 40-second-per-foot safety fuse or at least a 48-inch length of 30-second-per-foot safety fuse would have to be used to allow sufficient time to evacuate the area.

(c) Where flyrock might damage exposed safety fuse, the blast shall be timed so that all safety fuses are burning within the blastholes before any blasthole detonates.

(d) Fuse shall be cut and capped in dry locations.

(e) Blasting caps shall be crimped to fuse only with implements designed for that purpose.

(f) Safety fuse shall be ignited only after the primer and the explosive material are securely in place.

(g) Safety fuse shall be ignited only with devices designed for that purpose. Carbide lights, liquefied petroleum gas torches, and cigarette lighters shall not be used to light safety fuse.

(h) At least two persons shall be present when lighting safety fuse, and no one shall light more than 15 individual fuses. If more than 15 holes per person are to be fired, electric initiation systems, igniter cord and connectors, or other nonelectric initiation systems shall be used.

Extraneous Electricity—Surface and Underground

§ 57.6600 Loading practices.

If extraneous electricity is suspected in an area where electric detonators are used, loading shall be suspended until tests determine that stray current does not exceed 0.05 amperes through a 1-ohm resister when measured at the location of the electric detonators. If greater levels of extraneous electricity are found, the source shall be determined and no loading shall take place until the condition is corrected.

§ 57.6601 Grounding.

Electric blasting circuits, including powerline sources when used, shall not be grounded.

§ 57.6602 Static electricity dissipation during loading.

When explosive material is loaded pneumatically or dropped into a blasthole in a manner that could generate static electricity—

(a) An evaluation of the potential static electricity hazard shall be made and any hazard shall be eliminated before loading begins;

(b) The loading hose shall be of a semiconductive type, have a total of not more than 2 megohms of resistance over its entire length and not less than 1000 ohms of resistance per foot;

(c) Wire-countered hoses shall not be used;

(d) Conductive parts of the loading equipment shall be bonded and grounded and grounds shall not be made to other potential sources of extraneous electricity; and

(e) Plastic tubes shall not be used as hole liners if the hole contains an electric detonator.

§ 57.6603 Air gap.

At least a 15-foot air gap shall be provided between the blasting circuit and the electric power source.

§ 57.6604 Precautions during storms.

During the approach and progress of an electrical storm—

(a) Surface blasting operations shall be suspended and persons withdrawn from the blast area or to a safe location.

(b) Underground electrical blasting operations that are capable of being initiated by lightning shall be suspended and all persons withdrawn from the blast area or to a safe location.

§ 57.6605 Isolation of blasting circuits.

Lead wires and blasting lines shall be isolated and insulated from power conductors, pipelines, and railroad tracks, and shall be protected from sources of stray or static electricity. Blasting circuits shall be protected from any contact between firing lines and overhead powerlines which could result from the force of a blast.

Equipment/Tools—Surface and Underground

§ 57.6700 Nonsparking tools.

Only nonsparking tools shall be used to open containers of explosive material or to punch holes in explosive cartridges.

§ 57.6701 Tamping and loading pole requirements.

Tamping and loading poles shall be of wood or other nonconductive, nonsparking material. Couplings for poles shall be nonsparking.

Maintenance—Surface and Underground

§ 57.6800 Storage facilities.

When repair work which could produce a spark or flame is to be performed on a storage facility—

(a) The explosive material shall be moved to another facility, or moved at least 50 feet from the repair activity and monitored; and

(b) The facility shall be cleaned to prevent accidental detonation.

§ 57.6801 Vehicle repair.

Vehicles containing explosive material and oxidizers shall not be taken into a repair garage or shop.

§ 57.6802 Bulk delivery vehicles.

No welding or cutting shall be performed on a bulk delivery vehicle until the vehicle has been washed down and all explosive material has been removed. Before welding or cutting on a hollow shaft, the shaft shall be thoroughly cleaned inside and out and vented with a minimum ½-inch diameter opening to allow for sufficient ventilation.

§ 57.6803 Blasting lines.

Permanent blasting lines shall be properly supported. All blasting lines shall be insulated and kept in good repair.

General Requirements—Surface and Underground

§ 57.6900 Damaged or deteriorated explosive material.

Damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer.

§ 57.6901 Black powder.

(a) Black powder shall be used for blasting only when a desired result cannot be obtained with another type of explosive, such as in quarrying certain types of dimension stone.

(b) Containers of black powder shall be—

(1) Nonsparking;

(2) Kept in a totally enclosed cargo space while being transported by a vehicle;

(3) Securely closed at all times when—

(i) Within 50 feet of any magazine or open flame,

(ii) Within any building in which a fuel-fired or exposed-element electric heater is operating, or

(iii) In an area where electrical or incandescent-particle sparks could result in powder ignition; and

(4) Open only when the powder is being transferred to a blasthole or another container and only in locations not listed in paragraph (b)(3) of this section.

(c) Black powder shall be transferred from containers only by pouring.

(d) Spills shall be cleaned up promptly with nonsparking equipment. Contaminated powder shall be put into a container of water and shall be disposed of promptly after the granules have disintegrated, or the spill area shall be flushed promptly with water until the granules have disintegrated completely.

(e) Misfires shall be disposed of by washing the stemming and powder charge from the blasthole, and removing and disposing of the initiator in accordance with the requirement for damaged explosives.

(f) Holes shall not be reloaded for at least 12 hours when the blastholes have failed to break as planned.

§ 57.6902 Excessive temperatures.

(a) Where heat could cause premature detonation, explosive material shall not be loaded into hot areas, such as kilns or sprung holes.

(b) When blasting sulfide ores where hot holes occur that may react with explosive material in blastholes, operators shall—

(1) Measure an appropriate number of blasthole temperatures in order to assess the specific mine conditions prior to the introduction of explosive material;

(2) Limit the time between the completion of loading and the initiation of the blast to no more than 12 hours; and

(3) Take other special precautions to address the specific conditions at the mine to prevent premature detonation.

§ 57.6903 Burning explosive material.

If explosive material is suspected of burning at the blast site, persons shall be evacuated from the endangered area and shall not return for at least one hour after the burning or suspected burning has stopped.

§ 57.6904 Smoking and open flames.

Smoking and use of open flames shall not be permitted within 50 feet of explosive material except when separated by permanent noncombustible barriers. This standard does not apply to devices designed to ignite safety fuse or to heating devices which do not create a fire or explosion hazard.

General Requirements—Underground Only

§ 57.6960 Mixing of explosive material.

(a) The mixing of ingredients to produce explosive material shall not be conducted underground unless prior approval of the MSHA district manager is obtained. In granting or withholding approval, the district manager shall consider the potential hazards created by—

(1) The location of the stored material and the storage practices used;

(2) The transportation and use of the explosive material;

(3) The nature of the explosive material, including its sensitivity;

(4) Any other factor deemed relevant to the safety of miners potentially exposed to the hazards associated with the mixing of the bulk explosive material underground.

(b) Storage facilities for the ingredients to be mixed shall provide drainage away from the facilities for leaks and spills.

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Part VIII

Department of Transportation

Federal Aviation Administration

14 CFR Parts 125 and 135
Training and Checking in Ground Icing Conditions; Proposed Advisory Circular on Training, Testing, and Checking; Interim Final Rule and Notice

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 125 and 135

[Docket No. 27459; Amendment No. 125–18, 135–46]

RIN 2120–AF09

Training and Checking in Ground Icing Conditions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule requires part 125 certificate holders to provide pilot testing on conducting operations in ground icing conditions, part 135 certificate holders to provide pilot training on conducting operations in ground icing conditions, and part 125 and 135 certificate holders to check airplanes for contamination (i.e., frost, ice, or snow) prior to takeoff when ground icing conditions exist. This rule is necessary because accident statistics and experience indicate the importance of effectively determining whether the airplane's wings and control surfaces are free of all frost, ice, or snow prior to beginning a takeoff. The rule is intended to provide an added level of safety to flight operations in ground icing conditions under parts 125 and 135.

DATES: This interim final rule is effective January 31, 1994. Additional comments must be received not later than April 15, 1994.

ADDRESSES: Comments on this interim final rule should be mailed, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC–200), Docket No. 27459, 800 Independence Ave., SW., Washington, DC 20591. Comments delivered must be marked Docket No. 27459. Comments may be examined in room 915G weekdays between 8:30 a.m. and 5 p.m., except on Federal holidays.

FOR FURTHER INFORMATION CONTACT: Larry Youngblut, Flight Standards Service, Regulations Branch, AFS–240, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–8096.

SUPPLEMENTARY INFORMATION:

Background

On September 21, 1993, the FAA published proposed requirements for ground deicing procedures for parts 125 and 135 certificate holders (58 FR 49164). Under the proposal and this interim final rule, when ground icing conditions exist, parts 125 and 135 certificate holders are required to check their airplanes for contamination prior to beginning takeoff. In addition, under the proposed and final revisions to part 125, certificate holders are required to provide pilot testing on ground deicing/anti-icing procedures, and under proposed and final revisions to part 135, certificate holders are required to provide pilot training on ground deicing/anti-icing procedures.

The FAA proposed the requirements in response to part 135 accidents that have been caused by pilots beginning takeoff with contamination adhering to critical airplane surfaces. Regulations covering procedures for ground icing conditions under parts 121, 125, and 135 have for many years relied on the basic "clean aircraft" concept, i.e., that no person may take off an airplane when frost, ice, or snow is adhering to the wings, control surfaces, or propellers of the airplane (§§ 121.629, 125.221, 135.227). Under these regulations, ultimate responsibility for determining that the airplane is free of contamination in icing conditions and thus complies with the "clean aircraft" concept rests with the pilot-in-command (PIC). Both the FAA and industry have developed guidance and recommended procedures to assist the PIC in making that determination.

In 1992, due to a number of ground icing related accidents that had occurred in part 121 operations and in response to industry-wide recommendations to improve the safety of operations during ground icing conditions, the FAA amended the part 121 regulations (57 FR 44924, September 29, 1992). The amended regulations retain the "clean aircraft" concept and in addition, require part 121 certificate holders to establish and comply with an FAA-approved ground deicing/anti-icing program.

At the time of the part 121 rulemaking, the FAA did not include parts 125 and 135 because of time constraints associated with that rulemaking and the need for further FAA review to determine the appropriateness of applying a similar rule to other types of operations.

Since that time, the FAA has reviewed the accident history for part 125 and 135 operations, conferred with industry representatives, and studied the recommendations from the National Transportation Safety Board (NTSB) and the General Accounting Office (GAO). Based on this review, the FAA today adopts interim final rules for part 125 and 135 certificate holders that are designed to achieve the same results as the recent part 121 regulations on ground deicing/anti-icing procedures.

This rule is based partly on the different types of aircraft operated under part 135 and the differences between how part 135 certificate holders operate as compared to part 121 certificate holders. It also reflects part 135 accident data which indicates pilots may lack full awareness of the dangers associated with takeoff with contamination adhering to the airplane's critical surfaces. In this rule the FAA is revising part 135 pilot training requirements to include training on the hazards associated with operating in ground icing conditions.

A part 135 operator that does not expect to authorize takeoffs in ground icing conditions is not required to incur the cost of training its pilots on operating aircraft in ground icing conditions. However, no certificate holder may authorize a takeoff and no pilot may take off unless the pilot has completed the training required in § 135.341 and described in § 135.345 for operating in ground icing conditions.

In addition to revised training, the rule also requires that whenever frost, ice, or snow may reasonably be expected to adhere to the airplane, the certificate holder must complete an approved pretakeoff contamination check within 5 minutes of beginning takeoff, comply with an approved alternative procedure (e.g., when technology permits, having approved ice detectors or sensors installed on the airplane's wings and control surfaces), or comply with the part 121 deicing/anti-icing rule.

Operations conducted under part 125 are also included in this rule. Part 125 covers passenger carrying and cargo carrying operations involving airplanes with a seating configuration of 20 or more passengers or a maximum payload capacity of 6,000 pounds or more, when common carriage is not involved. Although the FAA's review of accident history does not reveal any ground icing accidents or incidents during part 125 operations, the types of airplanes flown are similar to those used in parts 121 and 135, the same airports are used and the same weather conditions are encountered. Thus, operations conducted under part 125 are equally susceptible to the hazards associated with operating during ground icing conditions.

While most part 125 operators use the same type airplanes as those used in part 121 operations, the size and scope of part 125 operations are more similar to the size and scope of most part 135 operations. For example, the number of aircraft used, the number of employees,

and the extent of direct crew involvement for part 125 operations are more similar to part 135 operations than to part 121 operations. For this reason, the FAA is issuing rules for part 125 certificate holders that are comparable to those being required for part 135 certificate holders.

Unlike part 135, which contains pilot training requirements, part 125 contains pilot testing requirements. Therefore, under the rule, pilots operating under part 125 are required to be tested on the subject areas relating to ground icing conditions and procedures similar to those contained in the part 135 training requirements. Like their part 135 counterparts, part 125 certificate holders are also required to complete a pretakeoff contamination check within 5 minutes prior to beginning takeoff anytime conditions are such that frost, ice, or snow may reasonably be expected to adhere to the airplane. Alternatively, the certificate holder may comply with the part 121 deicing/anti-icing rule or with an approved alternative procedure, such as, when technology permits, having approved ice detectors or sensors installed on the airplane's wings and control surfaces.

This rule does not require part 125 and 135 certificate holders that do not anticipate operating during ground icing conditions to train or test their pilots or develop pretakeoff contamination check procedures. However, if pilots of a certificate holder that chooses not to train or develop deicing procedures encounter ground icing conditions, they will not be able to take off until such conditions no longer exist. Thus, the FAA is providing flexibility for certificate holders so they may determine to what extent this amended rule affects their operations.

The present provisions in parts 125 and 135 allowing takeoff with polished frost on the aircraft are retained. In addition, the amendments to parts 125 and 135 do not change the FAA's policy of permitting takeoff with small amounts of frost on the underwings in the area of fuel tanks of certain airplanes when authorized by the Administrator. The FAA has authorized takeoffs with small amounts of frost near the fuel tanks when this frost is caused by cold soaked fuel and when this frost is within aircraft manufacturer established limits that have been approved by FAA aircraft certification offices and these limits are stated in aircraft maintenance or aircraft flight manuals.

Helicopter operations conducted under part 135 have not been included in this rule because helicopter design characteristics and operations differ in many ways from airplane operations under part 135. However, the "clean aircraft" concept in § 135.227(a) continues to apply to helicopters. The FAA will continue to review whether additional deicing rulemaking is required for helicopters.

Discussion of Comments

General

More than 70 comments were received. Eighty percent of these were from part 135 certificate holders and most of these commenters objected to all or parts of the proposed rule. Comments were also received from associations representing part 135 air carriers, pilots, as well as other organizations dedicated to aviation safety. These associations and organizations, although generally supporting the intent of this rulemaking, also objected to various parts of the proposed rule. The FAA has carefully considered all of the comments received. A full discussion of comments and FAA responses follows.

Additional Comment Period

Several commenters object to the 15-day comment period and many more object to the rush to place this rule in effect for the 1993–1994 winter season. Several suggest that the FAA issue this rule as an interim final rule with time for additional comment as was done for the part 121 rule last year.

FAA Response

While the comment period was shorter than normally provided, the interest of aviation safety requires accelerated rulemaking to assure adequate ground deicing/anti-icing rules for this winter. In response to the comments received, the FAA agrees that it is in the public interest to make this an interim final rule, as proposed, and to provide an additional comment period to obtain further comments on the rule this winter. All comments received before April 15, 1994, will be carefully considered. If warranted, the FAA will make changes to the rule.

Applicability

The proposed and interim final rule apply to certificate holders operating airplanes under parts 125 and 135 in ground icing conditions.

One helicopter operator states that there is no justification for training its personnel on operations in ground icing conditions since helicopters are prohibited from operating in falling or blowing snow or in icing conditions. One commenter states that part 125 operators should be grouped with part 121 operators rather than with part 135 operators. Two persons operating single-engine airplanes, VFR only, questioned the applicability of the proposed rule to their operations. One stated his understanding that the rule would not apply to his business since he does not fly in icing conditions.

The Air Line Pilots Association (ALPA), while generally supporting the proposed rule, states that the proposal fosters "perpetuation of two levels of safety for scheduled air carrier operations." ALPA states that it has a policy goal of one level of safety for the traveling public and that this goal means "that aircraft having 10 seats or more being operated as a scheduled commuter air carrier should be held to the same safety standards required of scheduled part 121 air carriers." ALPA addresses and to some extent disputes each of the factors cited by the FAA (airplane size and design, pilots more personally involved in flight details, faster turn around time, shorter delays) for differentiating between part 135 and part 121 operations. ALPA concludes that "the option to choose § 121.629 requirements for part 135 scheduled commuter air carriers should be changed to a requirement."

The Aviation Consumer Action Project (ACAP) states that it "joins the NTSB, the GAO, the Dryden Commission and the Flight Safety Foundation in advocating one standard of safety for all scheduled air carriers."

FAA Response

The proposed and interim final rule language of §§ 135.227(b) and 135.345(b)(6)(iv) applies to airplane operations. Thus, no new requirements apply to helicopters. Persons who do not operate airplanes in potential ground icing conditions are not affected by this rule. This rule does not address inflight icing conditions.

In regard to ALPA's and ACAP's comments, the FAA believes that this rule provides an equivalent level of safety to the traveling public. Sections 121.629, 125.221, and 135.227 all embody the clean aircraft concept. The differences within these rules are the methods involved in assuring compliance. The FAA's goal in this rulemaking is twofold. First, as in part 121, pilots will be made fully aware, through training, of the dangers involved in beginning takeoff with contamination adhering to the airplane. Second, as in the amended § 121.629, pilots will be required to accomplish one or more checks (pretakeoff and/or pretakeoff contamination) prior to beginning takeoff. Requiring that a pretakeoff contamination check be completed within 5 minutes prior to beginning a takeoff is intended to provide an equivalent level of safety to

§ 121.629. The FAA has fully considered ALPA's comments on the FAA's rationale for differentiating between part 135 and part 121 operations and for proposing different rules for the different types of certificate holders. The FAA believes, for the reasons stated in the preamble to the NPRM and in this rulemaking that significant differences exist, and these differences justify a different means of achieving the same clean aircraft concept that has been required under both parts for many years.

As explained above, part 125 certificate holders have been grouped with part 135 operators in this rulemaking because their operations are more similar to part 135 operations in size and scope than to part 121 operations.

Justification

Virtually all of the adverse comments received question the FAA's justification for the rule. One commenter states that, since there have been no accidents attributed to ground icing by part 125 certificate holders, "that rate will be difficult to reduce."

Most commenters state that the 14 ground-icing related accidents involving airplanes operating under part 135 during the period 1984–1992 do not justify the rule. These commenters point out that in almost all of these accidents it is likely that the operator was in violation of the present requirements. These commenters state that what is needed is compliance with existing rules, not new rules. Also, a large number of commenters state that in most of the cited accidents poor judgment was involved and as one commenter states, "no amount of rulemaking or training will improve the judgment or common sense qualities of these types of individuals."

FAA Response

The FAA recognizes that no amount of rulemaking will ensure 100% compliance with the clean aircraft concept; however, the FAA believes that the training and testing required under this rule will create an increased awareness among part 125 and part 135 pilots that will assist and improve pilots' judgment and decision-making skills.

As is stated in the proposed rule preamble, a common thread throughout the accidents and incidents cited was the pilots' apparent lack of awareness of the potential hazard from even small amounts of frost, ice, or snow on an airplane's wings and control surfaces. Thus, the FAA has determined there is sufficient evidence to justify additional training or testing and pretakeoff checking procedures to ensure that the clean aircraft concept is met prior to a pilot beginning takeoff during ground icing conditions. Specifically part 125 pilot testing and part 135 pilot training must address the elements set forth in §§ 125.287(a)(9) and 135.345(b)(6)(iv). Pretakeoff checking procedures are set forth in §§ 125.221(b) and 135.227(b).

Operating Limitations—General

Proposed and final §§ 125.221(a) and 135.227(a), which require a "clean aircraft" in order to take off, contain the same requirements and exception as contained in current §§ 125.221(a) and 135.227(a).

One commenter states that a light coating of frost adhering to a helicopter rotor blade should not pose a threat to the safe operation of the aircraft. The commenter believes that it should be up to the pilot to determine when an accumulation of frost should be removed. The commenter states that no person should attempt to operate a helicopter if ice or snow is adhering to the blades.

Proposed and final §§ 125.221(b) and 135.227(b) are new and require that during ground icing conditions an aircraft may not take off unless the pilot has completed all applicable training as required by §§ 125.287(a)(9) or 135.341 (described in § 135.345) and unless other specified requirements are met. One commenter states that the reference in part 135 should be to § 135.345 (which specifies the required training for operating airplanes during ground icing conditions in paragraph (b)(6)(iv)) rather than to § 135.341.

FAA Response

Prohibiting a pilot from taking off if frost is adhering to a rotor blade has been the rule in part 135 for many years. No change was proposed to this requirement and hence the requirement is not subject to change in the interim final rule.

Proposed § 135.227(b) references § 135.341 because that section specifically requires part 135 certificate holders, other than those that use only one pilot in their operations, to establish and maintain an approved pilot training program. This training is described further in § 135.345.

Underwing Frost

Proposed §§ 125.221(a)(2) and 135.227(a)(2) would allow takeoffs to be made with frost under the wing in the area of the fuel tanks if authorized by the Administrator.

One commenter states that since "no hazard exists from underwing frost in the area of fuel tanks, the requirement for FAA approval should be deleted."

FAA Response

The proposed language in §§ 125.221(a)(2) and 135.227(a)(2) provides a regulatory mechanism for allowing takeoffs with small amounts of unpolished frost in the area of the fuel tanks. Technically, under the existing FAR takeoffs with any amount of unpolished frost are prohibited. Therefore, the reference in the rule to "FAA approval" is retained.

Pretakeoff Contamination Check

Proposed §§ 125.221(b)(1) and 135.227(b)(1) would require a pretakeoff contamination check to ensure that the wings and control surfaces are free of frost, ice, or snow. This check would have to be completed within 5 minutes prior to takeoff.

A number of commenters object to the pretakeoff contamination check contained in new § 135.227(b)(1). The most serious concern of these commenters is the requirement that the check must be completed within 5 minutes prior to takeoff. Commenters state that the 5-minute limitation is unrealistically short and that it would disrupt most operations. The Regional Airline Association (RAA) states that the proposed rule would require this check within 5 minutes of takeoff *"regardless of the elapsed time since being deiced, the type of fluid used, or holdover time* unless the operator complies with the entire part 121 rule or is able to install and use approved ice detectors or sensors." (emphasis in original). RAA states that this proposed rule "is more restrictive than the part 121 rule and is inconsistent with the proposed requirement that pilots must be trained in the use of holdover times for fluids being used." RAA recommends that the FAA in the final rule recognize that takeoff within recognized holdover times would be an acceptable alternative to the pretakeoff contamination check.

The National Air Transportation Association (NATA) states that the 5 minute limit for a contamination check is unnecessary and, perhaps, dangerous. NATA suggests that pilots, "in an effort to get their 'wheels in the well' in less than 5 minutes, may be tempted or even feel compelled to cut corners, to hasten through or abbreviate check lists, etc."

Several commenters point out that the description of the pretakeoff contamination check should read "within 5 minutes prior to beginning takeoff" as it does in part 121 rather than "within 5 minutes prior to takeoff" as proposed. The Aviation Consumer

Action Project (ACAP) expresses concern over whether the pretakeoff contamination check can be adequately conducted from inside the airplane. ACAP states that *"it is impossible for pilots to confidently identify the presence or absence of contamination due to ground icing without leaving the cockpit."* (emphasis in original). ACAP cites the November 1992 GAO recommendations in support of its position and urges the FAA to require tactile examination of critical surfaces as part of the approved pretakeoff contamination check for parts 125 and 135.

FAA Response

The FAA agrees with the commenter and to be consistent with the language used in § 121.629(c)(4), the word "beginning" has been inserted into the pretakeoff contamination check definition and the rule language has been changed accordingly. The requirement for a pretakeoff contamination check to be completed within 5 minutes prior to beginning takeoff should not be a burden for most part 125 and 135 certificate holders since, as a practical matter, some type of check must be made to ensure compliance with the clean aircraft concept requirements of the present rules. An approved pretakeoff contamination check is a check to make sure that the wings and control surfaces are free of frost, ice, or snow. The proposed and interim final rule language does not specify the details of this check or how many or what surfaces are to be checked, but leaves the airplane type specific details to be developed by the certificate holder to be submitted to the FAA for approval. This approval is the responsibility of the certificate holder's principal operations inspector (POI). Thus, this check could be the same procedure as presently conducted to assure compliance with the existing rules. Depending on the aircraft design, particularly for aircraft involved in part 135 operations, this check can often be made from inside the airplane.

The FAA believes that the proposed and adopted § 135.227(b)(1) is not more restrictive than the part 121 rule even though this new rule always requires a pretakeoff contamination check be completed within 5 minutes prior to beginning takeoff. A part 135 certificate holder that operates pursuant to § 135.227(b)(1) does not have to comply with several requirements applicable to part 121 certificate holders. Part 121 certificate holders, as part of their approved program, must: (1) Develop a management plan defining personnel responsibilities; (2) train all personnel associated with the ground deicing/anti-icing process; (3) use holdover timetables; and (4) complete pretakeoff check procedures. Despite not applying these requirements to part 135 certificate holders, the FAA believes that an equivalent level of safety is maintained by requiring part 135 certificate holders to always complete a pretakeoff contamination check within 5 minutes prior to beginning takeoff. In any event, § 135.227(b)(3) allows part 135 certificate holders, that find it more advantageous to their operations, to comply with § 121.629(c) in lieu of always accomplishing a pretakeoff contamination check.

The FAA does not believe completing a pretakeoff contamination check 5 minutes prior to beginning takeoff would encourage pilots to "cut corners or hasten through or abbreviate check lists" because the pretakeoff contamination check would be one of the last checks initiated prior to takeoff.

The FAA does not agree with the ACAP assertion that it is impossible for a pilot to complete the required pretakeoff contamination check without leaving the cockpit. The rule, as proposed and as issued, requires this check to be "established by the certificate holder and approved by the Administrator for the specific airplane type * * *" In approving pretakeoff contamination check procedures for different airplane types, the FAA will consider the effects of each airplane's design on the crew's ability to ensure that the clean aircraft concept is met.

Approved Alternative Procedures

Sections 125.221(b)(2) and 135.227(b)(2) allow certificate holders to use an approved alternative procedure (to the pretakeoff contamination check) to ensure that their airplanes are free of frost, ice, or snow.

One commenter questions the availability of guidelines for use by inspectors in the field in implementing such alternative procedures. This commenter says that the only existing guidelines are in § 121.629 and asks if the FAA would accept an alternative procedure that does not meet part 121 requirements. Finally, this commenter says that the technology to detect surface frost, ice, or snow on an aircraft on the ground does not exist. The use of such equipment as part of an alternative procedure, as suggested by the FAA, would therefore not be a viable alternative.

FAA Response

The option to use an approved alternative procedure was included to permit certificate holders to develop alternative check procedures, such as industry development of new technologies. The FAA believes that certificate holders should take the initiative to develop such alternative procedures and submit them to the FAA for approval. Any such alternative procedures must be specifically designed for the type of aircraft and the type of operations in which they would be used. Contrary to the commenter's assertion, § 121.629 does not contain guidance for approval of an alternative procedure. Advisory Circular (AC) 135–XX, which appears in today's issue of the **Federal Register**, provides both guidance and coordination procedures to POI's for evaluating alternative procedures.

Compliance with Part 121 Deicing/Anti-icing Program

Sections 125.221(b)(3) and 135.227(b)(3) allow certificate holders to use an approved deicing/anti-icing program that complies with § 121.629(c) as an alternative means to comply with this rule.

Two commenters point out that there is a difference between part 135 scheduled air carriers and part 135 on-demand air carriers and that the proposed rule can only apply to the former. One of these commenters says that on-demand carriers could not implement this type of program because of the vast number of airports served and the lack of company trained personnel other than pilots.

One of the above commenters also says that training and testing previously completed in voluntary compliance with the part 121 rule and the proposed advisory circular on ground deicing and anti-icing should be accepted as evidence of compliance with § 135.227(b)(3). This commenter says that the final rule or supporting advisory circular should contain language to ensure that field inspectors are aware that they do not have to retrain and retest to comply with the new rule.

One commenter says that the proposed rule's cross reference to § 121.629(c) does not take into account that part 135 operators do not maintain part 121 documents. This commenter says that this part 121 material should be contained in the part 135 proposed rule.

FAA Response

The FAA agrees that a deicing/anti-icing program that complies with § 121.629(c) would not be selected by most part 135 on-demand air carriers. It would probably be more efficient for

most of these carriers to comply with the training and pretakeoff contamination check requirements of new § 135.227(b)(1).

Any training voluntarily completed and documented under the part 121 rule would be viewed as satisfying the part 135 deicing/anti-icing pilot training requirements provided the training covered the elements included in this rule and if the training was specific to the aircraft and operations being conducted under part 135. Part 135 certificate holders can obtain the part 121 rule and associated advisory circular by contacting the person identified under **FOR FURTHER INFORMATION CONTACT.**

Initial, Transition, and Upgrade Ground Training

Proposed § 135.345 would require initial, transition, and upgrade ground training for pilots in the knowledge and procedures necessary for operating airplanes during ground icing conditions. (Similarly § 125.287 would require initial and recurrent testing for pilots on such knowledge and procedures.)

Many part 135 certificate holders commented on the proposed training requirements. Most of these commenters say that the proposed training is unnecessary because their training programs already cover frost, ice, and snow removal in accordance with existing part 135 requirements (§ 135.227). Several commenters say that such training is included in their curricula for cold weather operations. One commenter addresses deicing in the "preflight check" portion of its training manual. This commenter also points out that deicing is addressed in FAA Advisory Circular 91–13C, "Removal of Frost, Ice & Snow", as well as in pilot training for a private pilot's license and the private pilot and commercial pilot written tests.

A number of commenters say that it would be cumbersome, time consuming, and costly to create a separate training section on ground deicing. Other commenters say that the proposed rule is not justified considering the low accident rate involving part 135 airplanes where ground icing was the probable cause.

One commenter says that most part 135 operators fly into different type air fields, each with its own deicing procedures, and that it would be impractical to create a training manual to cover all the possible deicing situations.

One commenter says that if "hands on" training with glycol/water solutions becomes required, the result will be a significant environmental impact and much higher costs to the operator.

A number of commenters provide suggestions or alternative ways in which they argue the FAA should require training in ground icing conditions. One commenter says that training for pilots to recognize snow or ice, or its effects, should be covered under pilot certification rules in part 61. Another commenter says that training must be comprehensive to ensure improved pilot technique in icing conditions. A third commenter points out the need for additional training and testing covering the effect of contamination on airfoils and its relationship to aircraft performance for those seeking commercial pilot certification (parts 61 and 91).

Another commenter requests that the FAA develop and publish an Advisory Circular to provide suggested methods to comply with proposed § 135.345, particularly in terms of the 1 hour initial training requirement (during the first year after the effective date of the rule).

FAA Response

The FAA recognizes that most training programs under part 135 already address operations in ground icing conditions. The intent of this rule is to ensure that all pilots being trained under part 135 acquire knowledge and skills in all of the specific topics listed in § 135.345(b)(6)(iv). Certificate holders who already cover all of these topics can obtain approval by showing those parts of their training program to their POI's. Certificate holders who do not currently cover all of these topics will need to add whatever material is missing to their training programs. A separate training section on deicing is not necessary.

The FAA disagrees with commenters who suggest that training on ground icing characteristics should be exclusively covered under part 61 pilot certification rules or part 91 general operating rules. It is only under the part 135 training programs or part 125 testing programs that pilots can learn not only the characteristics of airplane surface contamination, but also the procedures for dealing with such contamination in their particular work environment. Much of the information learned under §§ 125.287(a)(9) and 135.345(b)(6)(iv) will be tailored to the operations of each certificate holder.

FAA developed advisory material is discussed under the implementation section of this preamble.

Recurrent Training

Section 135.351 requires recurrent training for pilots on the subjects required for initial ground training on icing conditions, as appropriate, as well as emergency training.

One commenter says that the changes proposed for § 135.227 and § 135.345 are proposed for airplanes, yet the change proposed for § 135.351 applies to all aircraft.

FAA Response

The language added to § 135.351(b)(2) in both the proposed and interim final rule references §§ 135.341 and 135.345 so that the limitation to airplanes in these sections applies.

Implementation

The NPRM, published on September 21, 1993, allowed a 15-day comment period and proposed an effective date for all part 125 and 135 certificate holders of November 1, 1993. The preamble states that a certificate holder who intends to operate in ground icing conditions on or after that date would have to amend its approved training or testing program, initially train or test its pilots, develop procedures for accomplishing pretakeoff contamination checks for each type airplane, and have the FAA approve these procedures.

The preamble also states that the FAA is aware that requiring all pilots to be fully trained or tested by the effective date could be financially and logistically impractical for some certificate holders. Therefore, if training or testing cannot be completed as part of a certificate holder's established initial training or testing program by the effective date, the FAA announced that it would allow certificate holders to submit training or testing materials for approval by the certificate holder's POI. For this first year, the FAA has determined that approved pilot bulletins or other written take-home training materials (e.g., self-graded quizzes or video tapes) will be sufficient for initial pilot training or testing. If pilots complete these approved materials, the FAA would consider initial training/testing provisions of this rule satisfied. The certificate holder could then integrate these materials into its established training or testing program.

A number of comments were received on implementation. All comments state that the implementation date is unrealistic. One commenter states that the implementation time should be at least as long as that allowed for part 121 and another that the date for completion of pilot training programs should not be sooner than 90 days after issuance of FAA guidance material. Another commenter requests there be a phase-in allowed, beginning with those operations most likely to encounter

ground icing conditions. Several commenters need clarification on what must be accomplished by the implementation date.

Some commenters believe that the FAA cannot approve the programs in such a short time. In connection with FAA approval, one commenter asks what the consequences will be for certificate holders who after complying with the provisions of the new rule do not receive the required Operations Specifications and training program approval from the FAA by the deadline. This commenter would like an FAA policy statement specifying the options available to air charter operators who find themselves not in compliance through no fault of their own. The same commenter asks if an FAA approved annotation in a certificate holder's Operations Specifications to not attempt a takeoff when ground icing or falling snow conditions exist would meet the provisions of the proposed rule. One commenter says that, in its opinion, an amendment to the Aircraft Flight Log, and a new form would have to be developed, approved, and reproduced to show compliance with the pretakeoff contamination check. The time frame for such approval is approximately 90 days.

One commenter points out that FSDO offices are not fully staffed and that it would be difficult for POIs to review and approve these training programs in the time frame outlined in the notice (especially considering the proposed requirement that POIs review and approve pretakeoff contamination check procedures under proposed § 135.227(b)(1)).

One commenter recommends that the final preamble specifically allow for the use of take-home brochures, video tapes, self-grading quizzes or other types of review material as the part 121 interim final rule preamble allowed. Another commenter says that, because of the FAA imposed time line, the FAA should allow initial training and testing material to be distributed to flight crewmembers concurrent with the FAA approval process.

Two commenters mention that the guidance material promised by the FAA has not been issued and that complying with the rule will be difficult without FAA guidance.

FAA Response

The FAA's intent in this action was to have the rule implemented by the winter of this year. The FAA recognized that this would be a short implementation period, but believed that most part 125 and 135 certificate holders operating in ground icing conditions already have some type of procedures for ensuring compliance with the clean aircraft concept while operating during ground icing conditions (in compliance with §§ 125.221 and 135.227) and provide pilot training on these procedures. Therefore, to comply with this interim final rule, a certificate holder must have the training or testing program approved by the FAA, initially train or test its pilots, develop procedures for accomplishing pretakeoff contamination checks for each type airplane, and have these procedures approved by the FAA. If a certificate holder only provides minimal training on procedures for ground icing conditions now, the time frame does impose a greater burden. The FAA has developed a draft advisory circular, AC 135–XX, which when final will provide an outline of the material that the FAA would find acceptable to be included within a certificate holder's training program or testing procedure. The draft AC is published in this issue of the **Federal Register**.

After POI approval and completion of the approved materials by the certificate holder's pilots, the certificate holder will have satisfied the initial training/testing provisions of this rule. As mentioned previously, these materials may be take-home materials, video tapes, self-grading quizzes, or other materials. In effect, this allows a certificate holder to quickly provide initial training to its pilots and provides additional time for the certificate holder to amend its established training program.

The FAA does not believe that a phase-in of ground operating deicing procedures would accomplish the intent of the rule; however, if a certificate holder does not conduct operations with certain airplanes in ground icing conditions, procedures and training for these airplanes are not required by this rule.

The FAA has decided to make the rule effective on January 31, 1994. This will provide approximately the same time allowed after publication of the part 121 rule.

The FAA intends to move quickly to review and approve or deny the pretakeoff contamination check procedures and training or testing materials. The FAA has conducted training sessions for POIs and has provided POIs with guidance materials to facilitate their review.

Discussion of Cost Comments

Actual Operational Costs

One commenter states that the cost figures contained in the NPRM Regulatory Evaluation includes only training costs. Moreover, the commenter states that the actual operational costs need to be analyzed as well, prior to a fair benefit-cost determination. Another commenter states that the most important cost element has been ignored—the cost of purchasing, maintaining, and operating the deicing equipment.

FAA Response

Part 135 operators are not expected to incur significant operational costs. Of the three types of potential operational cost components (training and related functions, deicing fluids, and deicing equipment), only training is expected to impose significant incremental costs. Since deicing equipment is already in place at all major and medium size hub airports, it is unlikely that additional deicing equipment will be required by part 135 operators at these airports. Even though the deicing rule for part 121 had little, if any, impact on small airports, deicing equipment is already being used at these airports. During icing conditions, parts 125 and 135 aircraft operators at all airports (regardless of size) in the U.S. are required by §§ 125.221(b) and 135.227(b) of the FAR to utilize the FAA's "Clean Aircraft Concept," i.e., no aircraft is permitted to take off unless it is free of contamination (i.e., ice, snow, frost, etc.). Because of enhanced safety awareness as a result of the additional testing and training required by this rule, the FAA expects some increase in the use of deicing equipment. However, the need for additional deicing equipment is expected to be insignificant.

The FAA has not included any delay costs in this regulatory evaluation that might be incurred as a result of increased deicing. The FAA believes that delays for part 135 aircraft operations would not be significant for several reasons. First, part 135 operations, because of their flexible runway requirements and quick turnaround times, often do not experience the same delays associated with larger part 121 operations. Also, many part 135 and part 125 operations take place at small airports that do not experience large numbers of simultaneous arrivals and departures associated with the larger air carrier's hub and spoke operations.

The FAA invited comments associated with delay costs for the interim part 121 rule and none were received. However, the FAA invites part 135 and part 125 certificate holders to comment on any delay costs associated with this interim final rule.

Reduction in Services

One commenter states that the unnecessary requirements of this proposed rule and similar types of programs drive up costs for operators in an already floundering industry. In addition, this commenter contends that higher costs will ultimately reduce the services his company can offer to the flying public.

This commenter also asserts that station and vender auditing will increase dramatically for certain operators. Furthermore, the commenter notes that many of the industry's single-engine 135 operators will require deicing equipment at stations where they previously needed none, or at least require regular auditing of vendors. Currently, these vendors are seldom used, if ever. Additional deicing equipment purchase expenses for these operations will mount astronomically, according to this commenter.

FAA Response

A review of the accident history, as discussed in the background section of the NPRM, indicates this rule is necessary. While the commenter believes that station and vendor auditing will increase, the commenter failed to provide any data for the agency to evaluate nor has the commenter disproved the FAA's original assessment of costs and benefits associated with this rule. The comment regarding the need for additional deicing equipment has been discussed previously.

Loss of Revenue Days

One commenter notes that besides the added cost of the additional training, there will be a loss of revenue on days they are unable to fly due to this rule being implemented too close to the winter season.

FAA Response

The FAA disagrees with this commenter. The loss in revenues on days an air carrier is unable to fly during icing conditions would not be attributed to this rule. Currently, no air carrier can take off from a U.S. airport (regardless of size) unless it is free of contamination, as required by §§ 125.221(b) and 135.227(b) of the FAR. More on this issue and related matters is discussed in detail under "The Implementation" section of this document.

Number of Operators Impacted

This commenter states that the FAA's estimate that 70 percent of the part 135 unscheduled operators are potentially impacted by the proposed rule is not realistic, i.e., this 70 percent estimate should be higher. This commenter also mentions that Docket No. 27459 is unjustified based on potential costs and benefits.

FAA Response

The FAA disagrees with this commenter. As explained in the full regulatory evaluation, an estimated 70 percent of part 135 unscheduled aircraft operators are expected to be impacted by the rule. This assessment is stated as an assumption based on data received from the FAA's Office of Flight Standards, Management Information Section, in Oklahoma City, Oklahoma. The data represent the total number of active parts 125 and 135 certificate holders by city, state, name of operator, number of employees, type of aircraft, and number of seats. Based on this information, the FAA was able to estimate the number of air taxi certificate holders in warm climates who would not be impacted by this proposed rule, since such certificate holders would rarely encounter ground icing conditions. More descriptive information on the derivation of the 70 percent estimate is contained in the full evaluation of this rule.

Lost Revenue and Reduced Aircraft Operations

Several commenters contend that as the result of the proposed rule, additional research will have to be conducted for operations in and out of airports that are not certified for part 121 operations. Furthermore, these commenters state that, in most instances, they have found that smaller airports servicing part 135 on-demand operators do not have deicing equipment readily available that will be required to comply with the proposed rule. Without such equipment at small airports, on-demand operator services could be reduced according to these commenters. In conclusion, these commenters point out that the proposed rule could result in considerable loss in revenue and discontinued operations by some operators.

FAA Response

As stated in the NPRM, the FAA intends to issue an interim final rule. Therefore, the FAA would continue to accept comments from all impacted parties on costs that are not adequately reflected in its regulatory evaluation, especially with regard to the purchase of additional deicing equipment and deicing fluid by operators for use at small airports. As the result of the FAA's current "Clean Aircraft Concept", the FAA believes the demand for additional deicing equipment at small airports will be insignificant, and little if any reduction in on-demand service will occur.

Accurate Cost Estimation

According to several commenters, the cost estimates of the proposed rule cannot be calculated accurately. They contend that additional information is required to make this determination. Such information should contain answers to these questions: what is the availability of deicing equipment at smaller, non-hub airports complying with the NPRM?, how much deicing equipment is available at each destination/departure airport?, will additional equipment be required to complete the pre-takeoff contamination checks?, etc.

FAA Response

The FAA has estimated costs of this rule based on the best available data. These commenters, while disagreeing with the FAA cost estimates, did not provide any additional data. Therefore, the FAA retains its original cost estimates. However, as stated in the NPRM, the FAA is issuing an interim final rule. Therefore, the FAA will continue to accept comments from all impacted parties on costs that are not adequately reflected in its regulatory evaluation, especially with regard to the purchase of additional deicing equipment and deicing fluid by operators.

Modification of Training/Testing Program Costs

One operator asserts that the FAA economic impact of the proposed rule is misstated. According to this commenter, modification of the manuals will take 8 hours for each operator plus at least 8 hours of FAA review time. Coupled with the revision of all manuals for the industry's pilots and training, this commenter estimates the cost burden to his company to be $3,000 rather than $1,350 as estimated by the FAA.

FAA Response

The FAA disagrees with this commenter. Using 8 hours, the FAA was unable to derive the commenter's cost estimate of $3,000 for the modification of its manuals. This problem is due to the fact that the commenter fails to provide specific details of how the cost estimate was derived. In the full regulatory evaluation, the FAA provides detailed means on how it derived its cost estimates of $1,350 to $2,700 for the modification of manuals (and other materials) by operators. Without a similar illustration or explanation, the

FAA is unable to evaluate the merits of this commenter's remarks. Therefore, the FAA retains its original cost estimates.

Environmental Analysis

This rule is a federal action that is subject to the National Environmental Policy Act (NEPA). Under applicable guidelines of the President's Council on Environmental Quality and agency procedures implementing NEPA, the FAA normally prepares an environmental assessment (EA) to determine the need for an environmental impact statement (EIS) or whether a finding of no significant impact (FONSI) would be appropriate. (40 CFR 1501.3; FAA Order 1050.1D appendix 7. par 4 (a)). In the NPRM the FAA requested comments on the following:

(1) Whether the proposed rule will increase the use of deicing fluid,

(2) The impact, if any, of using these deicing fluids on taxiways "just prior to takeoff," and

(3) Containment methods currently used that can be adapted to other locations on an airport.

Two commenters state that the proposed rule will lead to increased use of deicing fluids. One commenter believes that the rule will cause excessive and unnecessary use of deicing fluids that will result in disposal problems and increased expense. Another commenter questions FAA's belief that "the rule will not promote significant additional use of deicing fluids" when the use of these fluids is the only method discussed in planned training and testing operations.

FAA Response

An EA that supports a FONSI is included in the docket for this rulemaking. The EA discusses in detail the potential effect of this rule and addresses in general terms the issues raised by the comments summarized above. The following discussion addresses these issues.

With respect to the potential for significantly increased use of deicing fluids, this is unlikely because no changes in deicing/anti-icing operations are required under the proposed rule, and therefore little, if any incremental increase in impact is anticipated due to implementation of the proposed rule. Training on fluids is only required for part 125 and part 135 certificate holders that presently use or plan to use deicing fluids. Training focuses on increased training and awareness for the use of these fluids that will result in more effective use and application of the deicing fluids currently being used.

With respect to increased disposal problems, the characteristics of glycols which are the active component of deicing/anti-icing fluids (e.g., low toxicity, low ecotoxicology, low volatility, high biodegradability) lead to minor environmental and public health impacts. Mitigation measures for air (release reporting under CERCLA) and water quality (storm water discharge NPDES permits) will reduce the possible minor impacts even further, producing no significant impacts overall. And finally, the baseline environment of airports are already affected by ongoing airport operations, including current deicing/anti-icing programs.

Paperwork Reduction Act

Information collection requirements in these amendments to parts 125 and 135 have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511). The OMB control number is 2120–0578.

Regulatory Evaluation Summary

The FAA has determined that this final rule is not a "significant rulemaking action", as defined by Executive Order 12866 (Regulatory Planning and Review). The anticipated costs and benefits associated with this final rule are summarized below. (A detailed discussion of costs and benefits is contained in the full evaluation in the docket for this final rule).

Costs

The FAA estimates that the total compliance cost of this final rule will be $8.1 million over the next 10 years, in 1992 dollars. On a discounted basis (using a 7 percent rate of interest), the total potential cost is $6.7 million. This estimate is based on costs to comply with three requirements: (1) Initial Training/Testing of Pilots, (2) Recurrent Training/Testing of Pilots, and (3) Modification of the Training/Testing Program. The cost of each of these components is discussed below.

Initial Training/Testing of Pilots

The FAA assumes that all pilots under part 125 will receive initial testing and pilots under part 135 will receive initial training of 1 hour during the first year after this rule becomes effective. Training and testing will be for pilots-in-command (PICs) and pilots second-in-command (SICs). Costs for these pilots are based on their hourly wage rates of $62 and $33, respectively. The cost of initial training and testing was derived based on the total number of PICs and SICs that are expected to be trained multiplied by their respective hourly wages.

Based on aircraft data obtained from the FAA Flight Standards Service Office, Information Management Section, there are an estimated 7,950 active fixed-wing aircraft operating under parts 125 and 135 that will be affected by the rule. However, many of these aircraft operate in climates that do not experience icing conditions; therefore, FAA estimates that about 7,950 (approximately 70 percent) will be affected by this rule. In order to estimate the total number of pilots that will be trained, the number of affected airplanes was multiplied by four pilots (two active and two reserve); this is approximately 29,300 pilots. Multiplying the number of pilots trained by their average hourly wage rate of $48 results in initial training/testing costs of $1.4 million (or $1.3 million, discounted).

Recurrent Training/Testing of Pilots

The recurrent training/testing required annually for each pilot will start in the second year of the 10-year time frame of the rule. The FAA estimates that the training will take approximately 15 minutes and cost $12 ($48 per hour x .25) per pilot. This cost estimate multiplied by the total number of pilots (29,300) results in estimated annual recurrent training costs of $350,000. Over the next 10 years, this cost will be $3.2 million (or $2.2 million, discounted).

Modification of Training/Testing Program

While the FAA cannot precisely estimate to what extent operators will incur costs as the result of modifying their respective training/testing programs, this evaluation assumes that some additional costs will be incurred. To calculate these costs, the FAA estimated that this rule will affect 97 scheduled part 135 operators, 2,043 unscheduled part 135 operators, and 26 part 125 operators. The one-time cost estimate of $2,700 (scheduled part 135 operators) and $1,350 (part 125 and unscheduled part 135 operators) for training/testing program modifications multiplied by the total number of operators amounts to $3.1 million (or $2.9 million, discounted). The FAA solicits comments prior to April 15, 1994 from the aviation community, particularly operators under parts 125 and 135, regarding the actual training costs and total compliance costs that are incurred.

Benefits

This final rule will generate potential safety benefits of $14.2 million (or $10.0 million, discounted) over the next 10 years, in 1992 dollars. These benefits will be the reduction in fatalities, serious injuries, and property loss from accidents involving ice contamination for airplane operations under parts 125 and 135.

To estimate the potential benefits associated with this rule, the FAA examined all of the part 135 icing accidents that have occurred from 1984 to 1992. A similar effort was employed for part 125 operations; however, there were no icing accidents or incidents involving part 125 operators. Even though there were no relevant part 125 ground icing accidents during the period examined, the FAA believes that there will be some part 125 future benefits from accidents avoided. Between 1984 and 1992, there were 14 accidents with 7 fatalities, 2 serious injuries, and 8 minor injuries. These accidents were examined closely to answer the following questions:

- To what extent will this rule have prevented the accident from occurring?
- What other factors (other than ice on the airframe) contributed to the accident?
- If there were other factors, how much did these factors contribute to the accident?

The analytical approach employed to quantify the potential safety benefits focuses on the increased safety awareness resulting from this additional training and testing and the improved checking procedures. Under this rule, a pilot will most likely perform a visual pretakeoff contamination check prior to departure. Alternatively, certificate holder's may have FAA approved ice detectors or sensors installed on the airplane's critical surfaces, or may comply with the part 121 deicing/anti-icing interim rule.

The FAA recognizes that there are many uncertainties when dealing with winter storms, human error, etc, and that even under this rule, it is possible that an accident may occur. Some of the 14 known accidents identified in this evaluation may have occurred even in the absence of icing conditions. Consequently, for purposes of this evaluation, the FAA is claiming as benefits generated by this rule, only 60 percent of the casualty losses from those 14 accidents. This estimate is based on the FAA's knowledge of ice contamination, similar issues related to part 121 operations, and review of those part 135 accidents involving icing conditions. The FAA realizes that there is still some uncertainty in the 60 percent effectiveness rate. Therefore, the FAA continues to solicit comments from the aviation community on the likelihood of this rule preventing these types of accidents.

To estimate the potential benefits of this rule, the FAA calculated the average annual number of accidents/incidents over the 9-year period. There were 14 accidents/incidents over the 9-year period averaging 1.6 (14/9) per year. Similarly, the average annual number of fatalities and serious injuries were .8 (7/9) and .2 (2/9), respectively. In order to provide the public and government officials with a benchmark comparison of the expected safety benefits of rulemaking actions with estimated costs in dollars, the FAA currently uses a minimum value of $2.5 million to statistically represent a human fatality avoided and $640,000 for each serious injury. These values are applied to the .8 annual fatalities and .2 annual serious injuries over the next 10 years. After including the average annual replacement value of the airplanes involved in these accidents/incidents, which is estimated to be approximately $280,000, the total benefits will be $23.7 million. Assuming that this rule is approximately 60 percent effective, the potential benefits will be $14.2 million, or $10.0 million discounted.

Conclusion to Cost/Benefit Analysis

This rule is expected to impose total costs estimated at $6.7 million (discounted) compared to total potential safety benefits estimated at $10.0 million (discounted). Therefore, the FAA has determined that this rule is cost-beneficial.

Final Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The RFA requires government agencies to determine whether rules that would have "a significant economic impact on a substantial number of small entities" and, in cases where they would, to conduct a Regulatory Flexibility Analysis.

According to FAA Order 2100.14A: Regulatory Flexibility and Guidance, a substantial number of small entities is defined as a number which is not less than eleven and which is more than one-third of the small entities subject to a proposed or existing rule. A significant economic impact on a small entity is an annualized net compliance cost which, when adjusted for inflation, equals or exceeds the significant cost threshold for the entity type under review.

The entities that will be affected by this rule are small operators that own, but not necessarily operate, nine or fewer aircraft. The FAA estimates that there are 26 operators under part 125, with an average of about two aircraft owned per operator. The FAA also estimates that there are 2,140 part 135 operators (97 scheduled and 2,043 unscheduled). On average, the unscheduled operators own fewer than four aircraft each. The scheduled operators own, on average, slightly more than 14 aircraft. Multiplying the $7.7 million cost of this rule by a capital recovery factor of .14278 (10 years, 7%), results in an annualized cost estimate of $1.1 million. This estimate of $1.1 million was subsequently divided by the total number of operators (2,166) and resulted in an estimated annual cost impact of about $500 per operator. This annualized cost estimate is less than the annualized threshold cost of $4,600 (1992 dollars). Therefore, this rule will not impose a significant economic impact on a substantial number of small aircraft operators.

International Trade Impact Statement

This rule will have no impact on the competitive posture of either U.S. carriers doing business in foreign countries or foreign carriers doing business in the United States. This assessment is based on the fact that this rule will impact operators engaged in U.S. domestic operations. These operators do not compete with operators engaged in similar activities in the United States.

Federalism Implications

The regulations herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this regulation will not have federalism implications to warrant the preparation of a Federalism Assessment.

Conclusion

The rule has been reviewed by the Office of Management and Budget under Executive Order 12866. This regulation is considered significant under DOT Regulatory Policies and Procedures for Simplification, Analysis, and Review of Regulations. In addition, the FAA certifies that this regulation will not

have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

A final regulatory evaluation of the regulation, including a Final Regulatory Flexibility Determination and International Trade Impact Analysis, has been placed in the docket. A copy may be obtained by contacting the person identified under **FOR FURTHER INFORMATION CONTACT.**

List of Subjects

14 CFR Part 125

Air carriers, Air transportation, Aviation safety, Safety.

14 CFR Part 135

Air carriers, Air taxi, Air transportation, Aviation safety, Safety.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends parts 125 and 135 of the Federal Aviation Regulations (14 CFR parts 125 and 135) as follows:

PART 125—CERTIFICATION AND OPERATIONS: AIRPLANES HAVING A SEATING CAPACITY OF 20 OR MORE PASSENGERS OR A MAXIMUM PAYLOAD CAPACITY OF 6,000 POUNDS OR MORE

1. The authority citation for part 125 continues to read as follows:

Authority: 49 U.S.C. 1354, 1421 through 1430 and 1502; 49 U.S.C. 106(g) (revised, Pub. L. 97–449, January 12, 1983).

2. Section 125.221 is amended by revising paragraph (a), by redesignating paragraphs (b) through (d) as paragraphs (c) through (e), respectively, and by adding a new paragraph (b) to read as follows:

§ 125.221 Icing conditions: Operating limitations.

(a) No pilot may take off an airplane that has frost, ice, or snow adhering to any propeller, windshield, wing, stabilizing or control surface, to a powerplant installation, or to an airspeed, altimeter, rate of climb, or flight attitude instrument system, except under the follow conditions:

(1) Takeoffs may be made with frost adhering to the wings, or stabilizing or control surfaces, if the frost has been polished to make it smooth.

(2) Takeoffs may be made with frost under the wing in the area of the fuel tanks if authorized by the Administrator.

(b) No certificate holder may authorize an airplane to take off and no pilot may take off an airplane any time conditions are such that frost, ice, or snow may reasonably be expected to adhere to the airplane unless the pilot has completed the testing required under § 125.287(a)(9) and unless one of the following requirements is met:

(1) A pretakeoff contamination check, that has been established by the certificate holder and approved by the Administrator for the specific airplane type, has been completed within 5 minutes prior to beginning takeoff. A pretakeoff contamination check is a check to make sure the wings and control surfaces are free of frost, ice, or snow.

(2) The certificate holder has an approved alternative procedure and under that procedure the airplane is determined to be free of frost, ice, or snow.

(3) The certificate holder has an approved deicing/anti-icing program that complies with § 121.629(c) of this chapter and the takeoff complies with that program.

* * * * *

3. Section 125.287 is amended by removing "and" at the end of paragraph (a)(7), removing the period at the end of paragraph (a)(8) and adding a semicolon in its place, and adding a new paragraph (a)(9) to read as follows:

§ 125.287 Initial and recurrent pilot testing requirements.

(a) * * *

(9) Knowledge and procedures for operating during ground icing conditions, (i.e., any time conditions are such that frost, ice, or snow may reasonably be expected to adhere to the airplane), if the certificate holder expects to authorize takeoffs in ground icing conditions, including:

(i) The use of holdover times when using deicing/anti-icing fluids.

(ii) Airplane deicing/anti-icing procedures, including inspection and check procedures and responsibilities.

(iii) Communications.

(iv) Airplane surface contamination (i.e., adherence of frost, ice, or snow) and critical area identification, and knowledge of how contamination adversely affects airplane performance and flight characteristics.

(v) Types and characteristics of deicing/anti-icing fluids, if used by the certificate holder.

(vi) Cold weather preflight inspection procedures.

(vii) Techniques for recognizing contamination on the airplane.

* * * * *

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

4. The authority citation for part 135 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421 through 1431, and 1502; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983).

5. Section 135.227 is amended by revising paragraph (a), by redesignating paragraphs (b) through (e) as paragraphs (c) through (f), respectively, and by adding a new paragraph (b) to read as follows:

§ 135.227 Icing conditions: Operating limitations.

(a) No pilot may take off an aircraft that has frost, ice, or snow adhering to any rotor blade, propeller, windshield, wing, stabilizing or control surface, to a powerplant installation, or to an airspeed, altimeter, rate of climb, or flight attitude instrument system, except under the following conditions:

(1) Takeoffs may be made with frost adhering to the wings, or stabilizing or control surfaces, if the frost has been polished to make it smooth.

(2) Takeoffs may be made with frost under the wing in the area of the fuel tanks if authorized by the Administrator.

(b) No certificate holder may authorize an airplane to take off and no pilot may take off an airplane any time conditions are such that frost, ice, or snow may reasonably be expected to adhere to the airplane unless the pilot has completed all applicable training as required by § 135.341 and unless one of the following requirements is met:

(1) A pretakeoff contamination check, that has been established by the certificate holder and approved by the Administrator for the specific airplane type, has been completed within 5 minutes prior to beginning takeoff. A pretakeoff contamination check is a check to make sure the wings and control surfaces are free of frost, ice, or snow.

(2) The certificate holder has an approved alternative procedure and under that procedure the airplane is determined to be free of frost, ice, or snow.

(3) The certificate holder has an approved deicing/anti-icing program that complies with § 121.629(c) of this chapter and the takeoff complies with that program.

* * * * *

6. Section 135.345 is amended by republishing the introductory text of paragraph (b), revising the introductory text of paragraph (b)(6), removing "and" at the end of paragraph (b)(6)(ii), adding "and" at the end of paragraph (b)(6)(iii),

and adding a new paragraph (b)(6)(iv) to read as follows:

§ 135.345 Pilots: Initial, transition, and upgrade ground training.

* * * * *

(b) For each aircraft type—

* * * * *

(6) Knowledge and procedures for—

* * * * *

(iv) Operating airplanes during ground icing conditions, (i.e., any time conditions are such that frost, ice, or snow may reasonably be expected to adhere to the airplane), if the certificate holder expects to authorize takeoffs in ground icing conditions, including:

(A) The use of holdover times when using deicing/anti-icing fluids;

(B) Airplane deicing/anti-icing procedures, including inspection and check procedures and responsibilities;

(C) Communications;

(D) Airplane surface contamination (i.e., adherence of frost, ice, or snow) and critical area identification, and knowledge of how contamination adversely affects airplane performance and flight characteristics;

(E) Types and characteristics of deicing/anti-icing fluids, if used by the certificate holder;

(F) Cold weather preflight inspection procedures;

(G) Techniques for recognizing contamination on the airplane;

* * * * *

7. Section 135.351(b)(2) is revised to read as follows:

§ 135.351 Recurrent training.

* * * * *

(b) * * *

(2) Instruction as necessary in the subjects required for initial ground training by this subpart, as appropriate, including low-altitude windshear training and training on operating during ground icing conditions, as prescribed in § 135.341 and described in § 135.345, and emergency training.

* * * * *

Issued in Washington, DC, on December 27, 1993.

David R. Hinson,

Administrator.

[FR Doc. 93-31945 Filed 12-27-93 3:51 pm]

BILLING CODE 4910-13-P

Notices

Federal Register
Vol. 58, No. 249
Thursday, December 30, 1993

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[AC No. 135-XX]

Proposed Advisory Circular on Ground Deicing and Anti-Icing Training, Testing, and Checking

AGENCY: Federal Aviation Administration, DOT.

ACTION: Request for comments on proposed advisory circular.

SUMMARY: Proposed advisory circular (AC) 135-xx, Ground Deicing and Anti-Icing Training, Testing, and Checking, provides guidance about ground deicing and anti-icing that should be incorporated in an air carrier's approved training program. This AC provides guidance about one method of complying with the requirements of revised Federal Aviation Regulation (FAR) § 135.227.

DATES: Comments must be received on or before February 28, 1999.

ADDRESSES: Written comments are invited on all aspects of the proposed AC. Commenters must identify file number AC 135-xx, Ground Deicing and Anti-Icing Training and Checking. Send all comments on the proposed AC to the following location: Federal Aviation Administration, Flight Standards Service, Commuter/Air Taxi Branch (Attention: AFS250), 800 Independence Avenue, SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT:

David Metzbower, Flight Standards Service, Commuter/Air Taxi Branch, AFS250, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-3762 (8 a.m. to 4:30 p.m. EST).

SUPPLEMENTARY INFORMATION: The guidance in this AC provides one method, but not the only method, of complying with the requirements of revised FAR § 135.227. This guidance material supplements the interim final rule, FAR § 135.227, which is being published in this issue. Due to the critical safety nature of this proposed AC, it is published in its entirety in order to allow commenters expedient access to the document.

Issued in Washington, DC on December 23, 1993.

Thomas C. Accardi,

Director, Flight Standards Service.

[FR Doc. 93-31946 Filed 12-29-93; 8:45 am]
BILLING CODE 4910-13-P

Ground Deicing and Anti-icing Training and Checking (AFS-250; 135-XX)

1. *Purpose.* This advisory circular (AC) provides one means, but not the only means, of complying with Federal Aviation Regulations (FAR) §§ 135.227, 135.345, and 135.351 (referred to as the FAR part 135 ground deicing rule). This AC provides guidance about FAR §§ 135.227, 135.345, and 135.351. Specifically, the guidance in this AC concerns:

a. Ground deicing and anti-icing training requirements that must be incorporated into an approved training program for certain air carriers;

b. Ground deicing and anti-icing guidance for those air carriers that are not required to have an approved training program; and

c. The pretakeoff contamination aircraft check required of all FAR part 135 air carriers except those that develop an approved alternative procedure or comply with the FAR part 121 ground deicing rule contained in FAR § 121.629(c).

2. *Related FAR sections. a. Part 135, Subpart A—general.* Sections 135.23 and 135.25.

b. Part 135, Subpart B—flight operations. Sections 135.77, 135.79 and 135.81.

c. Part 135, Subpart D—VFR/IFR operating limitations and weather requirements. Section 135.227.

d. Part 135, Subpart E—flight crewmember requirements. Section 135.244.

e. Part 135, Subpart H—training. Sections 135.323, 135.325, 135.327, 135.329, 135.339, 135.341, 135.343, 135.345, 135.347, and 135.351.

f. Special Federal Aviation Regulation (SFAR) no. 58. Advanced Qualification Program.

3. *Related reading material.* The following material should be useful in developing material, instructions, and procedures for incorporation in the certificate holder's training programs and operations manual:

a. AC 20-117, Hazards Following Ground Deicing and Ground Operations in Conditions Conducive to Aircraft Icing.

b. Federal Aviation Administration (FAA) publication, Winter Operations Guidance for Air Carriers and Other Adverse Weather Topics.

c. AC 120-58, Pilot Guide for Large Aircraft Ground Deicing.

d. AC 120-XX Pilot Guide for Ground Deicing of Air Taxi and Commercial Aircraft.

e. AC 135-XX, Ground Deicing and Anti-Icing Training and Checking.

f. Society of Automotive Engineers (SAE):

(1) AMS 1424, Deicing/Anti-Icing Fluid, Aircraft, Newtonian—SAE Type I.

(2) AMS 1428, Fluid, Aircraft Deicing/Anti-Icing, Non-Newtonian, Pseudo-Plastic, SAE Type II.

(3) ARP 4737, Aircraft Deicing/Anti-Icing Methods with Fluids, for Large Transport Aircraft.

g. International Standards Organization (ISO) publications:

(1) ISO 11075, Aerospace—Aircraft de-icing/anti-icing newtonian fluids ISO type I.

(2) ISO 11076, Aerospace—Aircraft de-icing/anti-icing methods with fluids.

(3) ISO 11077, Aerospace—De-icing/anti-icing self propelled vehicles—Functional requirements.

(4) ISO 11078, Aerospace—Aircraft de-icing/anti-icing non-newtonian fluids ISO type II.

4. *Background.* a. The "clean aircraft" concept. The current regulations in FAR parts 121 and 135 rely on the "clean aircraft" concept; i.e., that no person may takeoff an airplane when frost, ice, or snow is adhering to the wings, control surfaces, or propellers of the airplane (FAR §§ 121.629 and 135.227). The rationale behind this concept is that the presence of even minute amounts of frost, ice, or snow (referred to as "contamination") on particular airplane surfaces can cause a potentially dangerous degradation of airplane performance and unexpected changes in

airplane flight characteristics. Under current regulations, ultimate responsibility for determining whether the airplane is free of contamination and complies with the "clean aircraft" concept rests with the pilot-in-command (PIC). Both the FAA and industry have developed guidance and recommended procedures that are designed to help the PIC in making that determination. These procedures include monitoring weather conditions and temperature changes, visual checks, and using deicing/anti-icing fluids. When conditions conducive to the formation of frost, ice, or snow on airplane surfaces exist at the time of takeoff, those surfaces must be checked for contamination in accordance with FAR § 135.227. When contaminants are adhering to airplane surfaces, those contaminants, except as specifically provided, must be removed before takeoff. Because of the wide variations in airplane design and performance characteristics, methods for removing contamination for airplanes operated under FAR parts 121 and 135 vary greatly. Deicing of airplanes may be accomplished:

(1) By applying heated water followed by undiluted glycol-based fluid;

(2) By applying a heated water/glycol solution;

(3) By mechanically brushing the snow or ice off; or

(4) By placing the airplane in a hangar until the frost, ice, or snow melts.

Note: Currently, anti-icing (the treatment of the airplane with undiluted glycol-based fluid to prevent frost, ice, or snow from adhering to aircraft surfaces) is not commonly used in FAR part 135 operations.

b. Accidents related to icing. National Transportation Safety Board (NTSB) records reveal that 14 ground icing-related accidents and incidents involving airplanes operating under FAR part 135 occurred during the period of 1984–1992. While most of these accidents/incidents involved FAR part 135 non-scheduled cargo operations, three involved either non-scheduled or scheduled passenger carrying operations. Four of the accidents resulted in a total of seven fatalities. The NTSB identified other probable causes in some of these accidents/incidents, but in all 14 cases the NTSB identified the existence of frost, ice, or snow on the wings or other critical surfaces of the airplane as a probable cause. A common thread throughout these accidents/incidents was the pilots' apparent lack of awareness of the potential hazard from even small amounts of frost, ice, or snow on an airplane's wings and control surfaces. For instance, one pilot lost his life in an accident involving a non-scheduled cargo operation in Morrisonville, New York, on March 19, 1984. Prior to the accident, after identifying the presence of ice accumulation on the leading edges and upper wing surfaces, the pilot declined the use of a hangar to warm the airplane and instead attempted to remove the ice from the leading edges by hand. In another accident in Vienna, Missouri, on March 3, 1988, a pilot of a night cargo operation and another person lost their lives after taking off in known icing conditions. Before the flight, a line serviceman noticed ice on the aircraft's wings and suggested its removal, but the pilot declined.

5. *Definitions.* The terms used in this AC are not defined in FAR part 1, but are defined herein for better understanding of this material as follows:

a. Deicing. A procedure by which frost, ice, or snow is removed from the aircraft in order to provide clean surfaces.

b. Anti-icing. A precautionary procedure that provides protection against the formation of frost or ice and accumulation of snow on treated surfaces of the aircraft for a limited period of time.

c. Deicing/anti-icing. A combination of the two procedures above. It can be performed in one or two steps.

(1) One-step deicing/anti-icing is carried out with an anti-icing fluid. The fluid used to deice the aircraft remains on aircraft surfaces to provide limited anti-ice capability.

(2) Two-step deicing/anti-icing consists of two distinct steps. The first step (deicing) is followed by the second step (anti-icing) as a separate fluid application. Anti-icing fluid is applied to protect the relevant surfaces, thus providing maximum possible anti-ice capability (holdover time).

d. Holdover time. The estimated time the application of deicing or anti-icing fluid will prevent the formation of frost or ice and the accumulation of snow on the treated surfaces of an aircraft. Holdover time begins when the final application of deicing/anti-icing fluid commences, and it expires when the deicing/anti-icing fluid applied to the aircraft loses its effectiveness as described in the appropriate holdover timetable.

e. Pretakeoff contamination check. A pretakeoff contamination check is a check to make sure the wings and control surfaces are free of frost, ice, or snow. Section 135.227 of the FAR requires that a pretakeoff contamination check be completed within 5 minutes prior to beginning takeoff. Under FAR part 135, depending upon the type of aircraft, it may be accomplished from within or outside the aircraft and may be visual or tactile or a combination, as long as the check is adequate to ensure the absence of contamination. The certificate holder's FAA principal operations inspector (POI) must approve the pretakeoff contamination check procedures for each specific type of aircraft operated by the certificate holder. Also, the pretakeoff contamination check is referenced or described within the certificate holder's operations specifications.

6. *Overview of the FAR part 135 ground deicing rule.* The FAA and the aviation community rely almost exclusively on the PIC's judgment for ensuring the clean aircraft concept. The FAA believes that pilot education is the paramount element to combating the threat of icing. After reassessing its policy and reviewing accident statistics, the FAA still believes that pilot education is a major element in combating these types of accidents, but it must be supplemented by aircraft checks for contamination. To ensure the implementation of the clean aircraft concept, the FAR part 135 ground deicing rule requires education through additional training, and an aircraft check for contamination of the wings and control surfaces prior to beginning takeoff. All part 135 certificate holders whose aircraft expect to takeoff in ground icing conditions must complete a pretakeoff contamination check. The part 135 ground deicing rule allows an operator to develop an approved alternative method of checking the aircraft for contamination such as deice sensors. Additionally, part 135 certificate holders may choose to check the aircraft for contamination by complying with the FAR part 121 deicing rule.

7. *Applicability of the part 135 ground deicing rule. a. General.* The FAR part 135 ground deicing rule requires that a certificate holder who has a required, approved training program to incorporate deicing/anti-icing pilot training and pretakeoff contamination check procedures or an approved alternative to the pretakeoff contamination check (alternative aircraft check) into that approved training program. The procedures for a pretakeoff contamination check or the alternative aircraft check should also be in the certificate holder's operations manual and referenced in its operations specifications. The part 135 ground deicing rule does not apply to part 91 operations conducted by a part 135 operator.

b. Certificate holder who does not operate in ground icing conditions. The FAR part 135 ground deicing rule does not apply to a certificate holder who does not operate during ground icing conditions. That certificate holder is not required to train its pilots or develop pretakeoff contamination check procedures. However, that operator's aircraft cannot takeoff under a part 135 operation until ground icing conditions cannot reasonably be expected to exist.

c. FAR part 135 certificate holder who complies with the FAR part 121 ground deicing rule. If approved, a part 135 operator can comply with the FAR part 121 ground deicing rule. However, the operator must comply with the entire FAR part 121 ground deicing rule and not just with selected provisions.

d. Certificate holders who use only one pilot in their operations. Certificate holders who use only one pilot in their operations (single pilot operations) are not required to comply with the manual and approved training program requirements in FAR § 135.21, Manual requirements, and 135.341, Pilot and flight attendant crewmember training programs. Therefore, single pilot operations are not required to have an approved pilot training program nor the additional training required by the FAR part 135 ground deicing rule. However, single pilot operations must comply with all the operational requirements (i.e., pretakeoff contamination check or an approved alternative to the pretakeoff contamination check described in its operations specifications) of the FAR part 135 ground deicing rule. The pilots of these types of operators will need to demonstrate the knowledge required to operate in ground icing conditions during initial and recurrent flight checks. Thus, the information contained in this AC is also applicable to certificate holders who use only one pilot in their operations.

e. Helicopter operations. Helicopters generally do not operate in icing conditions. The FAA's review of icing-related accidents and incidents did not reveal any accident history for helicopter operations that suggest additional training or a special inspection requirement would be necessary. Therefore, helicopter operations conducted under FAR part 135 are excluded from the additional training and aircraft checking requirements of the FAR part 135 ground deicing rule. However, the "clean aircraft" concept still applies to helicopters.

8. *Miscellaneous.* a. *1993 winter season.* Because of the short lead time for implementing the FAR part 135 ground deicing rule, the FAA will allow maximum flexibility in providing the required training for the 1993 winter season. Initial training can be accomplished through the issuance of bulletins, manual revisions, self-grading quizzes, or other review materials. Receipt of training documents by the operator's pilots will satisfy the training requirement for the 1993 winter season. Formal training will be accomplished in the next recurrent training cycle.

b. Associated deicing/anti-icing personnel. The ground deicing rule in FAR part 135 requires additional training for pilots only. If the certificate holder uses additional employees to accomplish deice procedures the FAA anticipate approving such procedures in circumstances in which those additional employees are also be trained in accordance with the certificate holder's training program and manual procedures.

c. Credit for previous training. (1) Part 135. The FAA recognizes that many part 135 training programs contain training on operations in ground icing conditions. A separate training section on deicing in the operator's approved training program is not necessary. Under the part 135 ground deice rule, credit for previous appropriate training given by the operator to its pilots will be granted. Certificate holders can obtain approval by showing those appropriate parts of their current part 135 training program to their POI's along with any appropriate documentation. Certificate holders who do not cover all of the topics required by the part 135 ground deice rule will need to add those topics to their approved training program.

(2) Part 121. Training completed and documented under the part 121 ground deice rule will be accepted and credited, as appropriate, toward training required under the part 135 ground deice rule. To obtain credit for training completed under the part 121 ground deice rule, the training must be appropriate including specific aircraft type and cover the elements required by the Part 135 ground deice rule.

9. *Operational requirement of the FAR part 135 ground deicing rule.* a. *Pretakeoff contamination check.* Except for those FAR part 135 certificate holders who voluntarily choose to comply with the FAR part 121 ground deicing rule or those that develop an approved alternative procedure, each applicable air carrier who operates under FAR part 135 must develop approved procedures for a pretakeoff contamination check of the aircraft. As previously stated, the part 135 ground deice rule does not apply to a certificate holder who does not operate in ground icing conditions. In accordance with FAR § 135.227, the certificate holder's POI must approve the pretakeoff contamination check procedures for each specific type of aircraft operated by the certificate holder. Except for single pilot operations, the procedures for a pretakeoff contamination check should be contained in the certificate holder's approved training program, operations manual, and referenced within the certificate holder's operations specifications. FAR Part 135 single pilot operations will have the pretakeoff contamination procedures described in its operations specifications.

b. Alternative procedure to the pretakeoff contamination check. The Administrator may approve a certificate holder's alternative procedure which ensures that wings and control surfaces are free of frost, ice, or snow, instead of a pretakeoff contamination check. An alternative procedure may include procedures, techniques, or equipment (such as wing icing sensors) to establish that wings and control surfaces are not contaminated. These procedures, techniques, or equipment must be approved by the Administrator and detailed in the operator's training program (if applicable), operations manual (if applicable), and referenced in its operations specifications.

c. Part 135 certificate holder who complies with the FAR part 121 ground deicing rule. The FAR part 135 ground deicing rule allows a certificate holder to comply with FAR § 121.629(c) program requirements. Guidance for development of a FAR part 121 program is contained in AC 121–XX.

10. Training requirements in certificate holder's approved training program. For certificate holders who are required to have an approved training program and who anticipates takeoffs in ground icing conditions, that training program must include pilot ground training in those subjects relating to deicing and anti-icing operations as required by FAR § 135.345 for initial, transition, and upgrade training and FAR § 135.351 for recurrent training. These training requirements must include procedures for operating airplanes during ground icing conditions. That training must include at least the following elements (a more detailed discussion of each of these elements follows):

a. Procedures for the use of holdover timetables when using deicing/anti-icing fluids.

b. Aircraft deicing/anti-icing procedures, including inspection and check procedures and responsibilities.

c. Communications procedures.

d. Airplane surface contamination

(i.e., adherence of frost snow, ice, or snow) and critical area identification, and how contamination adversely affects airplane performance and flight characteristics.

e. Types and characteristics of deicing/anti-icing fluids, if used by the certificate holder.

f. Cold weather preflight inspection procedures.

g. Techniques for recognizing contamination on the airplane.

11. *Procedures for the use of holdover timetables when using deicing/anti-icing fluids.* a. *Use of holdover timetables.* Holdover times are only an estimate of the time deicing/anti-icing fluid prevents the formation of frost or ice and the accumulation of snow on the treated surfaces of an aircraft. A holdover time begins when the final application of deicing/anti-icing fluid commences and expires when the deicing/anti-icing fluid applied to the aircraft loses its effectiveness as described in the appropriate holdover timetable. The effectiveness of deicing/anti-icing fluids are based on a number of variables; e.g., temperature, moisture content of the precipitation, wind or aircraft skin temperature. The operational use of holdover timetables is not mandatory for FAR part 135 operations unless the operator elects to comply and the FAA approves its compliance with the FAR part 121 ground deicing rule requirements. Holdover timetables provide information on the effectiveness of deicing/anti-icing fluids and should be used for departure planning and coordination purposes in conjunction with pretakeoff contamination check procedures. Operations manuals should contain detailed procedures for conducting the pretakeoff contamination check. Procedures for using holdover timetables in the operator's manual are required for those operators who are authorized to comply with the part 121 ground deice rule and are recommended for other part 135 operators who conduct takeoff operations in ground icing conditions.

b. Development of holdover timetables. Holdover timetables have been developed by the SAE and the ISO. Each certificate holder may develop their own holdover timetables for use by its personnel, but the timetables must be supported by data acceptable to the Administrator; currently, the SAE/ISO holdover timetables are considered by the FAA to be the only acceptable data for use by FAR part 121 certificate holders. This policy will also apply to FAR part 135 certificate holders. (See Appendix A, Tables 1 and 2). Further guidance regarding holdover timetables is contained in AC 20–117, Hazards Following Ground Deicing and Ground Operations in Conditions Conducive to Aircraft Icing; AC 120–58, Pilot Guide for Large Aircraft Ground Deicing; SAE ARP 4737, Aircraft Deicing/Anti-Icing Methods for Large Transport Aircraft; AC 120–XX, Pilot Guide for Small Aircraft Ground Deicing; and ISO 11076, Aerospace—Aircraft Deicing/Anti-Icing Methods with Fluids.

12. *Aircraft deicing/anti-icing procedures, including inspection and check procedures and responsibilities.* Deicing and anti-icing procedures must be specific to each aircraft type in accordance with FAR § 135.345. Those aircraft-specific procedures should include instructions and checking guidelines for use by their pilots, and if appropriate and authorized, other personnel to determine whether or not aircraft surfaces are free of contaminants. Those aircraft-specific instructions and guidelines should also be in the certificate holder's operations manual, and described their operations specifications.

a. Deicing/anti-icing procedures. Deicing/anti-icing procedures should include, as applicable to each certificate holder:

(1) Methods of deicing (e.g., warm hangar, deicing fluid).

(2) Safety requirements during fluid application.

(3) Aircraft-specific considerations.

(4) Location-specific procedures.

(5) Post deicing/anti-icing checks.

(6) Contractor Deicing. Many certificate holders will utilize contract services, such as aircraft servicing vendors, fixed base operators, or other air carriers to perform deicing/anti-icing. The certificate holder's training program should include the PIC's responsibilities for supervising a contractor who provides deicing/anti-icing services.

b. Deicing/anti-icing checking procedures and responsibilities. The certificate holder's training program must have pilot training on aircraft-specific surface contamination checking to include the following:

(1) Pilot preflight inspection/cold weather preflight inspection procedures. This is the normal walk-around preflight inspection conducted by a pilot. This inspection should be used to note any aircraft surface contamination and direct any required deicing/anti-icing operation.

(2) Pretakeoff contamination check. An aircraft check completed within 5 minutes prior to beginning takeoff to make sure the wings and control surfaces are free of contamination. Each carrier must define the content of the pretakeoff contamination check. The check may be conducted from inside or outside the aircraft, depending upon such factors as atmospheric conditions, lighting conditions, aircraft type and ability of the crew to see the relevant aircraft surfaces.

(3) Certificate holders should consider the following guidelines for obtaining approval to conduct the pretakeoff contamination checks from inside the aircraft.

(i) Can some of the surfaces be seen to adequately determine whether or not the wings and control surfaces are free of contaminants? This determination should consider the aircraft type, the method of conducting the check—that is, from the cockpit or cabin; lighting; and atmospheric conditions.

(ii) Does the certificate holder have procedures to recognize, and has the pilot been properly trained to recognize changes in weather conditions to allow the PIC to ascertain whether or not the wings and control surfaces could reasonably be expected to remain free of contaminates?

c. Alternative procedure. The Administrator may approve a certificate holder's alternative procedure, which ensures that wings and control surfaces are free of frost, ice, or snow, instead of a pretakeoff contamination check. An alternative procedure may include procedures, techniques, or equipment (such as wing icing sensors) to establish that wings and control surfaces are not contaminated. Any alternative procedure must be approved by the certificate holder's POI through the manager of the Air Transportation Division and after approval, detailed in the operator's training program (if applicable), operations manual (if applicable), and referenced in its operations specifications.

d. PIC responsibility. Operator developed guidance and procedures should contain a discussion regarding the PIC's responsibility to make the decision on whether or not to takeoff.

e. Aircraft surfaces. The aircraft surfaces, which should be clear of contaminants before takeoff, should be described in the aircraft manufacturers' maintenance manual or other manufacturer-developed documents, such as service or operations bulletins.

(1) Certificate holders should list in their approved training programs and operations manual (which are referenced in the operations specifications) for each type of aircraft used in their operations, the surfaces which should be checked on pilot-conducted preflight inspections and pretakeoff contamination checks.

(2) Generally, the following aircraft surfaces should be clear of contaminants, if the aircraft manufacturer's information is not available:

(i) Propeller, windshield, wing, empennage, stabilizing, and control surfaces.

(ii) Powerplant installation(s) including associated surfaces and systems such as engine inlets and fuel vents.

(iii) Airspeed, altimeter, rate of climb, and flight attitude instrument including associated surfaces or systems such as pitot heads, static ports, and instrument sensor pickup points.

13. *Communications.* a. The PIC should have the following information when deicing/anti-icing with fluids is accomplished:

(1) Fluid type (for example, Type I or Type II).

(2) Fluid/water mix ratio.

(3) Start time of final fluid application/beginning of holdover time.

(4) Verification that the aircraft is free of contamination.

b. ATC coordination.

c. Means for obtaining most current weather information.

14. *Airplane surface contamination.* a. Certificate holders should include training which ensures that the pilots understand the following:

(1) Freezing Precipitation. Snow, sleet, freezing rain, drizzle, or hail which adheres to aircraft surfaces.

(2) Frost, including hoarfrost, is a crystallized deposit, formed from water vapor on surfaces which are at or below 0°C (32°F).

(3) Freezing Fog. Clouds of supercooled water droplets that form a deposit of ice on objects in cold weather conditions.

(4) Snow. Precipitation in the form of small ice crystals or flakes which may accumulate on or adhere to aircraft surfaces.

(5) Freezing Rain. Water condensed from atmospheric vapor falling to earth in supercooled drops, forming ice on objects.

(6) Rain or High Humidity (on Cold-Soaked Wing). Water forming ice or frost on the wing surface when the temperature of the aircraft wing surface is at or below 0°C (32°F). Some aircraft may be susceptible to the formation of frost or ice on wing surfaces when the wing surfaces are cold-soaked and the aircraft is exposed to conditions of high humidity, rain, drizzle, or fog at ambient temperatures above freezing.

(7) Underwing Frost. Takeoff with frost under the wing in the area of the fuel tanks (caused by cold-soaked fuel) within limits established by the aircraft manufacturer, authorized by FAA aircraft certification offices, and stated in aircraft maintenance and flight manuals may be permitted.

b. Effects of frost, ice, snow, and slush on aircraft performance, stability, and control. The certificate holder should obtain this information from the manufacturer of each type of aircraft it uses in its operations and should ensure that its pilots are trained in the following effects of contamination on aircraft performance.

(1) Increased drag/weight.

(2) Tendency for rapid pitch-up during rotation or wing roll off.

(3) Loss of lift.

(4) Stall occurs at lower-than-normal angle of attack.

(5) Buffet or stall occurs before activation of stall warning.

(6) Decreased effectiveness of flight controls.

15. *Types and characteristics of deicing/anti-icing fluids.* (a) Certificate holders should refer to the following SAE publications for additional information on specific deicing and anti-icing methods and procedures and on fluid characteristics and capabilities: AMS 1424, Deicing/Anti-Icing Fluid, Aircraft, Newtonian—SAE Type I; AMS 1428, Fluid, Aircraft Deicing/Anti-Icing, Non-Newtonian, Pseudo-Plastic, SAE Type II; and ARP 4737, Aircraft Deicing/Anti-Icing Methods with Fluids, for Large Transport Aircraft; and the following ISO documents: ISO 11075, Aerospace—Aircraft de-icing/anti-icing newtonian fluids ISO type I; ISO 11076, Aerospace—Aircraft de-icing/anti-icing methods with fluids; ISO 11077, Aerospace—de-icing/anti-icing self propelled vehicles—Functional requirements; ISO 11078, Aerospace—Aircraft de-icing/anti-icing non-newtonian fluids ISO type II.

(b) If the certificate holder intends to use deicing/anti-icing fluids for ground deicing, the types and characteristics of deicing/anti-icing fluids should be included in the certificate holder's training program and operations manual. Deicing and anti-icing fluids with differing characteristics and capabilities exist; they may undergo improvements, and new types of fluids may be developed. Certificate holders should ensure that their pilots are knowledgeable about the characteristics of each type of fluid used.

Certificate holders should ensure that the following subjects are discussed, as applicable:

(1) Deicing fluids.

(i) Heated water.

(ii) Newtonian fluid (SAE/ISO Type I) (see Caution).

(iii) Mixtures of water and SAE/ISO Type I fluid.

(iv) Mixtures of water and SAE/ISO Type II fluid.

Note: Deicing fluid should be applied heated to assure maximum efficiency.

b. Anti-icing fluids:

(i) Newtonian fluid (SAE/ISO Type I) (see CAUTION).

(ii) Mixtures of water and SAE/ISO Type I fluid.

(iii) Non-Newtonian fluid (SAE/ISO Type II).

(iv) Mixtures of water and SAE/ISO Type II fluid.

Note: SAE/ISO Type II anti-icing fluid is normally applied cold on clean aircraft surfaces, but may be applied heated. Cold SAE/ISO Type II fluid normally provides longer anti-icing protection. SAE/ISO Type I anti-icing fluid should be applied heated.

c. Fluid Characteristics.

(1) Type I Fluids.

(i) Unthickened.

(ii) Limited holdover time.

(iii) Applied to form thin liquid film on wing.

(2) Type II Fluids.

(i) Thickened.

(ii) Longer holdover times in comparison to those of Type I fluids.

(iii) Application results in a thick liquid film (a gel-like consistency) on wing.

(iv) Wind flow over the wing (shear) causes the fluid to progressively flow off the wing during takeoff.

(3) Deicing/Anti-Icing Fluids Handling/Performance Implications. The type fluid used and how completely the fluid flows off the wing during takeoff determines the effects of the following handling/performance factors. The aircraft manufacturer may also provide performance information regarding the use of the different deicing/anti-icing fluids.

(i) Increased rotation speeds/ increased field length.

(ii) Increased control (elevator) pressures on takeoff.

(iii) Increased stall speeds/reduced stall margins.

(iv) Lift loss at climbout/increased pitch attitude.

(v) Increased drag during acceleration/increased field length.

(vi) Increased drag during climb.

16. *Cold weather preflight inspection procedures.* a. Pilot preflight inspection/ cold weather preflight inspection procedures. This is the normal walk-around preflight inspection conducted by a pilot. This inspection should be used to note any aircraft surface contamination and initiate any required deicing/anti-icing operations.

b. A thorough preflight inspection is

more important in temperature extremes because those temperature extremes may affect the aircraft or its performance. At extremely low temperatures, the urge to hurry the preflight of the aircraft is natural, particularly when the aircraft is outside and adverse weather conditions exists, which make the preflight physically uncomfortable for the pilots. This is the very time to perform the most thorough preflight inspection.

c. Aircraft areas that require special attention during a preflight during cold weather operations depend on the aircraft design and should be identified in the certificate holder's training program. The preflight should include all items recommended by the aircraft manufacturer. A preflight should include items appropriate to the specific aircraft type. Generally, those items may include:

(1) Wing leading edges, upper and lower surfaces.

(2) Vertical and horizontal stabilizing devices, leading edges, upper surfaces, lower surfaces, and side panels.

(3) Lift/drag devices such as trailing edge flaps.

(4) Spoilers and speed brakes.

(5) All control surfaces and control balance bays.

(6) Propellers.

(7) Engine inlets, particle separators, and screens.

(8) Windshields and other windows necessary for visibility.

(9) Antennas.

(10) Fuselage.

(11) Exposed instrumentation devices such as angle-of-attack vanes, pitot-static pressure probes, and static ports.

(12) Fuel tank and fuel cap vents.

(13) Cooling and auxiliary power unit (APU) air intakes, and exhausts.

(14) Landing gear.

d. Blowing Snow. If an aircraft is exposed to blowing snow, special attention should be given to openings in the aircraft where snow can enter, freeze, and obstruct normal operations. The following openings should be free of snow and ice before flight:

(1) Pitot tubes and static system sensing ports.

(2) Wheel wells.

(3) Heater intakes.

(4) Engine air intakes and carburetor intakes.

(5) Elevator and rudder controls.

(6) Fuel vents.

17. *Techniques for recognizing contamination on the airplane.* a. Certificate holders should have aircraft-specific techniques for the use of their pilots (and other personnel, if applicable) to recognize contamination on aircraft surfaces and indications of loss of effectiveness of fluids.

b. Some indications for loss of effectiveness of deicing/anti-icing fluid or contamination on aircraft surfaces include:

(1) Progressive surface freezing or snow accumulation.

(2) Random snow accumulation.

(3) Dulling of surface reflectivity (loss of gloss) caused by the gradual deterioration of the fluid to slush.

(4) Fluid characteristics and indications that the fluid is losing its effectiveness obtained from the deicing/anti-icing fluid manufacturers.

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federal register

Thursday
December 30, 1993

Part IX

Environmental Protection Agency

40 CFR Part 82
Protection of Stratospheric Ozone; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL-4819-8]

Protection of Stratospheric Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This final rule establishes regulations that implement the statutory ban on nonessential products containing or manufactured with class II ozone-depleting substances under section 610(d) of the Clean Air Act, as amended. This final rule was developed by EPA in order to clarify definitions and provide exemptions, as authorized under section 610(d). The substances affected by this rulemaking are certain products made with hydrochlorofluorocarbons (HCFCs). This action will facilitate implementation of the ban, with a statutory effective date of January 1, 1994, and provide guidance and exceptions to the ban that are authorized by the statute.

EFFECTIVE DATE: This final rule is effective January 1, 1994. For additional information concerning the effective date see section VI in Supplementary Information.

ADDRESSES: Comments and materials supporting this rulemaking are contained in Public Docket No. A-93-20, in room M-1500, Waterside Mall (Ground Floor), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Dockets may be inspected from 8:30 a.m. until 12 noon, and from 1:30 p.m. until 3 p.m., Monday through Friday. A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: Cynthia Newberg, Program Implementation Branch, Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation (6205-J), 401 M Street, SW., Washington, DC 20460. (202) 233-9729. The Stratospheric Ozone Information Hotline at 1-800-296-1996 can also be contacted for further information.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

I. Background

The Class II Nonessential Products Ban proposal, published on September 27, 1993 (58 FR 50464), contains a detailed background of the issues relating to the proposed ban. That background section includes information on the ozone depletion problem, the 1978 aerosol ban, the Montreal Protocol, the excise tax on certain ozone-depleting substances, the Clean Air Act as amended in 1990 (the Act), the proposed accelerated phaseout of ozone-depleting substances, and the labeling rule. Rather than repeat this background discussion, EPA refers readers of this final rule to 58 FR 50464 for such background.

II. Notice of Proposed Rulemaking

On September 27, 1993, EPA published a notice of proposed rulemaking (NPRM) (58 FR 50463) addressing issues related to the statutory prohibition against the sale or distribution, or offer for sale or distribution in interstate commerce of nonessential products containing or manufactured with a class II substance, imposed by section 610(d) of the Act.

During the development of that NPRM, EPA met with representatives from various industries and environmental organizations. The Agency also conducted two advisory meetings held in the EPA auditorium, on February 19, 1993, and March 29, 1993, in order to allow the public to review draft background documents on products containing or manufactured with class II substances and to offer comments and technical expertise on the development of the NPRM. Minutes of these meetings and copies of the background documents are contained in Docket A-93-20. The Agency used these forums as appropriate venues for hearing the concerns of various stakeholders potentially affected by the class II ban.

Title VI of the Act divides ozone-depleting chemicals into two distinct classes. Class I is comprised of chlorofluorocarbons (CFCs), halons, carbon tetrachloride and methyl chloroform, Methyl Bromide and hydrobromofluorocarbons. Class II is comprised of hydrochlorofluorocarbons (HCFCs). (See listing notice January 22,

1991; 56 FR 2420.) Section 610(b) of the Act, as amended, requires EPA to promulgate regulations banning nonessential products releasing class I substances. EPA published its final rule for the Class I Nonessential Products Ban on January 15, 1993 (58 FR 4768).

In the September 27 NPRM, EPA proposed regulations to implement the statutory prohibition imposed by section 610(d) on the sale or distribution in interstate commerce of specified class II products. Since many aspects of the proposed regulations were similar in structure to the section 610(b) final rule banning class I substances published on January 15, 1993, EPA proposed to revise the regulations promulgated under 40 CFR part 82 subpart C to incorporate the class II ban.

Section 610(d)(1) states that after January 1, 1994, "it shall be unlawful for any person to sell or distribute, or offer for sale or distribution, in interstate commerce—(A) any aerosol product or other pressurized dispenser which contains a class II substance; or (B) any plastic foam product which contains, or is manufactured with, a class II substance." Section 610(d)(2) authorizes EPA to grant certain exceptions and section 610(d)(3) creates exclusions from the class II ban in certain circumstances.

Section 610(d)(2) authorizes the Administrator to grant exceptions from the class II ban for aerosols and other pressurized dispensers where "the use of the aerosol product or pressurized dispenser is determined by the Administrator to be essential as a result of flammability or worker safety concerns," and where "the only available alternative to use of a class II substance is use of a class I substance which legally could be substituted for such class II substance."

Section 610(d)(3) states that the ban of class II substances in plastic foam products shall not apply to "foam insulation products" or "an integral skin, rigid, or semi-rigid foam utilized to provide for motor vehicle safety in accordance with Federal Motor Vehicle Safety Standards where no adequate substitute substance (other than a class I or class II substance) is practicable for effectively meeting such standards."

EPA believes that, unlike the class I ban, the class II ban is self-executing.[1] Section 610(d) bans the sale of the specified class II products by its own terms, without any reference to required EPA regulations. Consequently, EPA concluded that it was not required to promulgate regulations within one year of enactment under section 610(a) to implement the class II ban. EPA believes that the statutory text clearly establishes this obligation only with respect to regulations under section 610(b) to implement the class I ban.[2] EPA issued proposed regulations and is today issuing final regulations implementing the class II ban in order to better define the products banned under section 610(d) and to grant authorized exceptions under section 610(d)(2). Section 301(a) of the Act gives EPA the authority to promulgate such regulations as are necessary to carry out its functions under the Act. EPA believes that it is necessary within the meaning of section 301 to promulgate regulations more clearly defining the products subject to the class II ban and granting exceptions to the ban under section 610(d)(2). The following sections discuss the NPRM in more detail.

A. Medical Products

Section 610(e) states that "nothing in this section shall apply to any medical devices as defined in section 601(8)." Section 601(8) defines "medical device" as "any device (as defined in the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321)), diagnostic product, drug (as defined in the Federal Food, Drug, and Cosmetic Act), and drug delivery system—(A) if such device, product, drug, or drug delivery system utilizes a class I or class II substance for which no safe and effective alternative has been developed, and where necessary, approved by the Commissioner of the Food and Drug Administration; and (B) if such device, product, drug, or drug delivery system, has, after notice and opportunity for public comment, been approved and determined to be essential by the Commissioner in consultation with the Administrator."

EPA proposed exempting medical devices that the FDA considers essential by exempting all devices listed under 21 CFR section 2.125(e).

B. Aerosol Products and Pressurized Dispensers Containing Class II Substances

1. Definition of Aerosol Products and Pressurized Dispensers

Section 610(d) bans the sale of all aerosol products and pressurized dispensers containing class II substances not specifically excepted by the EPA under section 610(d)(2). Consistent with the class I ban, EPA proposed that the phrase "aerosol product or other pressurized dispenser" should not be interpreted as applying to pressurized containers ("bulk containers") used to distribute materials for use into other products because these materials generally are self-pressurized when so contained.[3]

The final rulemaking for the Class I Nonessential Products Ban clarified EPA's interpretation of this language (58 FR 4790). EPA believes that the phrase "aerosol product or other pressurized dispenser" was meant to include non-aerosol products such as CFC–12 dusters and freeze sprays. However, the Agency does not believe that the term "other pressurized dispenser" applies to pressurized containment vessels such as small containers of motor vehicle refrigerant or containment vessels for recycled, recovered, or reclaimed refrigerant. Under EPA's interpretation, the phrase "aerosol products or pressurized dispenser" does not include bulk pressurized containers which are used solely for the transportation or storage of controlled substances to be later integrated into a use system. As described in 40 CFR 82.3(i) and the December 10, 1993 final rule implementing section 606 and related provisions of sections 603, 607, and 616 of the Act (58 FR 65018), a "controlled substance means any substance listed in appendix A or appendix B to [subpart A] whether existing alone or in a mixture, but excluding any such substance or mixture that is in a manufactured product other than a container used for the transportation or storage of the substance or mixture" (58 FR 65063). A bulk container, also described in 40 CFR 82.3(i), means a container in which "a listed substance or mixture must first be transferred from [and transferred] to another container, vessel, or piece of equipment in order to

[1] The Congressional Record statement by Representative Ralph Hall (D-Texas) regarding the Congressional intent of the legislation as passed states "any failure of the Administrator to promulgate regulations as required by this title, or any court order delaying the effective date of such regulations, shall not alter the effective dates of the statutory requirements and prohibitions that are set forth in this title" (October 26, 1990, 136 Congressional Record H12907). Thus, EPA clearly stated in the NPRM that the Agency has no authority to alter the effective date of the statutory ban.

[2] Although the legislative history of section 610 is unclear on this point, the Senate Statement of Managers specifically states that the section 608 ban on the venting of refrigerants, which like the class II ban is an outright prohibition, is self-executing and will take effect on the stated date even if that date is in advance of EPA regulations implementing the ban. EPA believes that this analysis applies similarly to the class II ban. See 136 Congressional Record S16948, October 27, 1990.

[3] As explained in the class I ban, such an interpretation would have had a devastating and unintended impact on the air-conditioning and refrigeration industry

realize [the controlled substance's] intended use" (58 FR 65063). EPA distinguishes between manufactured products and bulk containers, where manufactured products are subject to the ban and bulk containers are not.

2. Proposed Exemptions

The products that EPA proposed to exempt are actually product categories rather than particular products manufactured and marketed by individual companies, relying upon the definition of "product" developed in the Class I Nonessential Products Ban rulemaking. EPA reiterated its belief that in section 610 of the statute, Congress applied this term to any type or category of merchandise or commodity offered for sale, as well as any use of an ozone-depleting substance in the manufacture or packaging of any such merchandise or commodity. Consequently, when granting exceptions today, EPA is taking action with regard to entire product categories rather than individual products in this rulemaking. (EPA recognized that in the case of certain niche markets, there may be only one individual product that falls within a particular category; in such a case, EPA could consider an exception for that specific product.)

EPA carefully considered requests for exceptions and exemptions received prior to the publication of the NPRM in order to determine which foam or aerosol products may meet the criteria for exceptions and exemptions set out in the statute. EPA stated in the NPRM that there was legal authority to consider exempting any of the eleven products that received class I exemptions, as well as any product that was using an HCFC to replace methyl chloroform, carbon tetrachloride or halons. EPA put forth a list of proposed exemptions, asked for additional information concerning several products for which the Agency could not adequately determine if an exemption was authorized and discussed several possible revisions to the class I ban that would result in creating the potential for additional exemptions.

EPA proposed to exempt the following aerosol products:

- Medical devices listed in 21 CFR 2.125(e);
- Lubricants, coatings or cleaning fluids for electrical or electronic equipment, which contain class II substances for solvent purposes, but which contain no other class II substances;
- Lubricants, coatings or cleaning fluids used for aircraft maintenance, which contain class II substances for solvent purposes but which contain no other class II substances;
- Mold release agents used in the production of plastic and elastomeric materials, which contain class II substances for solvent purposes but which contain no other class II substances; and
- Spinnerette lubricants/cleaning sprays used in the production of synthetic fibers, which contain class II substances for solvent purposes but which contain no other class II substances.

Based on the restriction regarding the sale and distribution of certain cleaning fluids containing class I substances to commercial purchasers, EPA also proposed exempting sales or distribution to commercial purchasers of any aerosol or pressurized dispenser cleaning fluid for electronic and photographic equipment which contains a class II substance.

EPA requested additional comment to determine if exemptions were warranted based on worker safety or flammability concerns regarding the use of a substitute for class II substances in the products listed below, as well as comment on current and potential uses of class II substances in the following products:

- Lubricants for pharmaceutical and tablet manufacture;
- Gauze bandage adhesives and adhesive removers;
- Topical anesthetic and vapocoolant products;
- Plasma etching;
- Solvent uses in document preservation sprays;
- Solvent uses in red pepper bear repellent sprays.

In order to grant an exception to the class II ban, the only available alternative to the use of the class II substance must be a legal use of a class I substance and the Agency must determine that the aerosol product or pressurized dispenser is essential as a result of flammability or worker safety concerns. Consequently, EPA was generally limited to considering products that were exempted under the class I ban or products that use HCFCs as substitutes for methyl chloroform, carbon tetrachloride or halons. EPA discussed in the NPRM that the class II exemptions are integrally linked to the Class I Nonessential Products Ban. EPA believes that the class I ban and the Act gave ample notice to the public through the class I rulemaking process that future exemptions from the class II ban would not be available. The NPRM notes, however, that there are a number of products that do not use class I substances, but do use class II substances. Some of the manufacturers of these products may not have commented on the need for a class I exemption, because they were not aware of the connection between the two bans (e.g. that class II exemptions could only be obtained where class I use was legal). As stated above, without a legal class I use, the Agency does not have authority under section 610(d) to grant exemptions under the class II ban. EPA proposed considering the need to revise the class I ban to provide exemptions for several products brought to the Agency's attention prior to the issuance of the NPRM. For the most part, these were products that no longer used class I substances and therefore did not submit comments to EPA during that rulemaking. Therefore, since these products were not sufficiently considered in the earlier rulemaking, these products could not meet the statutory requirement regarding the only legal substitute being the use of a class I substance. The Agency requested comment on the need to revisit the Class I Nonessential Products Ban through this rulemaking with respect to any product for which there is no substitute for the class II use other than the use of a class I substance, where that use would no longer be legal. EPA specifically discussed two products:

- pesticides used in aircraft; and
- antispatter products used by welders.

In addition, EPA discussed the possibility of considering other factors not specified in the Act, such as economic feasibility or availability of the alternatives. EPA stated, however, that it did not believe it had such authority, but requested comment regarding the economic feasibility and availability of alternatives relative to dusters and safety sprays and whether EPA could consider these factors.

Finally, the Agency discussed granting exemptions based on the legal use of methyl chloroform, carbon tetrachloride and halons. The NPRM specifically mentioned two products. The first product was a pesticide, used to kill wasps and hornets nesting near high-voltage power lines, that may require an exception based on the solvent use of HCFC–141b in a new formulation, replacing the current formulation that uses methyl chloroform. The second product described in the NPRM is a parts cleaner for hydraulic and electronic parts in aircraft, automotive and marine maintenance. EPA requested comment on worker safety or flammability concerns regarding the manufacturing and use of these products, as well as comment on current and potential uses

of class II substances in both products. In addition, EPA requested comment on whether the only available alternative to the use of a class II substance in the wasp and hornet pesticide and the hydraulic parts cleaner is the use of a class I substance.

EPA was unaware of any other products for which manufacturers, distributors or retailers are substituting or planning to substitute class II substances, where the only legal substitute for the class II substance is the use of a class I substance; however, EPA requested comment on the need to grant additional exceptions based on worker safety or flammability concerns for products containing or manufactured with class II substances where the only alternative is the legal use of a class I substance.

C. Foam Products Containing Or Manufactured With Class II Substances

Section 610(d) prohibits the sale, distribution, or offer of sale or distribution in interstate commerce of all plastic foam products which contain, or are manufactured with, class II substances, and which are not specifically excluded from the ban under section 610(d)(3), as of January 1, 1994. Certain types of plastic foam products, specifically foam insulation products and integral skin, rigid, or semi-rigid foams necessary to meet the Federal Motor Vehicle Safety Standards, are excluded from the ban by the statute. However, in this rulemaking, EPA has determined which plastic foam products qualify as "foam insulation products," and whether adequate substitutes for certain HCFC-blown foams are practicable for effectively meeting the Federal Motor Vehicle Safety Standards.

The NPRM states that for the purposes of this rulemaking, EPA interprets the term "plastic foam product" to mean any product (as defined in 40 CFR 82.62) composed in whole or in part of material that can be described as "foam plastic" or "plastic foam." EPA interprets "foam plastic" or "plastic foam" to mean a type of plastic such as polyurethane or polystyrene which has been produced using blowing agents to create bubbles or "cells" in the material's structure.

The foam plastics manufacturing industries, the markets their products serve, and their uses of CFCs and HCFCs are extremely varied. CFC–11, CFC–12, CFC–113, CFC–114, HCFC–22, HCFC–141b, and HCFC–142b have all been used to some extent as blowing agents in the manufacture of plastic foam products, which include building and appliance insulation, cushioning foams, packaging materials, flotation devices and shoe soles.

1. Insulating Foam Products

There are two basic types of foam produced with halocarbons: thermosetting foams and thermoplastic foams. In the production of thermosetting foams, a blowing agent is mixed with chemicals which react to form the plastic foam product. With thermoplastic foams, the blowing agent is injected into a molten plastic resin which hardens upon cooling.

The NPRM discusses an important distinction between foam plastics where the cells are closed, trapping the blowing agent inside, and those with open cells which release the blowing agent during the manufacturing process. The gas trapped in closed cell foams can, if it possesses a low thermal conductivity, provide significant thermal insulation. All of the foam products used as thermal insulation are closed cell foams. Open cell foams are not good thermal insulators.

CFCs had been commonly used as blowing agents in the manufacturing process of many foam products because they have suitable boiling points and vapor pressures, low toxicity, very low thermal conductivity, are non-flammable, non-reactive, and, until the imposition of the excise tax on ozone-depleting substances, they had been very cost-effective. Among the many commonly used substitutes for CFCs in foam production are HCFCs, CO_2, hydrocarbons and methylene chloride. In addition, HFCs and fluorinated ethers may offer long-term substitutes for plastic foam production.

Section 610(d)(3) states that the ban on plastic foam products containing or manufactured with HCFCs shall not apply to "foam insulation products." EPA identified two possible interpretations of this phrase. "Foam insulation products" could be interpreted to mean products containing foam that are used for insulating some object. This phrase could also mean products containing "insulating foam."

In addition, the NPRM considered different possible interpretations of the word "insulation." The largest use of plastic foams produced with CFCs and HCFCs is in products that provide thermal insulation for buildings, equipment, and a host of different objects, but comments received during the development of the NPRM suggested that the word "insulation" could also conceivably refer to a product or material that protects or "insulates" some object from other phenomena, such as noise, shock, or electromagnetic radiation. Several commenters have suggested to EPA that the word "insulation" should be interpreted to mean a product or material that protects some object from physical impacts or vibration. EPA examined each of these options in preparing the proposed rulemaking.

The NPRM states that EPA believes that the word "insulation" should be interpreted to mean thermal insulation exclusively. The primary uses of plastic foam products consist of thermal insulation, cushioning, and packaging applications.

Because the statutory language is ambiguous, EPA has the authority to reach a reasonable interpretation in developing a definition of foam insulation. (See *Chevron* v. *NRDC*, 467 U.S. 837 (1984)). Reviewing the provisions of section 610 as a whole, EPA proposed that the exemption in section 610(d)(3)(A) should apply only to thermal insulation products. In section 610(d)(3), Congress provided two statutory exemptions, one for foam insulation and one for certain types of motor vehicle safety foam under specified circumstances. Under a broad interpretation of foam insulation including all insulating uses, such as physical shock or impact insulation, motor vehicle safety foams would be included in the definition of foam insulation, since motor vehicle safety foams serve to insulate vehicle occupants from crash impact. Therefore, the second exemption provided by Congress would be entirely unnecessary if the first exemption were broad enough to include the products covered by the second exemption. Furthermore, it would not be necessary for Congress to limit motor vehicle safety foams to specific circumstances where substitutes were unavailable. A broad interpretation of the definition of foam insulation would exempt motor vehicle safety foams from the class II ban even where substitutes were easily available, contrary to the explicit provisions of the second exemption. EPA concluded that since a broad interpretation of insulating foam would render the second exemption superfluous, the better reading of the statute would limit the first exemption to thermal insulation foams. See the NPRM for a full discussion of this issue (58 FR 50481).

For the purposes of this rule, EPA proposed defining "foam insulation product" as any product containing the following materials:

(1) Closed cell rigid polyurethane foam,

(2) Closed cell rigid polystyrene boardstock foam, and

(3) Closed cell rigid phenolic foam.

In addition, EPA proposed to define pipe insulation (also referred to as "pipe wrap") made out of closed cell rigid polyethylene foam as a foam insulation product. As explained in the NPRM, EPA concluded that all of these products were thermal foam insulation products and that no other products were thermal foam insulation products (58 FR 50481).

2. Foam Used To Meet Federal Motor Vehicle Safety Standards

Section 610(d)(3) states that the ban on class II substances in plastic foam products shall not apply to any "foam insulation product" or "an integral skin, rigid, or semi-rigid foam utilized to provide for motor vehicle safety in accordance with Federal Motor Vehicle Safety Standards where no adequate substitute substance (other than a class I or class II substance) is practicable for effectively meeting such Standards."

Section 103 of the National Traffic and Motor Vehicle Safety Act of 1966 authorized the National Highway Traffic Safety Administration (NHTSA) to promulgate Federal Motor Vehicle Safety Standards, which have subsequently been published in 49 CFR part 571. The Federal Motor Vehicle Safety Standards are, for the most part, performance standards. The use of particular materials is generally not specified in the standards in 49 CFR part 571 affected by this rulemaking. Consequently, to the best of the EPA's knowledge, no HCFC-blown foams are specifically required by the NHTSA regulations. However, since the enactment of the laws requiring these standards beginning in the late 1960s, the motor vehicle manufacturing industry has relied almost exclusively on foams to meet the part 571 impact protection standards (the only exception EPA is aware of consists of leather-wrapped steering wheels and leather-covered dash boards, and the Agency understands that even these products have foam underneath).

After conducting its own research and consulting with officials at the NHTSA and industry sources, EPA proposed applying the statutory ban on the sale, distribution, or offer of sale or distribution in interstate commerce to all foam components used in motor vehicles except those made out of integral skin foam and those which qualify as foam insulation products as defined in § 82.62(h) effective January 1, 1994. Based on the Agency's understanding of when substitutes to HCFC use in integral skin foam used to meet Federal Motor Vehicle Safety Standards would be available, EPA proposed exempting integral skin foam made with HCFCs used to meet Federal Motor Vehicle Safety Standards under the provisions of section 610(d)(3)(B) from the class II ban on plastic foam products only until January 1, 1996. At that time, the exemption for HCFC-blown integral skin foam will "sunset." In addition, EPA proposed to permanently exempt from the class II ban existing inventories of integral skin products needed to meet the Federal Motor Vehicle Safety Standards manufactured prior to January 1, 1996.

EPA indicated that the Agency will revisit the sunset provision for this exemption at a future date if the Agency receives a request from the public for extending the exemption based on the unavailability of substitutes.

D. Temporary Exemptions

EPA proposed certain limited exemptions from the statutory ban on class II substances. Administrative creation of exemptions from statutory requirements are authorized only in limited circumstances, outlined in *Alabama Power Co., et al.* v. *Costle, et al.*, 636 F. 2d 323 (D.C. Cir 1979). Agencies can create such exemptions only where necessary based on administrative feasibility or the de minimis nature of the exemption. EPA proposed providing a "grandfather" exemption for existing inventories, based on the de minimis rationale, as well as a temporary exemption for products requiring federal approval for reformulation, based on administrative feasibility.

EPA proposed exempting existing inventories of products otherwise subject to the class II ban based on the de minimis environmental impact of such an exemption. Many of the products covered by the class II ban, particularly many of the foam products, release class II substances either during manufacture or disposal, rather than during use. Thus, banning the sale of existing inventories of such products would have a de minimis environmental impact. While there are also cases where the class II substance is released in the use of the product, especially with the aerosol products, EPA stated its conclusion in the NPRM that emissions to the environment from these products, once manufactured, will be little or no different from the releases from these products if removed from commerce and subsequently disposed of.

The proposed exemption would cover all products placed into initial inventory by December 27, 1993, the date ninety days after publication of the NPRM. EPA believes that this is adequate time for manufacturers to alter manufacturing processes to exclude class II substances. Under the proposal, to continue selling products after January 1, 1994, the manufacturer or distributor must be able to show, upon request by EPA, that the product was in fact manufactured, and thus placed into initial inventory by December 27, 1993. Shipping forms, lot numbers, manufacturer date stamps or codes, invoices, or the like, may be used to identify the date the product was placed into initial inventory. EPA believes these types of records are normally kept by manufacturers and distributors of products affected by this rulemaking and that no additional recordkeeping will be required by this rule.

In addition, EPA proposed exempting from the class II ban those products requiring federal approval prior to reformulation, provided that manufacturers of such products have made a request of the appropriate federal agency for such federal approval prior to January 1, 1994. *Alabama Power* authorizes creation of administrative exemptions where necessary, based on administrative feasibility.

EPA proposed allowing manufacturers that require federal approval for reformulations of a product or approval of a specific substitute product to continue to sell or distribute, or offer for sale or distribution in interstate commerce, their existing formulations until ninety days after receiving all appropriate federal agency approvals, providing the request for approval from the appropriate federal agency had been submitted by January 1, 1994. EPA proposed allowing manufacturers that are ultimately denied federal approval for reformulations of a product or approval of a specific substitute product to continue to sell or distribute, or offer for sale or distribution in interstate commerce, their existing formulations until thirty days after receiving notice of denial from the federal agency. EPA felt this shorter period was appropriate since in this case, manufacturers need merely cease using class II substances rather than altering manufacturing processes to accommodate the new formulation or substitute. Consistent with the temporary exemption for products placed in initial inventory prior to December 27, 1993, products put into initial inventory by the manufacturer, before thirty days after receipt of denial or ninety days after receiving an approval by the appropriate federal agency, would be grandfathered. To continue selling after January 1, 1994, the manufacturer or distributor would be required to show, upon request, that the pertinent federal approvals were applied for prior to

January 1, 1994 and that the product was in fact manufactured by ninety days following the receipt of all appropriate federal approvals or thirty days following denial.

E. Ban on Sale or Distribution in Interstate Commerce

EPA proposed that the term "interstate commerce" in section 610(d) refer to the product's entire distribution chain up to and including the point of sale to the ultimate consumer. Under section 610, the statute prohibits all sale, distribution, or offer of sale or distribution in interstate commerce after the January 1, 1994 effective date. As such, all sales and distribution of banned products, including retail sales, would be prohibited as of January 1, 1994, as required by the Act, unless otherwise specified.

F. Scope of Interstate Commerce

EPA's interpretation of interstate commerce does not cover the sale, distribution, or offer of sale or distribution, of nonessential products within the boundaries of a single state. Thus, EPA believes that the Act does not ban the sale, distribution, or offer of sale or distribution of a product otherwise affected by this rulemaking that is completely manufactured, distributed, and sold without ever crossing state lines. However, the Agency stated in the NPRM that to avoid coverage by this proposed rulemaking, an affected party must provide adequate documentation that not only was the product manufactured, distributed, and/or sold exclusively within a particular state, but also that all of the raw materials, components, equipment, and labor that went into manufacturing, distributing, selling, and/or offering to sell or distribute such a product originated within that state as well. The sale of the affected product includes every sale up to and including the sale to the ultimate consumer, and all these sales must take place without ever crossing a state line for the product to be considered not part of interstate commerce.

G. Resale of Used Products

EPA proposed an interpretation of sale, distribution, or offer of sale or distribution in interstate commerce which does not cover the resale of used products. Resale of used products means a sale, by a person after a period of use other than demonstration use. The Agency recognizes that more than one consumer often derives utility from owning and using certain durable goods affected by this rulemaking, such as automobiles and boats. Restricting the resale of such used durable goods before the end of their productive lifetimes would provide little, if any, environmental benefit. Because restricting the resale of such used durable goods would impose significant economic hardship on a great many consumers without providing any associated environmental benefits, EPA does not believe that Congress intended to ban their resale. Consequently, while EPA's interpretation of "interstate commerce" is such that interstate commerce includes the entire chain of sale and distribution from the manufacturer of a new product to its ultimate consumer, the Agency recognized in the NPRM that in the case of durable consumer goods such as boats and motor vehicles, resale of the product to additional consumers may occur after the original sale of the new product to the ultimate consumer after some period of use by the original ultimate consumer. In such cases, EPA proposed to not consider the resale of these banned products to constitute sale, distribution, or offer of sale or distribution, of a new product in interstate commerce for the purposes of this rulemaking.

H. Imports and Exports

The NPRM states that EPA believes that both the import of any product for sale or distribution within the United States, or the sale or distribution of any product intended for ultimate export from the United States, are acts of interstate commerce within the meaning of section 610 and would, accordingly, be affected by this regulation. The import or export of products affected by today's rulemaking would be subject to the same restrictions as the sale, distribution, or offer of sale or distribution of these products in the United States. EPA did not by these provisions intend to extend its authority to regulate foreign commerce. The class II ban applies only to interstate commerce and EPA intended in the NPRM to regulate imports and exports only while they were in interstate commerce. EPA did not intend to regulate the foreign commerce aspects of imports and exports. EPA intended only that the manufacture of products for ultimate export and the distribution of imported products be subject to these rules to the extent they fell within interstate commerce as defined in section II.F., above.

I. The Use of Affected Products Purchased Before the Effective Date of the Ban

The NPRM discusses EPA's confirmation in the final class I ban rulemaking that nonessential products purchased before the effective date of the ban may still be used, and that the Agency is not regulating the use of nonessential products, merely their sale and distribution as authorized by the statutory language (58 FR 4782). Consistent with that rulemaking, the class II ban proposal states that EPA is not regulating the use of affected products, only the sale and distribution of affected products in interstate commerce.

J. Verification and Public Notice Requirements for Cleaning Fluids for Non-Commercial Electronic and Photographic Equipment

Section 610(b)(2) required EPA to ban the sale of chlorofluorocarbon-containing cleaning fluids for electronic and photographic equipment to non-commercial users. EPA estimates that non-commercial sales of such fluids represent a small fraction of the total use of these products. Nevertheless, the statute specifically required EPA to ban the sale of these products containing CFCs for non-commercial use. Consequently, EPA proposed, and the final rule included, a ban on the sale, distribution, or offer of sale or distribution of these products to non-commercial users. As a result of this statutory mandate, there is no remaining chlorofluorocarbon which legally could be substituted for class II substances in non-commercial cleaning fluids for electronic and photographic equipment.

EPA stated in the class II ban NPRM that aerosol cleaning fluids for electronic and photographic equipment sold to commercial users are often used at work benches in industrial situations. Flammability is a concern in such environments. In addition, these cleaning fluids may be used on electronic or electrical equipment that must be serviced while electrical current is turned on. Therefore, the Agency believes flammability is a concern associated with the use of aerosol cleaning fluids for electronic and photographic equipment. Accordingly, EPA proposed providing an exemption for the sale of aerosol cleaning fluids for electronic and photographic equipment containing class II substances to commercial users.

In the class I ban, EPA required sellers and distributors to post signs stating that sale, distribution, or offer of sale or distribution, in interstate commerce of these products to non-commercial users is prohibited and that purchasers of these products must provide verification that they are commercial users. In addition, sellers and distributors were required to verify that purchasers of

these products are commercial users. Purchasers could fulfill this requirement by presenting any number of existing documents generally issued to commercial entities as a condition for conducting business. Sellers and distributors would have to have a reasonable basis for believing that the information presented by the purchaser is accurate and thus that the purchaser is in fact a commercial user. These documents could include a federal employer identification number, a state tax exemption number, a local business license number and a government contract number. EPA believes that these requirements impose the least burden while still meeting the statutory requirement to prevent non-commercial users from purchasing CFC-containing cleaning fluids.

EPA stated in the NPRM that the statutory language in section 610(d) compels the Agency to adopt similar verification provisions with regard to cleaning fluids containing class II substances. Consequently, the Agency proposed verification and public notice requirements similar to those in the class I ban final rule. Included in the proposal was an option allowing the sellers and distributors to use one sign to provide the proper notification.

III. Summary of Major Public Comments

A public hearing on the proposed rule was held on October 12, 1993. Nine groups presented oral comments on the NPRM. A transcript of the hearing is contained in Docket A–93–20.

EPA received a total of 91 written comments on the proposed rule during the forty-five day public comment period, and these comments are also contained in Docket A–20–93. Many commenters expressed support for EPA's definition of "insulating products" while a few commenters suggested EPA modify the definition. Many comments requested that EPA re-examine the use of HCFC–22 in aerosols, specifically in mold release agents, document preservation sprays and spinnerette lubricant/cleaning sprays. A number of commenters requested that EPA consider providing an exemption for the solvent and propellant uses of class II substances in document preservation sprays. Several commenters put forth requests to exempt class II substances in certain circumstances based on worker safety and flammability concerns, where the only legal alternatives are halons. Finally, a few commenters discussed the benefits of EPA's proposed grandfathering provisions.

IV. Response to Comments

EPA received several comments indicating that there were errors in the published version of the regulatory text. EPA has reviewed and updated that text.

A. Aerosol Products and Pressurized Dispensers

EPA received one comment indicating that the Agency should clarify the definition of "other pressurized dispenser." The commenter was particularly concerned with how the Agency would treat a container used solely to transport class II substances. In the class I ban final rules and in the class II ban NPRM, EPA discussed bulk containers used to transport class I and class II substances, including small containers of CFC–12 used in the automotive industry. EPA would like to clarify that these are bulk containers, used solely to transport the controlled substance, and are not considered to be pressurized dispensers for the purposes of section 610.

Product which may contain only a class I or class II substance or mixture of class I and class II substances and other substances, are subject to the bans promulgated under section 610. Products are different from bulk containers in that to perform its function, products are directly applied from the container in which they are sold. Furthermore, products to be added into a system, such as an air conditioner, that contain a class I or class II substance, but that do not function as part of the use system (e.g. some function other than cooling in an air-conditioner) are considered products, not bulk containers. One example of this is a leak repair product that is transferred into an air-conditioning system under pressure provided by a refrigerant. The primary function of the product is to repair a leak rather than to charge the system with refrigerant. Another example is a duster, whose inherent function is to remove dust through forced air. The controlled substance is used as pressure to force the air from the container. A bulk refrigerant, on the other hand, is transferred under its own pressure and provides refrigerant qualities to the system to which it is transferred. Furthermore, in the final regulations implementing section 606, published on December 10, 1993, EPA clearly delineates between manufactured products and bulk containers used to transport substances.

EPA received one comment from a manufacturer that employs an alternative technology in the production of various aerosol products and pressurized dispensers. This commenter stated that a patent-pending process is available that allows the manufacturing of formulations without ozone-depleting substances. The commenter indicated that this technology is being widely used and considered in many fields and provides a safe nonflammable alternative to class I and class II substances. EPA applauds the efforts of this commenter to develop a technology that does not contribute to stratospheric ozone depletion. As the phaseout dates for class I and class II substances approaches EPA is pleased to learn that alternatives will be available. However, the commenter did not provide enough information to allow EPA to judge where this new technology can effectively replace the need for EPA to provide specific exceptions or exemptions to the statutory ban. Therefore, EPA cannot consider this technology as an alternative sufficient to allow the Agency to alter any of the exemptions in this final rulemaking.

EPA received comments concerning the relationship between the class I and class II bans and the Significant New Alternatives Program (SNAP) being promulgated under section 612 of the Act. The SNAP final rule will provide industries with lists of "acceptable" and "unacceptable" alternatives for use as substitutes for ozone-depleting substances. In addition, the use of acceptable alternatives may be subject to other restrictions promulgated under Title VI, as well as other federal, state, and local requirements.

EPA received several comments describing the positive and negative aspects of various alternatives that could be used or considered in different applications. Many commenters described factors that should be considered where a given alternative is considered. EPA has reviewed this information.

1. Products Using Class II Substances As Replacements For Class I Substances That Include Methyl Chloroform, Carbon Tetrachloride or Halons

EPA has authority to consider granting exceptions for products containing one or more class II substances, where the only available alternative for the class II substance(s) is legally available class I substances and the use of the class II substance is essential based on flammability or worker safety concerns. This section discusses cases where the only alternative within class I may be methyl chloroform, carbon tetrachloride or halons. Although EPA was not aware of any situations justifying these

exemptions, EPA indicated in the NPRM that a manufacturer, distributor, or retailer of a product containing one or more class II substances could request, through the public comment process, an exception from EPA, citing methyl chloroform, carbon tetrachloride or halons as the only legal alternative(s). EPA stated in the NPRM that the Agency would consider such requests received during the comment period, but may require significant proof that such claims were not attempts to circumvent the intent of the ban. Moreover, EPA would consider the similarity of the class I substances and the corresponding class II alternatives to ensure the substances have parallel uses.

a. *Wasp and hornet sprays.* Just prior to issuing the NPRM, EPA learned of a product, a pesticide used to kill wasps and hornets nesting near high-voltage power lines, that may require an exception based on the solvent use of HCFC–141b in a new formulation, replacing the current formulation that uses methyl chloroform. EPA did not have enough information to determine what if any substitutes, other than methyl chloroform, exist, and whether or not worker safety or flammability concerns affect the use of alternatives in these products. Furthermore, EPA did not have confirmation that an application for formulations using HCFC–141b had been submitted under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) for these HCFC formulations. Therefore, the Agency did not propose to exempt the use of class II substances in wasp and hornet sprays used near high-voltage power lines. However, EPA requested comment on worker safety or flammability concerns regarding the manufacturing or use of these products, as well as comment on current and potential uses of class II substances in these products. In addition, EPA requested comment on whether the only available alternative to the use of a class II substance in wasp and hornet pesticides used near high-voltage power lines is the use of a class I substance.

EPA received two comments addressing this issue. One comment, from the manufacturer of wasp and hornets sprays, stated that many electric utility employees use wasp and hornet sprays while on ladders to work on high-tension power equipment. Sometimes these employees are fifty feet or more above ground. Solvent alternatives to class I and class II substances in these insecticides are flammable. Therefore, without using a class I or class II substance as the solvent, the utility worker would either be unable to destroy the wasps or hornets, or would be forced to spray a flammable product near a potentially charged line. Recently, an application for registration under FIFRA for a wasp and hornet spray formulation including HCFC–141b was submitted to EPA. EPA agrees with the concerns raised by this commenter. The class I ban exempted methyl chloroform. Therefore, manufacturers could continue to use methyl chloroform until methyl chloroform is no longer available. Based on this information, EPA believes it is appropriate, and in this action is providing an exemption for the sale and distribution of products using HCFC–141b as a solvent to replace methyl chloroform in wasp and hornet sprays used by private and public utility employees near high-tension power lines. EPA is further requiring that the seller of a wasp and hornet spray containing an HCFC as a solvent provide notification of the requirements to ensure that the exempted wasp and hornet spray is sold either to an organization that employs personnel who work near high-tension power lines and requires use of an HCFC-pesticide, or that the seller is selling the product only for eventual resale to such an organization. This notification will take the form of written notification of the requirements prior to any sale that occurs after January 1, 1994, by including this information on sales brochures, order forms, invoices and the like. The seller must notify the purchaser that "it is a violation of federal law to sell or distribute wasp and hornet sprays containing hydrochlorofluorocarbons as solvents to anyone, *except* for use near high-tension power lines where no other alternative except a class I substance is available. The penalty for violating this prohibition can be up to $25,000 per unit sold." EPA understands that at least one major manufacturer intends to label this product to accurately reflect this requirement. The Agency would like to clarify that this exemption is only for the sale and distribution of the product used near high-tension power lines; other consumer wasp and hornet sprays, including those used near electrical lines and cables, as well as other pesticides, are in no way affected by this exemption.

A second commenter suggested that EPA provide an exemption for HCFC–22 used as a propellant in wasp and hornet sprays because HCFC–22 is non-flammable and non-conductive. In the NPRM, EPA only discussed an exemption based on the use of methyl chloroform. EPA believes that while the solvent properties of methyl chloroform are similar to HCFC–141b, EPA does not believe this situation is true for HCFC–22. HCFC–22 is generally considered to be a propellant, while methyl chloroform is considered a solvent. Therefore, EPA does not believe that HCFC–22 in this product would be considered a substitute for methyl chloroform. It is possible that the commenter was making this request for an exemption based on the propellant uses of a different class I substance, such as CFC–12; however, the commenter did not provide such information, nor did the commenter demonstrate that the legal use of a class I substance is the only alternative for the use of HCFC–22 for this product. EPA believes there are adequate propellant substitutes available for use in wasp and hornet sprays. Therefore, EPA is not providing an exemption for the use of HCFC–22 in this product.

b. *Hydraulic Brake Cleaners.* EPA requested comments on the need to provide an exemption for the solvent uses of hydraulic brake cleaners. While the NPRM proposed an exemption for the solvent uses of class II substances in lubricants, coatings, or cleaning fluids used to clean electrical and electronic equipment, and for lubricants, coatings or cleaning fluids used to maintain aircraft, EPA did not propose an exemption for all hydraulic equipment. EPA received several comments concerning this issue. One commenter stated that it favored an exemption for hydraulic parts cleaning products for aircraft maintenance. EPA would like to clarify that the proposed exemption for the solvent uses of class II substances in aircraft maintenance was in no way limited to non-hydraulic applications, but applied to all aircraft maintenance cleaning including hydraulic applications.

A second commenter requested that EPA include marine and automotive cleaning as well as aircraft cleaning. The commenter manufactured a product using methyl chloroform. The commenter's new formulation includes a class II substance. The commenter stated that automotive cleaning applications, particularly in the area of brake cleaning, require a nonflammable product because the work is often performed in close proximity to high-temperature exhaust systems. The commenter states that nonflammable, safe solvents are necessary where there is an extremely high heat potential and the environment is enclosed. Potentially the products could be used near open flames and electrical equipment. While EPA agrees that a safe working environment is essential, EPA does not

agree that an exemption for the solvent uses of class II substances is necessary for these products. The automotive maintenance industry employs a variety of flammable products and therefore, routinely provides an appropriate working environment for the use of these products. Moreover, there are many flammable brake cleaners regularly used by both professionals and do-it-yourselfers. In addition, nonflammable products that do not contain class II substances are available. These products may contain perchloroethylene and may therefore require particular worker safety conditions. However, EPA believes that these products represent adequate substitutes already accepted by the marketplace. Based on this information, EPA does not believe that the worker safety or flammability concerns raised by this commenter justify the requested exemption. Therefore, this final action will not provide an exemption for hydraulic brake cleaners, other than those used for aircraft maintenance as proposed.

c. *Portable fire extinguishers.* While in the NPRM, EPA discussed the legal authority to consider exemptions where the only available alternative for the class II substance(s) is halons, EPA did not propose any such exemptions. Prior to the issuance of the NPRM, EPA did not receive any comments regarding the substitution of HCFCs for halons as it relates to this rulemaking. During EPA's public meeting held to discuss the upcoming ban with affected stakeholders on March 29, 1993, EPA discussed the definition of the terms "aerosol products" and "pressurized dispensers" as well as the requirements under section 610(d). While representatives of the fire equipment manufacturing industry and chemical suppliers to that industry were present at this meeting, no information regarding the use of HCFCs as halon replacements or the potential need for exemptions was brought to the Agency's attention. Therefore, EPA did not propose any exemptions for halon replacements. However, during the public comment period, EPA received several comments requesting exemptions for HCFCs used as halon replacements.

In the Significant New Alternatives Program (SNAP) NPRM (58 FR 28093) being promulgated under section 612 of the Act, EPA discusses fire extinguishing streaming agents and total flooding agents. Halocarbons represent only a portion of the agents available for fire protection, and in fact appear to be a decreasing portion as more and more users are choosing to install "alternative" systems. However, a number of HCFCs have been suggested as halon replacements, including HCFC–22, HCFC–123 and HCFC–124 for both streaming and total flooding applications. Commenters claimed that there are particular situations where the only legal alternative would be the use of either a halon or a class II substance.

Two comments regarding the treatment of halon replacements indicated that the Agency should not consider any fire extinguishing equipment under the class II ban rulemaking. Another commenter suggested that EPA should add an exemption under this rule for "all pressurized fire extinguishers and fire extinguishing systems containing class II substances." This commenter also further stated that EPA treated fire extinguishing systems separately during the class I rulemaking and that the Agency should therefore take a consistent approach. EPA disagrees with both of these commenters. Fire extinguishing equipment was not treated separately or exempted under the class I ban rulemaking, but rather halons were not included in the class I ban. Portable fire extinguishers using CFCs were in fact banned.

Another commenter, also referring to the class I rulemaking, notes that in the final rule EPA defines chlorofluorocarbons to include Class I, Group I and III substances, but not Group II substances (halons). Therefore, while CFC-fire extinguishing equipment was banned, halon-fire extinguishing equipment was exempted. Furthermore, the commenter reviewed the preamble discussion for the proposed SNAP rule, published in the **Federal Register** on May 12, 1993 (58 FR 28093), suggesting that EPA consider a method to provide a consistent and complementary approach under this rule. The commenter also stated that it had expended substantial effort and resources in the search for, and development of, an environmentally acceptable halon replacement. A prohibition on the general use of class II substances as halon replacements in fire protection applications could result in deeming this commenter's efforts as useless. EPA agrees that halons were not included in the class I ban. EPA only banned the use of CFCs in aerosol products or pressurized dispensers. EPA further agrees that an outright prohibition on the use of class II substances could have an adverse economic impact on this industry; however, EPA does not have authority under section 610 to consider economic impacts. EPA may exempt products based only on flammability and worker safety concerns where a legal class I alternative exists, which would be the case with halon replacements, as they were not covered in the class I ban. Cases such as these are discussed below.

A third commenter stated that EPA is incorrect in its interpretation of section 610(d). Referring to the requirements under the 1978 ban on aerosol propellants and under other sections of Title VI, the commenter states that "the ban on CFC and HCFC use in aerosol products was clearly intended to cover its use as an aerosol propellant." The commenter further stated that "although HCFCs used as fire protection agents would in most cases be used in 'pressurized dispensers,' the HCFC is not the propellant, but is instead the active ingredient * * * (the commenter does not believe) that section 610(d) was intended to cover the use of HCFCs as active ingredients in essential products such as fire protection equipment or extinguishers." EPA disagrees with this commenter. Congress in no way restricted consideration under this rulemaking to only the use of class II substances as propellants. Rather, Congress banned all class II uses of aerosols and pressurized dispensers unless qualifying for an exclusion. Moreover, the authority for all Title VI rulemakings is wholly separate in mandate and intent from the 1978 aerosol propellant ban.

A fourth commenter states that all fire extinguishers are pressurized to some extent, but that the Agency should consider categorizing them as equivalent to bulk containers. This commenter believes that the NPRM is in conflict with the SNAP NPRM and that banning the use of HCFCs in fire extinguishers would cause great economic hardship. EPA recognizes the need to consider decisions made under the SNAP rulemaking; however, SNAP determinations in no way restrict EPA authority under section 610. EPA believes that all portable fire extinguishers are pressurized dispensers, since pressure is necessary to propel the fire extinguishant and such extinguishant is dispensed directly from the fire extinguisher via a self-contained apparatus. Moreover, fire extinguishers are products, not bulk containers transporting chemicals.

EPA would like to clarify that all aerosol products and pressurized dispensers, regardless of their use, are encompassed under the statutory language that appears in section 610(d). Moreover, the use of all HCFCs, whether as propellants, solvents, or active ingredients are covered by the self-executing statutory ban. Congress in no way limited the types of products to be

banned or the types of uses for HCFCs to be banned. Furthermore, while EPA had authority to consider which products would be banned under the rulemaking for the class I ban, the Act clearly bans aerosol products and pressurized dispensers containing HCFCs. Therefore, if EPA had not chosen to promulgate regulations at this time, on January 1, 1994, all aerosol products and pressurized dispensers, including fire extinguishing equipment, would have been automatically banned regardless of any SNAP determinations. While EPA does attempt to coordinate decisions made under various rulemakings, regulations promulgated under section 612 only determine which replacements are acceptable; however, the use of class II substances in aerosols and pressurized dispensers regardless of the application are still subject to the section 610(d) ban. This situation was discussed in various parts of the SNAP NPRM.

Nevertheless, it has come to EPA's attention that the situation may not have been thoroughly reviewed in the Class II Nonessential Products Ban NPRM as it relates to halon alternatives. EPA realizes that some extinguishants may be appropriate in certain environments on certain types of fires, whereas others would be appropriate in different situations. There may be cases where an HCFC is the only appropriate alternative to halons given the circumstances of the environment and fire potential.

EPA has authority under section 610(d)(2) to grant exemptions for the use of HCFCs where the only alternative is the use of a class I substance, which includes halons. As stated above, the equipment using streaming agents is consistent with the definition of an "aerosol product" or "pressurized dispenser" and therefore subject to this rulemaking. However, EPA recognizes that total flooding agents contained in total fire suppression systems used to extinguish fires are different from a portable device used to extinguish fires. These total flooding systems differ from an aerosol product or pressurized dispenser in that total flooding systems are "systems" that are completely installed and can be triggered to be automatically activated during an emergency situation. The extinguishant is incorporated into the system from bulk containers. Such systems thus do not constitute a pressurized dispenser or aerosol product within the meaning of section 610. Portable fire extinguishers, on the other hand, do constitute a pressurized dispenser, as they provide the product and dispensing apparatus in a self-contained portable unit. With this distinction, EPA believes that flooding systems and fixed automatic extinguishing systems are not included within the scope of the class II ban.

EPA discusses the Halon 1211 substitutes and alternatives for streaming applications in the SNAP NPRM. Halocarbon substitutes on the SNAP Proposed Acceptable list include class I agents (HBFC–22B1, CFC blends), class II agents (HCFC–22, HCFC–123, and HCFC–124) and perfluorocarbons (PFCs). Alternative technologies on the Proposed Acceptable list include dry chemical, carbon dioxide, water, and foam. Technical constraints restricts the applicability of several substitutes and alternatives in specific applications. In addition, due to environmental or health concerns, SNAP places further use restrictions on some of the substitute agents, such as restricting their use to non-residential applications only. Finally, other regulatory constraints limit the potential use of certain alternatives, as discussed below.

Regulatory restrictions being promulgated under section 612 may limit the availability of certain "acceptable" alternatives to the use of halons. For example, the SNAP NPRM includes several use restrictions based on various health and environmental concerns. Some restrictions are in keeping with the Climate Change Action Plan released by the President in October 1993, which directs EPA to use section 612 to control emissions of global warming gases.

Other regulatory constraints not fully discussed in the SNAP NPRM limit the situations in which certain "acceptable" alternatives may be considered. At least one alternative deemed "acceptable" under the SNAP NPRM uses CFCs in an application that was clearly banned in the class I rulemaking. The use of CFCs in portable fire extinguishers was banned in the class I final rulemaking and therefore, while the SNAP NPRM proposes that CFCs are acceptable alternatives, it is not legal to sell or distribute or offer for sale or distribution aerosol products or pressurized dispensers containing CFCs after January 17, 1994, unless specifically exempted by the class I ban rulemaking. CFCs in this application were not exempted under the class I ban.

HCFCs could potentially be used in portable fire extinguishing equipment for both the residential and commercial markets; however, in residential applications, EPA has determined that there are alternatives available that can be used effectively to suppress any fire that may occur. In commercial and industrial applications, there are situations in which portable fire extinguishers containing HCFCs meet the criteria for granting an exemption as set forth in section 610(d)—the use of the product is deemed essential as a result of flammability or worker safety concerns and the only alternative is the use of a class I substance that can be legally substituted. Therefore, EPA believes that in many applications, the only alternative to the use of a class II substance may be the use of a class I substance that can be legally substituted in fire extinguishing equipment. The reasons why other substitutes may not be suitable are discussed below.

Non-halocarbon alternatives to Halon 1211 are already in widespread use in selected commercial applications because of their effectiveness, and due to the current regulatory climate, their use has been increasingly adopted wherever possible. However, unlike Halon 1211, which is gaseous, these non-halocarbon alternatives are not "clean agents" and may cause secondary damage to the property being protected. In addition, in many commercial or industrial applications the types of fires that may occur, the confined environments in which the fires may exist, and the kinds of equipment or chemicals that may be involved will limit the effectiveness of many alternatives in commercial and industrial use. Therefore, the only alternative to the use of a class II substance in these situations may be the legal use of a class I substance (halons).

One alternative, CO_2, is adopted most frequently because it is the only non-halocarbon clean agent and in many applications, it will not cause any secondary damage. There are, however, several limitations that restrict its use. When used in confined spaces, CO_2 poses a significant risk of asphyxiation to occupants and thus, may only be used where sufficient ventilation exists. CO_2 requires six times the weight and storage volume of Halon 1211, and thus is not suitable where weight and storage constraints are a factor. In addition, there is some controversy about whether CO_2 contributes to thermal shock of electric components. Furthermore, CO_2 may not be used on Class A fires.

Water and foam are both very effective agents, but cannot be used on Class C electrical fires since they contribute to electrical shock hazards. In addition, they may cause significant secondary damage and thus are not suitable because the extinguishant can otherwise irreparably damage that which it is intended to protect.

Multi-purpose dry chemical is effective on Class A, B, and C fires, but like water and foam, can cause considerable secondary damage to certain equipment and could result in

greater health and environmental damage. For example, if the multi-purpose dry chemical damaged a critical component on a marine vessel or aircraft, it could threaten the safety of the crew and passengers.

Use of water, foam or CO_2 on hot metals is limited, as uneven cooling may lead to warping of costly components.

EPA does not believe a suitable alternative extinguishant would include a substance that would damage beyond repair the item the extinguishant is employed to protect. Therefore, EPA believes that to provide adequate fire protection in some circumstances, HCFCs may be the only available alternative to halons that can provide sufficient protection without creating a human hazard or irreparable damage from the original threat of flammability. Such cases might include, but are not limited to the following:

- Certain industrial settings, e.g. chemical/refinery processing;
- Certain electric utility facilities, e.g. nuclear power stations;
- Libraries and museums;
- aviation and marine vehicles;
- commercial settings containing types of high value electronic equipment.

For applications like these, halons or HCFCs may be the only suitable fire extinguishant to suppress a fire in progress without further damaging the equipment requiring protection and without creating a human hazard. The suitability of the agent implies that an agent is commercially available, that a fire will be extinguished quickly, and will result in minimum degradation of the products being protected from the fire. Some HCFCs, because of their chemical composition, may tend to suppress fires and reduce explosions in a shorter time and with smaller amounts of agent than do other alternatives, including some HFCs. The smaller amount of agents needed result in smaller amounts of acid gases, thus reducing risks to human health and safety. In light of this, EPA would consider a class II fire extinguishant as suitable in those cases where other alternatives are not commercially available and/or the chemical composition of the other alterative cannot be shown by accepted fire protection standards to be efficient in extinguishing fires in the relevant situations/applications. The selection of agents usually requires input from a fire protection professional who can assess the situation and the potential use of alternatives to class I and class II substances. EPA wishes to clarify that commercial availability in this of an alternative in this context does not consider the relative cost of that alternative or the convenience associated with its purchase.

The high cost associated with the use of class I and class II substances will likely influence the decision-making process whenever other alternatives are suitable and legal. EPA is aware that an industry infrastructure exists that can aid a commercial or industrial user in appropriate risk assessment and determinations of appropriate fire extinguishants. Furthermore, state and local fire codes in many cases require that the purchasers of fire protection equipment comply with widely accepted industry practices. The National Fire Protection Association (NFPA) has developed many standards that the industry regularly relies upon, as well as guidance on compatibility of certain extinguishants with certain types of potential fires and environments.

Class II substances may be the only available alternative for use in water vessels and in both non-commercial and commercial aircraft. Circumstances that involve the potential use of an extinguishant in a confined environment, where even limited damage to equipment may leave the water vessel or aircraft inoperable, may limit the feasibility of alternatives to class I and class II substances.

In light of the above discussion, EPA will exempt from the class II ban HCFC fire extinguishant alternatives for applications where HCFCs are the only suitable alternative to halon use other than alternatives that are subject to other regulatory constraints that effectively limit their legal use, including the final SNAP regulations, once promulgated. This includes situations where a clean agent is necessary to avoid irreparable damage to an area or the equipment being protected in that area or where other alternatives can cause a hazard to persons in the area. Prior to promulgation of the final SNAP rule under section 612, which is anticipated by February 15, 1994, those HCFC fire extinguishant alternatives found acceptable under the proposed SNAP regulations will be exempted from the class II ban, where a determination can be made consistent with industry fire extinguishant standards that there are no other acceptable alternatives for commercial and industrial use that can be substituted for halons.

EPA is requiring that distributors as defined in § 82.62(d) of portable fire extinguishers must verify that the purchasers of HCFC portable fire extinguishers are commercial entities as defined in § 82.62(b) or that the purchaser is the owner of a water vessel or non-commercial aircraft and that distributors make a good faith effort to ensure that the HCFC portable fire extinguisher is being purchased for use in a commercial or industrial establishment, or for use in a water vessel (as defined in 33 CFR part 177) or aircraft. In order to meet this requirement, EPA is requiring that the seller provide written notification of the requirements of this rule to the purchaser. This notification will take the form of a sign clearly posted where the portable fire extinguishers are displayed for sale. In cases where the purchaser does not physically come into contact with product at the point of sale, EPA requires that the seller provide prior written notification of the restrictions concerning the sale of HCFC portable fire extinguishers on sales brochures, order forms, invoices and the like. EPA reviewed the standards developed by NFPA and has based this requirement on those standards.

The seller must indicate to the purchaser that "it is a violation of federal law to sell portable fire extinguishers containing hydrochlorofluorocarbons to anyone, *except* for use in applications where necessary to extinguish fire efficiently without irreparably damaging the equipment or area being protected or where the use of other alternatives can cause a hazard to persons in the area. The penalty for violating this prohibition can be up to $25,000 per unit sold. Individuals purchasing such products must present proof of their commercial status in accordance with 40 CFR 82.68(a) or of ownership of a marine vessel or boat as defined in accordance with 40 CFR 82.62(j), or of ownership of a noncommercial aircraft in accordance with 40 CFR 82.68(k)."

EPA would like to clarify that the servicing of existing portable fire extinguishers is in no way affected by the class II ban. If after a discharge, a portable fire extinguisher is serviced and recharged, where ownership of the recharged product remains the same (e.g. not sold or distributed in interstate commerce), the servicing procedure, including recharging, is not affected by the class II ban.

2. Products Requiring Both Class I and Class II Exemptions

EPA realizes that the class II ban exemptions are integrally linked to the Class I Nonessential Products Ban. EPA believes the class I ban and the Act gave sufficient notice to the public, and through the class I rulemaking process, addressed all of the comments received

by the Agency. EPA realizes that there are a number of products that do not use class I substances, but do use class II substances for which no other substitutes are workable and worker safety or flammability concerns exist. Some of the manufacturers of these products may not have commented on the need for a class I exemption, because they were not aware of the connection between the two bans (e.g. that class II exemptions could only be obtained where class I use was legal). Without a legal class I use, the Agency does not have authority under section 610(d) to grant exemptions under the class II ban. EPA proposed considering revisions to the class I ban to provide exemptions, such that appropriate class II exemptions could be granted for several products brought to the Agency's attention prior to the issuance of the NPRM. The Agency requested comment on the need to revisit the Class I Nonessential Products Ban through this rulemaking with respect to any other product for which there is no substitute for class II use other than a class I use which is no longer legal.

a. *Aircraft pesticides.* EPA specifically requested comment on the need to revise the class I ban to provide an exception for aircraft pesticides, with the intent that the class I substances would not actually be used. The class I exception would merely provide the basis upon which to grant a class II exception, where no other acceptable alternatives are available. In addition, EPA requested comment on worker safety or flammability concerns regarding the use of substitutes for class II substances that may be used or considered for use in aircraft pesticides.

EPA received comment from the Department of Defense (DOD), one of the primary users of aircraft pesticides. DOD stated that a nonflammable product is required in three areas: for the disinsection of aircraft for potential vectors of disease; for the treatment of pests aboard naval vessels, particularly submarines; and for the airlifting of pesticides to military forces deployed in specific regions. The military uses a formula with two percent d-phenothrin and requested a temporary exception for the continued manufacturing and sale of the present formulations until suitable substitutes are available. EPA agrees with DOD, that in many situations a nonflammable pesticide is essential and should be available for particular uses. EPA's determination regarding the aircraft pesticide product used by DOD is discussed below. EPA understands that DOD would be able to use the same product in all the situations discussed in their comments.

Comments were also submitted by the Air Transport Association Of America (ATA), representing many air carriers. The ATA stated that to the best of their knowledge they knew of only one producer of an aerosol insecticide that meets legal requirements for safe disinfection of aircraft during flights. Airlines operating internationally are legally required to abide by the Convention on International Civil Aviation to which the United States is a party, and the standards of the International Civil Aviation Organization. In conformance with recommended practices of the World Health Organization, aircraft insecticides must be effectively dispersed throughout all aircraft compartments after the aircraft has been closed for departure from the takeoff location. ATA stated that currently the only available product that meets all the requirements its members must adhere to contains either a class I or class II substance. ATA is aware of a new product that will be available shortly. Therefore, ATA requested that EPA consider a temporary exemption for this product.

EPA also received comment from a manufacturer who believes that a solvent recently developed that contains class II substances would be appropriate for use in aircraft pesticides. This product would represent a new pesticide, requiring registration under FIFRA. To the extent of EPA's knowledge, this formulation has not been submitted for review in accordance with FIFRA.

EPA received comments from two aircraft pesticide manufacturers. The first commenter stated that overseas flights have always used fogging insecticides to destroy pests while the plane is in the air. The commenter stated that there are no alternatives to the use of a class II substance in these products other than the use of a class I substance; therefore, EPA should revise the class I ban to provide the legal authority to consider an exemption for the use of HCFCs in this product, and then simultaneously provide an exemption under the class II ban.

EPA received a comment from a different manufacturer, the manufacturer that originally raised this issue with EPA. This manufacturer stated that they did not obtain a class I exemption because they were in the process of converting to the use of HCFCs. The manufacturer unsuccessfully tested several possible HFC formulations. At that point the manufacturer approached EPA and requested an exemption under the class II ban based on the need to manufacture a product that could meet the pressure standards put forth by the Department of Transportation (DOT) and still meet the flammability requirements put forth by DOD. However, the manufacturer states that recent findings lead the manufacturer to believe that a possible substitute that contains no ozone-depleting substances has been located. This product will include an element that will decrease the pressure of the HFC–134a, thus meeting DOT's standards. In order to register the product under FIFRA, the manufacturer will need to complete toxicological studies. Tests of this nature often take long periods of time. This manufacturer notes that they are aware of another product being used in Australia for aircraft disinfection; however, that product is not registered under FIFRA and would therefore need to complete the same toxicological testing to be approved for use in the United States.

EPA is pleased to learn that while this manufacturer was pursuing a potential exemption, the manufacturer continued to also investigate moving entirely away from class I and class II substances. In light of the manufacturer's determination that an alternative might exist, EPA cannot provide an outright exemption for the use of class II substances in aircraft pesticides. EPA recognized in the NPRM that products that require federal approval prior to using a new reformulation are often subjected to a lengthy review process. EPA proposed and is today exempting from the class II ban those products requiring federal approval prior to reformulation, provided that manufacturers of such products have made a request of the appropriate federal agency for such federal approval prior to January 1, 1994. EPA understands that at least one manufacturer will make the appropriate request prior to that date. The time frames associated with federal approval processes represent the amount of time necessary for the federal agency to conduct a responsible review of the formulations and determine the acceptability of the formulation under applicable statutes and regulations. The federal agencies cannot expedite their internal processing procedures simply because a formulation would otherwise be subject to a ban without compromising the integrity of their own program reviews.

To the best of EPA's knowledge, there is only one manufacturer that has a product available for use as an airline pesticide today, and that particular product contains a class I substance. EPA believes that a replacement product containing class II substances will be

available shortly, following federal approval, followed by a replacement that contains no ozone-depleting substances. Therefore, EPA is establishing a temporary exemption for aircraft pesticides releasing class I substances to expire upon federal approvals of any substitute product. EPA would like to clarify that if the substitute contains HCFCs, and if an application for an alternative formulation is filed by January 1, 1994, the use of class II substances will be exempt from the ban in accordance with § 82.65(b) and (c). Therefore, until the review process is complete, all aircraft insecticides that have applied for appropriate federal approvals will be able to legally use class II substances in their formulations under § 82.65(b). This exemption will expire after an alternative aircraft pesticide that does not contain class I or class II substances becomes available.

b. *Dusters.* Prior to issuing the NPRM, EPA was contacted by manufacturers concerned about the availability and economic feasibility of using substitutes to class II products. In particular, manufacturers of dusters and safety sprays had commented on the possible need for a class I exception based on the unavailability and the high cost of alternatives. EPA requested comment on the need to revise the Class I Nonessential Products Ban to provide a potential exception for these products. In addition, EPA requested comment on worker safety or flammability concerns regarding the use of substitutes for class II substances that may be used or considered for use in dusters and safety sprays. Two commenters stated that problems regarding the supply and availability of substitutes for class I substances were corrected earlier this year. These commenters were among those that raised the original concerns with EPA. In addition, one commenter noted that as a result of the need to reduce the levels of ozone depletion, the manufacturer began utilizing flammable propellants in 1989. The commenter believes that in certain duster and noise horn applications, flammable propellants are acceptable to the consumers. According to the commenter, these flammable products do not pose an extreme safety hazard. At the same time, non-flammable products are also available, albeit at a higher price. EPA received one comment suggesting that the only available substitutes to class I or class II dusters are hydrocarbons. The commenter believes that EPA should provide an exemption based on the increased risks associated with flammability. EPA disagrees with this commenter based on the information supplied by the other commenters, as outlined above.

EPA is not exempting dusters or safety sprays using class II substances in this final rule. The first two commenters clearly state that both flammable and nonflammable alternatives are currently available. EPA agrees with these commenters, recognizing that alternatives include HFC–134a and HFC–152a. Therefore, EPA agrees that there is no need to revise the class I ban with regard to dusters and safety sprays to facilitate continued class II use. EPA further notes that numerous other consumer products are flammable; however, the potential of an accident often can be greatly minimized by taking prescribed precautions. Moreover, EPA wishes to clarify that taking economic factors into account in its exemption determinations is not consistent with the statutory language in section 610(d).

c. *Tire Inflators/tire sealer.* EPA received comments from the manufacturer of tire inflator/sealer products. The commenter stated that it is within EPA's discretion to reopen the review period for consideration of additional "essential use" exemption applications for products containing or manufactured with class I ozone-depleting substances. The commenter stated that the alternatives to the use of a class I or class II substance for this product are either hydrocarbons or HFCs. The commenter further stated that the hydrocarbons are flammable and are volatile organic compounds that are precursors to formation of tropospheric ozone. The commenter stated that additional federal controls on hydrocarbons in consumer products potentially include use prohibitions in the future. The commenter noted that SNAP lists HCFCs as proposed "acceptable" alternatives in the regulations to be promulgated under section 612. In addition, the commenter believes that HFC–134a and HFC–152a are currently in short supply and are significantly more costly than HCFCs.

EPA does not believe that this commenter demonstrated a compelling need for EPA to revise the class I ban. As the commenter points out, alternatives are available. Several tire inflators and sealants are being sold today that contain hydrocarbons. Used as advised, precautions can be and are currently taken to prevent accidents. While future regulations may limit the availability of hydrocarbons, EPA cannot base its decisions today on what may happen in the future. Moreover, both HFC substitutes and not-in-kind substitutes (e.g. changing the tire) represent other alternatives to tire inflator/tire sealer products. Consideration of market conditions, including cost of substitutes, is not within EPA's discretion under section 610(d). Regulations promulgated under section 612 merely identify which substances are "acceptable" or "unacceptable" alternatives; they do not speak to the ban mandated under section 610(d) and cannot alter its effectiveness. The use of particular substances in the manufacture of aerosol or pressurized dispensers is still clearly subject to the class II ban. As noted above, taking the cost-effectiveness of substitutes into account is not consistent with the statutory language in section 610(d). Therefore, this final action will not include a reopening of the class I ban to consider the need to provide exemptions for tire inflator/tire sealer products. EPA will consider reopening the class I ban in the future should new regulations limit all available alternatives to class I or class II use.

The same commenter referred to an exemption under section 610 as an "essential use" exemption. EPA would like to clarify the distinction between exemptions under the nonessential products bans and essential use exemptions. Exemptions granted under the class II ban are for continued sale and distribution of products ozone-depleting substances that are currently produced and imported in the United States. These domestic regulations only impact the manufacturers, distributors, retailers and users of aerosol products, pressurized dispensers and foam products sold in the United States. On the other hand, under the Montreal Protocol process, member countries can put forth nominations for essential use exemptions that would allow for continued production of ozone-depleting substances after the production phaseout to be used in an application for which there are no suitable substitutes. The Parties receive and review these applications individually and may decide to grant particular exemption requests. If the Parties agree that a particular application is essential, additional production of an ozone-depleting substance will be authorized for that particular application after the phaseout has taken effect. The Parties will review essential uses on a yearly basis to evaluate if the essential use exemptions are still appropriate. EPA understands that this same commenter submitted a request for an essential use exemption, but that the commenter subsequently withdrew the application, since the

commenter's apparent intention was to receive an exemption under the class I ban rather than the Montreal Protocol.

3. Aerosol Products and Pressurized Dispensers Exempted By The Class I Ban

The following eleven products were exempted from the class I ban:

- Medical devices listed in 21 CFR 2.125(e)
- Lubricants for pharmaceutical and tablet manufacture
- Gauze bandage adhesives and adhesive removers
- Topical anesthetic and vapocoolant products
- Solvent uses in lubricants, coatings or cleaning fluids for electrical or electronic equipment
- Solvent uses in lubricants, coatings or cleaning fluids used for aircraft maintenance
- Solvent uses in mold release agents
- Solvent uses in spinnerette lubricant/cleaning sprays
- Plasma etching
- Solvent uses in document preservation sprays
- Solvent uses in red pepper bear repellent sprays

Because of the differing mandates in, and statutory constraints of, section 610(a)(b) and (c) and section 610(d), EPA did not propose exemptions for all of these products in the NPRM for the class II ban; however, in all cases EPA requested comment on the need for and appropriateness of potential exemptions for these uses. Comments received by the Agency are discussed below.

a. *Lubricants for pharmaceutical and tablet manufacture.* EPA received one comment regarding a lubricant used in pharmaceutical manufacturing. This commenter stated that HCFC–141b has replaced CFC–113 as the lubricant carrier for the manufacture of hypodermic needles. The commenter notes that an exemption for HCFC–141b is consistent with the intent of section 610(d) to allow the use of HCFCs in medical devices, although in this particular application the exemption would be for the manufacturing process, not the product. The commenter indicates its belief that while such an exemption is not consistent with the statutory language, it may be consistent with Congressional intent. EPA agrees that the use of class II substances in the manufacturing of hypodermic needles is not consistent with the statutory language regarding the exemption for medical devices. However, EPA believes that under the class I ban's exemption for lubricants for pharmaceutical and tablet manufacture, EPA has authority to consider exemptions under the class II ban for hypodermic needle production, where the class II substances are used to replace CFC–113 as the only legally available alternative, and where there is a clear demonstration of flammability or worker safety concerns. However, in the absence of a demonstration of worker safety or flammability concerns in the production of hypodermic needles, which the commenter did not submit, the fact that the only legal alternative to the use of the class II substance is a class I substance, by itself, is not enough to allow EPA to include an exemption for the use of lubricant carriers for the manufacture of hypodermic needles in the final rule. EPA may reconsider an exemption for this use at a later date if presented with appropriate documentation.

b. *Solvent uses in lubricants, coatings and cleaning fluids for electrical or electronic equipment.* EPA proposed exempting the solvent uses of class II substances in lubricants, coatings, and cleaning fluids for electrical or electronic equipment. EPA received several comments favoring such an exemption. One commenter stated that the cleaners are often sprayed to ensure that the electrical contacts are free of dirt and other contaminants. In addition, one commenter stated that the only available substitutes contain hydrocarbons that pose increased risks associated with using a flammable product on electronic or electric equipment. The commenter claims that chemicals used in these cleaners must be nonflammable, nonconductive, nontoxic, odorless, quick-drying and effective, because the individuals using them are in very close proximity to the cleaner spray. Another commenter stated that in both these applications and in applications associated with aircraft maintenance discussed below, the products are used in "clean-in-place" situations, often near energized circuits, welding or soldering equipment, hot motors, engines or other hot surfaces.

EPA believes that the use of a product near a hot motor does not necessarily constitute a flammability concern; however, in cases where the product is used in close proximity to ignition sources, and where the user cannot provide adequate safety precautions, a nonflammable product is essential. Therefore, EPA agrees with these commenters. This final action adopts the proposed exemption for the solvent uses of a class II substance in lubricants, coatings and cleaning fluids for electrical or electronic equipment.

c. *Solvent uses in lubricants, coatings or cleaning fluids used for aircraft maintenance.* EPA received comments concerning the uses of class II substances in lubricants, coatings or cleaning fluids used for aircraft maintenance. One commenter stated that the only known substitute for the use of a class I or class II substance was a hydrocarbon. A second commenter stated that while the amount of class II compounds used in aircraft maintenance activities is low, until environmentally preferable alternatives become available, the use of class II compounds is necessary. The commenter stated that the concerns over worker safety and flammability raised in the NPRM are valid. The materials are often used inside the aircraft, which acts as a confined space. It is often difficult to ventilate these spaces, making the toxicity and flammability of the materials used particularly critical. As stated above, one commenter that provides products for both aircraft maintenance and electronic or electrical equipment cleaning noted that the products must often be used in "clean-in-place" situations. Several comments indicated that the physical characteristics of HCFC–141b are similar to CFC–113, exempted under the class I ban. EPA agrees with the concerns raised by many commenters. There are worker safety and flammability concerns that render the legal use of a class I substance as the only alternative to the solvent uses of HCFCs. Therefore, this final rulemaking will provide an exemption for the solvent uses of class II substances in lubricants, coatings, or cleaning fluids used in aircraft maintenance.

One commenter stated that aircraft maintenance should include all aircraft uses of the class II substances in aerosol lubricants, coatings and cleaning fluids because the same materials are used in manufacturing, flight tests, and in-service maintenance. EPA agrees that the exemption for the solvent uses of class II substances in lubricants, coating or cleaning fluids used for aircraft maintenance covers the use of these products during manufacturing, flight tests, and in-service maintenance.

d. *Solvent uses in mold release agents.* EPA received many comments regarding the uses of class II substances in mold release agents. All of these commenters supported EPA's proposed exemption for the solvent uses of class II substances in mold release agents. One commenter asked that EPA clarify that the use of HCFC–22 and HCFC–141b in the NPRM were merely examples of potential formulations for mold release agents. EPA agrees with this commenter. The Background Document on Aerosol Products and Pressurized Dispensers Containing Class

II Substances and other information contained in the Air Docket for this rulemaking (A–93–20) provides additional information concerning various formulations of mold release agents.

Several of the comments stated that HCFC–22 was the solvent in their formulation or that since HCFC–22 has some solvent characteristics, it should be exempted. Among the characteristics categorized as "solvent" by the commenters were: compatibility with co-solvents; nonflammability, fast evaporation rate, low boiling points, and good carrier capacity. One commenter stated that in order to use dimethyl ether (DME) as a propellant in mold release agents, the DME must be in solution to avoid collection of DME vapor that could collect and ignite. Several commenters indicated that they use DME to lower the amount of ozone-depleting substances needed in their mold release agents. One commenter stated that HCFC–22 dissolves the solvent or similar lubricant and suppresses the flammability of the mold release agent. Additionally, commenters stated that the use of HFC–134a or other like substances requires that the mold release agent be shaken routinely before use. If the user neglects to shake the product, the DME vapor could collect and ignite.

EPA has considered these comments very carefully and disagrees with many of the commenters. The Agency has previously stated on several occasions, including in the NPRM for this rulemaking, that HCFC–22 is generally used as a propellant in aerosol products and pressurized dispensers. "Carriers" and "dissolvers" are not necessarily characteristics of solvents. Since many solvents are flammable, nonflammability is not necessarily a characteristic of solvents. HCFC–22's quick evaporation rate leads EPA to question whether the HCFC–22 ever directly reacts with the molds. While mold release agents are often used at high temperatures, without an ignition source, the temperatures are not sufficiently high for DME to become combustible. EPA is aware of flammable and water-based mold release agents that are currently available that do not contain ozone-depleting substances. While HFC–134a may not be appropriate in combination with DME, EPA believes it is an adequate substitute for other formulations. However, EPA believes that the HCFC–22 and DME formulations may represent the only compatible formulation for particular molds.

In response to the claim that HCFC–22 may act as a solvent, EPA believes it should nevertheless be categorized as a propellant wherever it serves that purpose as well. In the final regulations promulgating the 1978 aerosol propellant ban, FDA stated in a decision to regulate the use of an ozone-depleting substance in a particular case, that "the propellants have other functions, but many propellants have dual function. As previously explained in the final rule to require a warning statement, if all propellants with dual functions were excluded, many products might be excluded, or might claim to be excluded * * *. Thus, this products [sic] is subject to the regulation because of the propellant use of the chlorofluorocarbon" (43 FR 11313). Based on this earlier ruling, EPA believes that it is appropriate to treat solvent/propellants as propellants under this rule because EPA concludes that substitutes are available. Where HCFC–22 is used as a propellant, its use generally is banned under the final rule. Furthermore, EPA does not believe that the commenters have demonstrated when HCFC–22 in mold release agents is acting solely as a solvent; could this demonstration be made, such use would be permitted under the exemption for solvent use where substitutes are not available. Therefore, HCFC–22 will in most case be banned as a propellant under this final rulemaking.

However, after careful consideration, EPA believes there are many cases where the use of HCFC–22 as a propellant may be essential based on worker safety or flammability concerns where there are no legal substitutes. EPA believes that some commenters did sufficiently demonstrate that while there are many different formulations for mold release agents, there are cases where the use of HCFC–22 is essential based on worker safety or flammability concerns. While EPA is limited to considering an exemption only where the sole substitute is the legal use of a class I substance, EPA did propose to revise the class I ban as necessary where a particular product may not have been sufficiently considered in that rulemaking.

EPA believes that solvent uses of class I substances were sufficiently considered; however, propellant functions in this product may not have been sufficiently considered. There are a wide variety of molds that require differing formulations of mold release agents in order to be compatible. In the case of mold release agents, EPA believes there are cases where the only substitute to HCFC–22 is CFC–12 due to worker safety and flammability concerns. Therefore, through this final action, EPA will revise the class I ban to provide the legal authority to consider a class II propellant exemption for mold release agents using HCFC–22 as a CFC–12 substitute, and will simultaneously provide such an exemption under the class II ban. EPA believes that the industry will choose to continue using class II substances instead of class I substances, realizing that the revision to the class I ban was solely performed to provide the required authority for a class II exemption and the pending phaseout date for CFCs. The final § 86.66(d)(2)(vii) of the class I ban is revised to read:

> * * * mold release agents used in the production of plastic and elastomeric materials, which contain CFC–11 or CFC–113 as a solvent, but which contain no other CFCs, and/or mold release agents that contain CFC–12 as a propellant, but which contain no other CFCs.

Based on this action, EPA will simultaneously exempt under the class II ban the use of HCFC–22 as a propellant in mold release agents where evidence of good faith efforts to secure alternatives indicates that, other than CFC–12, there are no technically feasible alternatives; and the solvent uses of HCFCs in mold release agents, where a solvent/propellant is to be considered a propellant. EPA would like to clarify that suitable alternatives include use of other mold release agent formulations. The suitability of mold release alternatives in this context does not consider the relative cost of that alternative or the convenience associated with its purchase.

EPA will further require that the seller of HCFC mold release agents provide notification to the purchaser concerning this restriction on sale of HCFCs where no other alternative is available. This notification will take the form of a sign clearly posted where the HCFC mold release agents are displayed for sale or written notification of the requirements if the purchaser does not physically come in contact with a display at the point of sale. Written notification will be provided prior to the sale occurring by including the information on sales brochures, order forms, invoices and the like. The seller must indicate to the purchaser that "it is a violation of federal law to sell mold release agents containing hydrochlorofluorocarbons as propellants to anyone, except for use in applications where no other alternative except a class I substance is available. The penalty for violating this prohibition can be up to $25,000 per unit sold."

e. *Solvent uses in spinnerette lubricant/cleaning sprays.* EPA received six comments regarding spinnerette lubricant/cleaning sprays. One

commenter stated that EPA should interpret 610(d)(2)(B) which states that EPA should provide an exemption where "the only available alternative to use of a class II substance is use of a class I substance which legally could be substituted for such class II substance" to mean that EPA should not allow an exception for a class II substance in any situation where "an alternative other than a class I substance was available." Therefore, the commenter believes that EPA should grant an exemption for all propellants in spinnerette lubricant/cleaning sprays because, other than the use of a class I substance (that could not be legally substituted), there are no alternatives to the use of a class II substance. EPA strongly disagrees with this commenter. EPA discussed in the NPRM that the two bans are integrally linked. In order to have an exemption to the class I ban, the only alternative must be the legal use of a class I substance. When the Clean Act Amendments were developed, clearly class II substances were viewed as merely interim substitutes for CFCs and would be available for a limited time after production of the class I substances ceased. Therefore, Congress appropriately limited the use of class II substances to situations where EPA already determined the use of a class I substance was essential, and where substitutes for ozone depleting substances were still unavailable. Therefore, EPA does not agree with the commenter's legal interpretation of section 610(d)(2)(B).

However, commenters stated that there are no available substitutes for all class II substances other than a class I substance in these uses. These commenters believe that there are class II substances that will be legally substituted for CFC–114 as a solvent; however, the commenters are concerned about class II propellants. Some commenters stated that EPA should exempt the solvents and propellants used as spinnerette lubricant/cleaning sprays, including HCFC–22, HCFC–142b, and HCFC–141b, noting that the worker safety and flammability concerns EPA discussed in the NPRM make it essential that a nonflammable formulation be used. One commenter believes that to meet worker safety and fire protection standards, the use of class I or class II substances is necessary for both propellants and solvents. All the commenters believe that sufficient alternatives to the propellant uses of class II substances, other than class I substances, have not yet been developed.

EPA agrees that spinnerette lubricants/clear ing sprays require a safe formulation. EPA is concerned that since these products are used by employees to wipe the spinnerette faces whenever a spinning machine is started or whenever a position breaks during operation, there are serious worker safety concerns. EPA believes that consistent with the mold release agents situation described above, EPA has sufficient reason to, through this final action, revise the class I ban with respect to propellants and simultaneously revise the class II proposed ban. Again, EPA believes that the industry will recognize the need to continue using class II substances instead of class I substances, realizing that the revision to the class I ban was solely performed to provide authority to consider an exemption to the class II ban and the pending phaseout date for CFCs. Therefore, EPA is revising § 82.66(d)(2)(viii) of the class I ban to read:

> Spinnerette lubricant/cleaning sprays used in the production of synthetic fibers, which contain CFC–114 as a solvent, but which contain no other CFCs, and/or spinnerette lubricant/cleaning sprays which contain CFC–12 as a propellant, but which contain no other CFCs.

Based on this action, EPA will simultaneously exempt the propellant uses of HCFC–22 and HCFC–142b, in addition to the solvent uses of class II substances in spinnerette lubricants/cleaning fluids under the final class II ban.

f. *Document preservation sprays.* EPA received thirteen comments concerning document preservation sprays. Most of the comments simply asked for an exemption based on the need to continue using the formulation that they currently purchase or sell. EPA received a series of comments from the one manufacturer of such sprays stating various reasons why EPA should provide an exemption for the use of HCFC–22 and HCFC–141b in their product. The manufacturer produces both aerosol and non-aerosol products. The manufacturer distinguishes between mass deacidification and deacidification by small institutions preserving a few documents per year. However, the manufacturer believes that the various potential not-in-kind substitutes are not always economically feasible or appropriate for very fragile papers. Originally documents were dipped into liquid solutions or the solutions were brushed onto the documents. These methods have various deficiencies relating to the need to ensure an even coat of the preserving chemicals. The manufacturer provided information concerning attempts to use propellants other than class I or class II substances. Nitrogen has successfully been used in larger containers; however, due to worker safety concerns involving improperly closed cylinders, these formulations do not represent a solution in all cases. DME's solvent properties caused the product to be too powerful, damaging what it was to preserve. Hydrocarbons alone or together with ether were evaluated but were found to be unsuccessful. The manufacturer further states that the HCFC–22 acts as both solvent and propellant in the aerosol product. The HCFC–22 is needed to lessen the solvent strength of HCFC–141b. Without HCFC–22, HCFC–141b would damage the document instead of preserving it. The manufacturer also provided EPA with information about the various alternatives used or considered both domestically and abroad. In every case, the manufacturer believes that either the product will damage the paper, will not create an adequate deacidification solution, or is not workable in every situation.

EPA reviewed these comments and other information gathered during this rulemaking. EPA believes that in almost every case, the not-in-kind substitutes are workable alternatives to the use of HCFC–141b and HCFC–22 in aerosol containers and pressurized dispensers. The manufacturer who provided extensive comments on the need for an exemption from the class II ban indicated that their own not-in-kind substitute was an appropriate alternative in many cases. Moveover, the manufacturer indicated that the not-in-kind alternative provided the added quality of strengthening the documents. However, as the manufacturer indicated, there are some situations in which their own substitute will not be effective. EPA considered the alternative products used both domestically and abroad. One alternative, involving a reaction of ammonia and ethylene oxide to form ethanolamine, uses di- and triethanolamine which are known to form a reaction product that is carcinogenic. Another alternative uses magnesium butyltriglycolate dissolved in either toluene or CFC–113. According to the submitted comments, initial results indicate that formulation may deface the documents and may have an unpleasant odor. EPA is aware of another potential substitute that contains perfluorocarbons (PFCs). The use of PFCs may be subject to restricts based on global warming potential and long atmospheric lifetimes under regulations promulgated under section 612. Moreover, the comments the

Agency has received indicate that the PFC-based product may not be appropriate for treating thick books, books with coated or dense paper, or tightly bound books.

EPA believes that in almost every case, either a not-in-kind substitute or a substitute formulation can be successfully used for preserving documents. However, EPA does not believe that all of the alternative formulations have been successfully tested to determine the degree of worker safety or flammability concerns. Therefore, EPA agrees that for treating thick books, books with coated or dense paper, and tightly bound documents, an exemption for propellant uses under the class II ban is required.

Based on worker safety and flammability concerns associated with the use of alternatives, and since the only alternative is the legal use of CFC–113, EPA will provide a solvent exemption for HCFC–141b. Furthermore, HCFC–22 is being used predominately as a propellant in document preservation. While it may also have some limited solvent capabilities in this product, as discussed above, solvents/propellants will be considered propellants under this rulemaking. Therefore, EPA will revise the class I ban and will today provide simultaneous exemptions under the class II ban for propellant uses in treating thick books, books with coated or dense paper, and tightly bound documents. § 82.66(d)(2)(x) of the class I ban will be revised to read:

* * * document preservation sprays which contain CFC–113 as a solvent, but which contain no other CFCs; and document preservation sprays which contain CFC–12 as a propellant, but which contain no other CFCs, and which are used solely on thick books, books with coated or dense paper and tightly bound documents.

EPA will provide a simultaneous exemption under the class II ban for HCFC–22 used as a propellant in document preservation sprays used solely to preserve thick books, books with coated or denser paper and tightly bound documents.

B. Foams

1. Definition of "Plastic Foam Product"

One commenter questioned EPA's definition of a "plastic foam product." EPA stated in the NPRM that the Agency interprets the term "plastic foam product" to mean any product composed in whole or in part of material that can be described as "foam plastic" or "plastic foam." The commenter believes that within the meaning of section 610(d) a plastic foam product should apply only to products such as cups, containers, and packaging where the product is wholly or primarily constructed of plastic foam or derives its essential purpose or functionality from the foam. The commenter bases this interpretation on the criteria for nonessentiality put forth in section 610(b). The commenter further believes that Congress did not explicitly require EPA to consider the essentiality of the product as it relates to section 610(d) because that language appears in section 610(b). EPA strongly disagrees with this commenter. Clearly Congress intended to ban products that are not wholly or primarily constructed of plastic foam or derive purpose or functionality from the foam itself. If Congress intended to only include the products suggested by the commenter, section 610(d)(3)(B) would not be necessary. Certainly an automobile does not derive purpose or functionality from the foam within the vehicle. Congress would not need to provide an exemption for foam needed to meet automobile safety standards if only products that were wholly or primarily constructed of plastic foam were to be banned. Moreover, Congress banned these products in their own terms, without requiring EPA to promulgate regulations. Therefore, since this ban does not require action on the part of the Agency, Congress could not foresee an explicit need for this final rulemaking; thus, it cannot be assumed that the standards put forth in section 610(b) (that require EPA to promulgate regulations) would apply to this self-executing ban. The section 610(b) criteria apply to EPA identification of additional nonessential products. They do not apply to EPA interpretation of the products Congress identified as nonessential in section 610(d).

EPA received one comment stating that an agency must construe the statute in a way that is consistent with the underlying purpose of the statute. (See *Batterton* v. *Francis*, 432 U.S., 416, 425 (1977), and *Gelman* v. *Federal Election Commission*, 432 F.2d 939, 943 (D.C. Cir. 1980)). The commenter further stated that Congress did not intend for Section 610(d) to cause manufacturers to switch to CFCs as a foam blowing agent. EPA agrees with this commenter and believes that where the use of HCFCs are banned, alternative blowing agents exist, alternative products that can perform the same function exist, or the product is not essential for the functioning of society. EPA has exempted HCFC use from the ban wherever a legal use of a CFC is the only available alternative.

2. Definition of "insulating products"

EPA requested comments on both its proposed definition of "insulating products" and potential alternative definitions. The majority of the commenters supported EPA's proposal to define "a foam insulation production as any product that is made with closed cell rigid polyurethane foam, closed cell rigid polystyrene boardstock foam, and closed cell rigid phenolic foam; and in addition, pipe insulation made out of closed cell rigid polyethylene foam. One commenter stated that the 1989 UNEP Technical Options Committee issued a report that identified two broad categories—foam that has significant thermal insulating properties and foam that does not. The report concludes that the three types of foams that have significant thermal insulating properties are closed cell rigid polyurethane foam, closed cell rigid polystyrene foam and closed cell rigid phenolic foam. As EPA stated in the NPRM, EPA based its decision on how to define which products were insulation products on work completed by the same UNEP Committee. The commenter further stated that there are compelling policy reasons for using a definition based on foam type rather than on perceived end-use. The commenter believes that under an all end-use approach, EPA may need to evaluate thousands of individual products containing foam produced with HCFCs to determine whether the foam in those products was serving an insulating function. EPA agrees that if the Agency were to require a review of every end-use, such a process would be both time-consuming and burdensome for both the Agency and industry.

One commenter suggested that EPA should expand its proposed exemption for existing inventories to become the basis for exempting all flotation foam or other uses of exempted products. The commenter believes that the de minimis standard in the *Alabama Power* decision should be applied to all types of non-insulating applications of closed cell rigid polyurethane, polystyrene, and phenolic foam. The commenter noted that in the NPRM, EPA identifies flotation foam as the largest non-insulating application of closed cell polyurethane and that the impact of using HCFCs in all the non-insulating applications of polyurethane would be insignificant. EPA agrees that the use of insulating foam products for non-insulating applications will have an overall insignificant impact on stratospheric ozone when considering all the domestic and international actions being taken in their entirety. However, EPA does not believe that this

commenter has sufficiently demonstrated how the acknowledged continued use of an insulating foam product in non-insulating applications is consistent with the de minimis standard within the meaning of the *Alabama Power* decision. EPA believes that the statute clearly bans the sale and distribution of foam that does not meet the criteria for the two statutory exemptions; however, the statute does not regulate the use of such exempted products.

A few commenters stated that they use closed cell rigid polyurethane foam, at least in part, to protect against noise and vibration. EPA stated in the NPRM that Webster's Dictionary defines to *insulate* as "to separate from conducting bodies by means of nonconductors so as to prevent transfer of electricity, heat, or sound." EPA suggested that this could be the basis for an alternative definition of insulating foam. However, since these comments expressed support for the proposed definition, EPA does not believe that these commenters were indicating that EPA should consider promulgating an alternative definition.

Many commenters stated that EPA's proposed definition would be less burdensome for industry to comply with and for the Agency to enforce, than any alternative definition. Several commenters were particularly concerned with the increased burden an end-use approach would create. A few commenters were not convinced that they would be able to identify which products were banned and which were exempted if a total end-use approach was included in the final rule. EPA agrees with these commenters. The Agency recognizes the need to consider the ability of industry to recognize which products are subject to the ban.

One commenter stated that EPA's proposed definition gives the Agency the discretion to add other products or categories where it can be sufficiently demonstrated that the foam product is used principally for foam insulation purposes. EPA agrees with this commenter. Several commenters suggested that EPA consider specific products or categories. EPA received several comments asking the Agency to broaden its definition to include other products or types of foam and a few comments asking EPA to consider a more narrow approach to exclude products. These comments are discussed in detail below.

a. *Closed cell rigid polyurethane foam.* EPA received many comments regarding the inclusion or exclusion of non-insulating applications under EPA's proposed definition. Many of these comments relate to the use of a closed cell rigid polyurethane foam in various applications. The comments will be discussed according to the foam's non-insulating application.

i. Foam used as flotation foam. The largest non-insulating application of closed cell polyurethane foam is as marine foam used in the manufacture of certain types of boats. The U.S. Coast Guard estimates that there are approximately 3,000 small volume boat builders, who produce anywhere from less than ten boats to several hundred boats annually, representing twenty-five percent of the recreational boats manufactured in the United States annually. The U.S. Coast Guard believes that to date, only a few of the small volume builders have experimented with non-CFC/non-HCFC blowing systems.

EPA received twenty-three comments that directly address the current uses of closed cell polyurethane foam in marine flotation applications, especially for boats that are under twenty feet in length. Several comments referred to U.S. Coast Guard regulations that require minimum flotation standards for all boats under twenty feet in length and to standards put forth by the American Boat and Yacht Council. A few comments requested that EPA specifically consider the need for HCFC foams in order to meet the U.S. Coast Guard standards. While EPA believes it is important for the manufacturers of boats under twenty feet to provide adequate flotation by meeting the U.S. Coast Guard standards, EPA cannot provide an exemption for flotation foam based on those regulations. EPA's only authority is to exempt insulating foams, and EPA has concluded that flotation foam is not thermal insulation foam within the meaning of section 610(d)(3).

U.S. Coast Guard regulations (33 CFR 183.101, subpart F) require that boats less than 26 feet in length meet certain flotation standards. While many small boat manufacturers currently use CFC- or HCFC-blown foam as both structural and flotation material in the manufacture of their products to comply with these regulations, these U.S. Coast Guard standards are performance-based and do not specify the use of any particular product. Such a broad exemption for all flotation foams would in no way be consistent with the statutory language in section 610(d). The statute specifically states that EPA will exempt certain foam products "utilized to provide for motor vehicle safety in accordance with Federal Motor Vehicle Safety Standards where no adequate substitute substance (other than a class I or class II substance) is practicable for effectively meeting such Standards." EPA believes that if Congress intended for the Agency to also consider U.S. Coast Guard standards, language to that effect would have been written into the statute. Furthermore, while the EPA is providing a temporary exemption for products requiring federal approvals before reformulating a product, EPA does not believe there are any U.S. Coast Guard regulations that require a manufacturer to receive approval to use a new formulation prior to use.

EPA received one comment from a foam manufacturer who indicated that many manufacturers believed that foam used for flotation purposes would be considered nonessential for purposes of the class II ban. The commenter further stated that during the last several years the manufacturer has been developing suitable alternatives. The manufacturer stated that such products have been developed and would add only approximately $10 to the price of the boat. The commenter encouraged EPA to take a position that would foster the use of this new technology, constrained only by the time needed by the commenter to prove the product's suitability to the marine flotation industry. The manufacturer suggested an approach similar to the sunset provision provided for certain foam products needed to meet automotive safety standards. EPA applauds the efforts of this manufacturer. EPA's research indicates that there are currently boats on the market today that do not use HCFCs in their foam blowing process. However, EPA is not given authority under the statute to consider any time-based exemptions except in the case of foam needed to meet Federal Motor Vehicle Safety Standards where EPA may determine when other substitutes will be available to meet safety standards. With respect to foam, EPA has no authority to create exemptions based on the availability of substitutes in other areas. The statute exempts all foam insulation without any clarifications; however, the statute exempts foam needed to meet Federal Motor Vehicle Safety Standards where no adequate substitute is practicable. Once substitutes are available to meet those standards, HCFCs are no longer required. Similar language is not contained in the exemption for foam insulation. Therefore, while the Agency agrees with the need to encourage industry to move away from HCFCs, EPA does not believe it can regulate such a move without revising its definition of what is an "insulating product." The Agency does not believe

this to be appropriate under the statutory language.

Several comments referred to polyurethane foam's ability to provide structural integrity, to provide sound insulation, to provide cushioning for fuel tanks, to insulate against cold water temperatures, and other functions the foam can perform for watercraft. One commenter additionally stated that in cases where the boat may be a year-round home, not exempting its use in boats, while exempting the use of closed cell rigid polyurethane used for thermal insulation in a traditional house, would be arbitrary. EPA believes that the boating industry does not primarily choose to use closed cell rigid polyurethane foam for its thermal capabilities; however, EPA agrees that it would be arbitrary to not allow its use as a thermal insulator in a structure that may act as a year-round home. EPA states in the NPRM that the Agency does not believe it has authority to regulate the actual use of a product that was exempted from the ban based on its characterization as a thermal insulating foam (in the case of closed cell rigid polyurethane foam), even in individual cases where the Agency believes that the product may not primarily be used for the thermal insulating qualities upon which EPA based the exemption.

A number of manufacturers reported dissatisfaction with non-CFC and non-HCFC blowing agents. One commenter stated that while HFC–134a has passed the U.S. Coast Guard's testing requirements, the industry has had difficulty with water absorption, rendering questions about the integrity of HFC–134a blown foam. In one case, the foam absorbed one pound of water per cubic foot. HFC–152a is gaseous at room temperature and is flammable. One comment stated that the use of HFC–152a would require special equipment, temperature-controlled storage and new safety precautions. The commenter further stated that HFC–152a would not be cost-effective. Several commenters discussed water-blown foams, stating that many questions concerning its performance were still outstanding. One commenter discussed the possible use of hydrocarbons such as cyclohexane and pentane, raising issues about safety and storage of flammable blowing agents, and the need to provide specialized employee training and supervision.

EPA understands that some boat manufacturers are hesitant about switching to alternative blowing agents. However, EPA believes that while many alternatives may require additional management controls, workable solutions to the use of ozone-depleting chemicals do exist. Furthermore, one of the most promising alternatives, the use of HFC–134a and water in combination, was specifically omitted by commenters. EPA does recognize that flotation foam serves as an important safety feature for many small watercraft and also that the use of closed cell polyurethane foam serves as a structural element. While EPA does not believe that the manufacturers of these boats are primarily choosing to use closed cell rigid polyurethane in order to provide thermal insulation, under this final action, manufacturers of boats will be able to continue using HCFCs in closed cell rigid polyurethane used for the manufacturing of their products, because the final rule exempts all closed cell rigid polyurethane under the definition of thermal insulating foam regardless of the ultimate use of such thermal insulating foams.

EPA received one comment stating the boats manufactured with HCFCs should not be required to be labeled. EPA wishes to clarify that at this time, the Agency has not promulgated regulations requiring products containing HCFCs to be labeled. However, the Administrator has the authority to promulgate such regulations in the future, under section 611 of the Act.

ii. Taxidermy. EPA received seven comments concerning the uses of polyurethane foam in the production of mannikin forms. Most of the commenters stated that the only proven alternative blowing agent, cyclohexane, would increase workplace health hazards significantly. One commenter stated that allowing the continued use of an HCFC-blown foam by taxidermists is inconsistent with the intent of Congress in developing this statute. While EPA agrees that the use of HCFC-blown foam by taxidermists would otherwise be nonessential within the meaning of section 610(d), and despite the fact that EPA believes that with the proper precautions, alternative blowing agents can be used safely, the foam used falls within one of the three UNEP categories of thermal insulating foam and is thus exempted under this final rule. Section 610(d)(3)(A) specifically exempts thermal insulation products, regardless of how those products are ultimately used. EPA does not believe it has the ability to practically regulate the use of all exempted products.

iii. Aerosol polyurethane foam. EPA received one comment requesting an exemption for aerosol polyurethane foam, also known as one compound foam. EPA has previously discussed that, in the final class I ban, aerosol polyurethane foam is a closed-cell rigid polyurethane product. Aerosol polyurethane is used by builders and do-it-yourselfers in a variety of applications. These include draft-proofing around pipes, cable runs, doors and windows; sealing doors and window frames; and joining together insulating panels, roofing boards, and pipe insulation. EPA stated that aerosol polyurethane foam would be treated as a foam and not as an aerosol product. Therefore, aerosol polyurethane foam products are included in the definition of foam insulation and exempted from the ban.

b. *Closed cell rigid polystyrene boardstock foam.* EPA received two comments regarding the use of closed cell rigid polystyrene boardstock foams. One commenter stated that while they have made a long and diligent search for an environmentally acceptable substitute for the uses of polystyrene for a non-insulating application, they have not yet been successful. The commenter stated that as soon as an alternative has been located, closed cell rigid polystyrene boardstock foam will no longer be used in their application. As stated above, EPA cannot practically regulate the use of an exempted product; however, EPA is pleased to learn that legal users of HCFC-blown foam will continue to investigate alternatives to non-insulating uses.

EPA received a second comment requesting that EPA clarify a possible inconsistency between the UNEP documents and the NPRM. EPA does not believe such an inconsistency exists. Both the Agency and UNEP documents discuss various types of foam products by category and often according to use. The UNEP documents reflect a similar structure. EPA believes that the rule and the accompanying Background Documents properly identify the types of foam exempted under the ban.

c. *Closed cell rigid polystyrene sheet foam.* EPA received three comments regarding closed cell rigid polystyrene sheet foam. The commenter stated that closed cell rigid extruded polystyrene sheet foam should be added to EPA's definition for insulating products based on its uses at certain thicknesses. A second commenter stated that their products are used as an underlayment when putting new siding on an existing home or other structure, as insulation and waterproofing protection for perimeter concrete and masonry walls, and as an underlayment when resurfacing flat roofs. The commenter noted that these products have an "R value" (rated resistance to heat flow used as a measure of insulating capacity) and suggested that EPA should exempt closed cell polystyrene sheet

foam in fanfold form with a facing material. EPA disagrees with these commenters. Extruded polystyrene foam sheet is primarily manufactured for food service and food packaging products. Traditionally, halocarbons have been attractive blowing agents for these products; however, hydrocarbon blowing agents and HFCs are among the alternatives. Many manufacturers, particularly those in the food service industry, have made great strides to eliminate their use of halocarbon blowing agents. Furthermore, the R value cited by two manufacturers ranges from 1.0 to 1.5. EPA does not believe that a product with those low R values can provide meaningful thermal insulating qualities. EPA believes that in general, these products are used to provide moisture resistance and a smooth surface, not as thermal insulation product. Therefore these products are not consistent with EPA's definition of an insulating foam product. Consequently, this final action will not expand the definition of a foam insulation product to include closed cell rigid polystyrene sheet foam or closed cell polystyrene sheet foam. § §

d. *Closed cell polyethylene foam.* EPA received six comments concerning polyethylene foam products. These comments dealt specifically with two different polyethylene foam products: backer rods and pipe wrap. Each product is discussed individually.

i. Backer rods. Two commenters believe that EPA should expand its definition of foam insulating products to include backer rods made with polyethylene foam because the backer rods have "significant" thermal insulating properties. One commenter stated that the use of hydrocarbon blowing agents instead of HCFCs presents unreasonable risks to human health. Commenters disagreed with the Agency's proposal to exclude backer rods from the definition of insulating foam products. One commenter stated that the statutory language and legislative history support a broader definition that would "indisputably" include backer rods. The commenter further believes that under the proposed definition of foam insulation products, backer rods should be exempt from the ban because of their thermal insulating capabilities. The commenter believes that the Agency's failure to propose including backer rods is not consistent with either the 1991 UNEP Flexible and Rigid Foams Technical Options Report, produced under the auspices of the United Nations Environmental Programme (UNEP) or the Background Document on Foam Products Made with Class II Substances, drafted as a background document to accompany this rulemaking. EPA reviewed these documents to confirm the commenter's statements. EPA would like to clarify that the 1991 UNEP Flexible and Rigid Foams Technical Options Report clearly categorizes polyethylene foam as "rigid packaging foam." The chart on p. 6 of the May 1993 Background Document on Foam Products Made with Class II Substances, listing principal foam types and applications, does not list thermal insulation as an application for closed cell polyethylene foam. Furthermore, on p. 21, the Background Document states that polyethylene foam is "used primarily for packaging." The Background Document does state that in some applications, thermal insulation is among the desirable properties; however, the Background Document indicates that these applications are either in addition to the primary packaging functions (e.g. packaging military equipment such as missiles) or in pipe wrap (as discussed below).

One commenter stated that excluding polyethylene backer rods conflicts with the Internal Revenue Service (IRS) regulations. According to the commenter, IRS regulations specifically identify backer rods a type of rigid foam insulation. As EPA stated in the NPRM, the IRS defined "rigid foam" as any closed cell polymeric foam (whether or not rigid) in which chlorofluorocarbons are used to fill voids within the polymer. The IRS definition of foam insulation is markedly different from the one proposed by EPA, in part because they were written with different statutory mandates and different implementation goals in mind. The IRS definition does indicate that Congress intended to single out foam products on the basis of their thermal insulation properties, in establishing the excise tax.[4] However, EPA's mandate calls for the Agency to exempt only "foam insulation products." Many non-insulating products contain some incidental insulating characteristics, but could not be considered foam insulation products. EPA firmly believes this is the case with polyethylene backer rods. The information submitted to EPA indicates that at best, backer rods still have low R values. Moreover, the primary function of backer rods used in the construction of buildings is to provide moisture protection.

One commenter stated that no effective substitutes for polyethylene foam backer rods are available for use in expansion joints. The commenter further believes that there are no blowing agents that can be effectively used to produce the backer rods and provide thermal capability. A second commenter stated that at considerable expense, they converted their manufacturing extrusion processes to non-HCFC alternatives. The commenter commended EPA for not including backer rods in the proposed definition. The commenter stated that backer rods are not used by the construction industry as thermal insulators. The function of backer rods is to fill the void in wall joints and seams for the application of sealants. Furthermore, the commenter does not believe it is necessary to use ozone-depleting substances to manufacture backer rods. According to this commenter, the backer rods manufactured with hydrocarbon blowing agents (e.g. isobutane) are currently sold and used throughout the United States and the world. As discussed above, EPA believes the thermal capability is a secondary function for backer rods and is pleased to know that alternative blowing agents are successfully being used. Therefore, this final action will not broaden the definition of a foam insulation product to include backer rods.

ii. Pipe wrap. EPA received three comments concerning polyethylene pipe wrap. One commenter, a polyethylene manufacturer, stated that at considerable expense, the manufacturer converted its extrusion processes to non-HCFC alternatives. The commenter strongly disagreed with the proposed inclusion of closed cell polyethylene pipe wrap within the definition of foam insulation product. The commenter believes that including pipe wrap in the proposed definition may result in adverse environmental impacts. Furthermore, the commenter believes that EPA should rely on the research of the UNEP. UNEP does not include any polyethylene products in the categories described as thermal insulators. The commenter stated that they manufacture a comparable product without the use of ozone-depleting substances. The commenter stated that arguments that HCFCs used as blowing agents allow for a better thermal insulating material are incorrect. The commenter has been using hydrocarbons to meet the "toughest thermal insulation specifications." In addition, the commenter stated that after a period of time the blowing agents are replaced by air in the finished

[4] If this commenter intended for EPA to adopt the IRS definition in its entirety, for this rulemaking, EPA wishes to point out that the IRS definition of rigid foam insulation only considers foam blown with CFCs and would result in no exemption for any foam insulation product containing HCFCs unless they contained CFCs as well.

products. EPA applauds these efforts to move away from HCFC use in thermal insulating uses. However, section 610(d) clearly exempts all foam insulating products, and thus EPA must provide exemptions for all products that clearly meet the definition of thermal foam insulation products.

One commenter raised concerns about the ability to use hydrocarbons safely. The commenter referred to the proposed SNAP regulations being promulgated under Section 612. The commenter points out that EPA states in the SNAP NPRM that the use of hydrocarbons have possible dangers. "Conversion to using hydrocarbons may entail significant capital investments in order to ensure worker safety fire hazards" (58 FR 28123). EPA would like to clarify that the SNAP NPRM does propose hydrocarbon blowing agents as an acceptable alternative for all polyolefin foams. In many industrial processes various safety precautions are necessary. One commenter stated that arguments surrounding the inability to use hydrocarbon blowing agents safely are groundless. The commenter stated that assuming reasonable safety precautions are undertaken, hydrocarbons can easily be used safely. EPA agrees that, if reasonable and adequate safety precautions are taken, hydrocarbons can be used safely in the production of polyolefin foam products.

Two commenters are concerned about EPA's approach in the case of pipe wrap. Both commenters believe the Agency should consider all polyethylene products together, one indicating that they all should be banned, the other believing they all should be exempted. Concerns about enforcement were raised. EPA chose to take a category-based approach in the other three exempted sectors, because an overwhelming majority of products produced with those types of foams are primarily used for insulation. That approach was also consistent with UNEP. In the NPRM, EPA raised serious concerns about how to enforce an end-use definition that would require the review of a tremendous number of products. Furthermore, the Agency felt that using an approach consistent with UNEP was most likely the intent of Congress. However, EPA proposed to add one additional product based on what the Agency believed were convincing reasons to consider a slight variation to the UNEP approach. EPA does not believe any other polyethylene product is used primarily for its thermal capability. In fact, EPA believes in all other cases, any thermal capability is incidental. The particular shape of pipe wrap, which increases its R value, and its primary insulating use, added to EPA's belief that it should be considered an insulating product. Moreover, from an enforcement perspective, adding one end-use product did not create a burden equal to that created by the potential of a total end-use regulatory regime.

One commenter was concerned about including only pipe wrap because manufacturers of various polyethylene end-use products, including pipe wrap, may be forced to convert to alternative blowing agents regardless of the inclusion of pipe wrap in EPA's definition. EPA believes that conversions away from ozone-depleting blowing agents is consistent with the intent of Title VI in its entirety. Regardless of this rulemaking, manufacturers will need to convert in the near-term to alternatives.

One commenter stated that some of the shapes they manufacture are cylindrical in design and are perfectly suitable for use as pipe wrap while other shapes clearly are not. The commenter raised concerns about judging what can be sold and what cannot. EPA understands these concerns. Accordingly, EPA will modify the NPRM's language in this final rulemaking to read: "* * * closed cell rigid polyethylene foam when such foam is suitable in shape, thickness and design to be used in a product that provides thermal insulation around pipes used in heating, plumbing, refrigeration, or industrial process systems." For the purposes of this rulemaking, suitability in this instance, refers to the size, shape, and thickness of the polyethylene products. Products that are cylindrical and hollow in shape, sized properly for use with pipes, and with a thickness appropriate for insulating pipes will be exempt. EPA hopes that manufacturers will make good faith efforts to ensure that the products manufactured with class II substances will be used in the exempted application. However, as stated above, under section 610 the Agency cannot practically regulate how all insulating products are used.

e. *Inomer foam.* EPA received one comment from the manufacturer of inomer foam. The commenter indicated that this type of foam is a member of the polyolefin family. The commenter manufacturers inomer foam with an integral skin to fabricate "insulating safety related products." The commenter stated that manufactured products include pipe insulation, rigid flotation foam for buoys, foam flotation collars, skier safety products, wiper seals for storage tanks, and seating surfaces for ski resort lift seats. The commenter stated that hydrocarbons had been considered only to a limited extent due to concerns raised by the manufacturer's insurance carrier. The commenter asked EPA to provide an exemption for inomer foam whether or not the foam is used for insulating purposes. The polyolefin foam family includes polyethylene and polypropylene. EPA understands that inomer foam is an enhanced form of polyethylene foam that includes zinc metallic ions to provide additional structural integrity, bonding, and durability. Since inomer foam is actually an enhanced form of polyethylene, inomer pipe insulation will be considered foam insulation product within the meaning of section 610(d)(3)(A); however, no other foam products manufactured with inomer foam will be considered insulating products. Under the final rules, all inomer foam that is suitable for use as pipe wrap will be exempt from the class II ban.

f. *Polyvinyl chloride.* EPA received one comment concerning the use of class II substances in the production of extruded polyvinyl chloride (PVC) foam. The commenter stated that PVC foam is used for gasket and sealant products, available in a variety of shapes and sizes, used in refrigeration, construction, automotive and other applications "where thermal insulating and low moisture absorption properties are essential." The commenter further stated that alternative blowing agents are actively being investigated and have been successful for at least half of this manufacturer's products. The commenter requested that PVC foam be considered an insulating foam product by this final action. EPA does not believe PVC foam is used primarily as thermal insulation. Whatever thermal characteristics PVC products may contain, EPA believes these are incidental. The class I ban briefly discusses PVC foam (58 FR 4778), stating that although both PVC foam and expanded polystyrene foam "could be considered flexible and packaging foams, EPA did not propose banning products made with expanded polystyrene foam or polyvinyl chloride foam in the NPRM for the class I ban because the 1991 UNEP report indicates that CFCs were never used in the production of either expanded polystyrene or polyvinyl chloride." EPA did reserve the right to revise the class I ban to specifically ban either expanded polystyrene or polyvinyl chloride if EPA learned CFCs were being used in the manufacturing of those products. EPA does not believe PVC foam is used as thermal insulation. Therefore, EPA is

not revising the definition of a foam insulating product under this final rulemaking to include products produced with PVC foam.

3. Foam Needed To Meet Motor Vehicle Safety Standards

EPA received three comments concerning the proposed provision to allow the use of class II substances in the production of integral skin foam used to meet Federal Motor Vehicle Safety Standards, sunsetting on January 1, 1996. One commenter agreed that EPA has authority to sunset the exemption for integral skin foam products needed to meet Federal Motor Vehicle Safety Standards; however, the commenter did not believe that EPA should sunset the exemption at this time. The commenter stated that the non-HCFC products have not yet completed safety testing and factories are not yet retooled for using the alternatives. EPA discussed in the NPRM that the January 1, 1996 sunset date was chosen based on information that alternatives will most likely be able to complete safety testing and become available before that date. If the Agency receives sufficient information indicating that by January 1, 1996, alternatives will not be available, EPA will consider revising that date. At this time, EPA believes that alternatives will be available by January 1, 1996. However, the Administrator may reconsider the date for sunsetting this provision at a later date.

One commenter stated that EPA does not have authority to provide a sunset provision under the exemption. The commenter further stated that since each model year is planned in advance, eliminating the exemption in 1996 will deprive manufacturers of the time needed to find adequate substitutes. EPA disagrees with this commenter. The statute only calls for an exception to the ban "where no adequate substitute substances (other than a class I or class II substance) are practicable for effectively meeting such Standards." The statutory language obligates EPA to consider integral skin, rigid, or semi-rigid foam. EPA determined that at this time, rigid and semi-rigid foam products do not require an exception; only integral skin requires an exception. Furthermore, the statute clearly states that the exception should only apply "where no adequate substitute substances" can meet the standards. As noted in the NPRM, water-blown foam will be available shortly, and HFC–134a will be available soon thereafter. Therefore, EPA believes that once these alternatives are available, there will be no need for a continuing exception because integral skin products manufactured with class II substances will no longer meet the statute's criteria under section 610(d)(3)(B), since alternatives will be effectively able to meet the safety standards.

One commenter stated that integral skin foams present long-term storage problems. According to this commenter, many automobile manufacturers are employing a just-in-time inventory system. Storage of integral skin foam presents certain difficulties. If HCFCs will not be available to produce integral skin foam replacement parts, the manufacturers may make life-time buys of particular products. The commenter believes that changing the production processes to compensate for different shrinkage rates for foams blown with alternatives could be costly and provide little environmental benefit because only a limited number of replacement parts will be sold. EPA disagrees with this commenter. Where the Agency can reasonably reduce the use of ozone-depleting substances, EPA is providing an environmental benefit. Moreover, the statute states that EPA will provide an exception "where no adequate substitute substance (other than a class I or class II substance) is practicable for effectively meeting such Standards." As EPA discussed in the NPRM, the Federal Motor Vehicle Safety Standards are, for the most part, performance standards. The use of particular materials is generally not specified in the standards in 49 CFR part 571 affected by this rulemaking. EPA stated in the NPRM that industry sources had indicated that alternative blowing agents, including water-blown foam and HFC–134a blown foam, will be available to meet the performance standards shortly. This commenter did not disagree with the future ability of the alternatives to meet the safety standards. Once alternatives are available, integral skin products will no longer meet the statutory criteria to receive an exception under section 610(d)(3)(B). Manufacturers would be able to use the alternative blowing agents to manufacture replacement parts rather than make life-time buys of integral skin products. Therefore, EPA is not revising the provision to exempt integral skin products needed to meet Federal Motor Vehicle Safety Standards to include replacement parts produced after January 1, 1996. Replacement parts placed into initial inventory before January 1, 1996 are exempt under the terms of the final rules (see § 82.65(a)). EPA will consider revisiting the sunset provision for this exception at a future date if the Agency receives a request from the public for extending the exception and if subsequent investigation by EPA determines that adequate substitutes will not be available by the January 1, 1996 date. The Agency will consider extending the exception for an additional period of time as appropriate, if necessary to allow development of adequate substitutes.

A second commenter requested that EPA broaden the provision for integral skin applications to include all instrument panels, armrest, and bolsters in all motorized vehicles. The commenter stated that integral skin purchasers seek long-term product stability. The commenter believes that Congress did not intend to selectively protect the operators and passengers of motor vehicles and not include the operators of trucks, boats, motorized wheelchairs and agricultural tractors; and suggests that Congress intended the definition of "safety" to include all motorized modes of transportation. EPA disagrees with this commenter. If Congress intended for the Agency to consider other transportation safety standards, Congress could have easily stated that EPA should consider all safety standards promulgated by the Department of Transportation. However, Congress referred specifically to "motor vehicle safety" and thereby to a set of regulations that have been promulgated under Section 103 of the National Traffic and Motor Vehicle Safety Act of 1966. Section 103 authorized the National Highway Traffic Safety Administration (NHTSA) to promulgate Federal Motor Vehicle Safety Standards, which have subsequently been published in 49 CFR part 571, and which are specifically mentioned in section 610(d)(3)(B). Consequently, EPA proposed and in this final action is applying the statutory ban on the sale, distribution, or offer of sale or distribution in interstate commerce to all foam components used in motor vehicles, except those made out of integral skin foam and those which qualify as foam insulation products as defined in § 82.62(h), effective January 1, 1994. EPA is exempting integral skin foam made with HCFCs used to meet the appropriate Federal Motor Vehicle Safety Standards promulgated under 49 CFR part 571, under the provisions of section 610(d)(3)(B) from the class II ban on plastic foam products until January 1, 1996. At that time, the exception for HCFC-blown integral skin foam will "sunset." In addition, EPA is exempting existing inventories of integral skin motor vehicle safety products

manufactured and placed into initial inventory prior to January 1, 1996.

4. Use Of a Class II Substance As A Startup Gas in Foam Production

EPA received one comment concerning the use of class II substances as a startup gas in the production of extruded polyethylene foams. The commenter indicated that potential nonflammable blowing agents are not suitable for the manufacturing of extruded polyethylene foam. The commenter stated that the use of flammable blowing agents during startup conditions presents many difficulties. The foam lines are not at stable operating conditions and friction generates static electricity. The commenter stated that EPA should consider providing an exception for the incidental uses of class II substances as a startup blowing agent where the foam product is pelletized to eliminate most of the class II substance. The commenter urged EPA to allow for the reuse of the startup foam (blown with class II substances) to encourage recycling, because the amount of the class II substance in an end product would likely be de minimis. Section 610(d) relates only to the sale and distribution of products in interstate commerce. Section 610(d) does not regulate the use of blowing agents as startup gases. However, the statute does clearly regulate the potential sale and distribution of the products that are produced with the startup gas used during the startup process. The Agency understands that generally startup gas is not intended to be incorporated into the finished product; however, when a startup gas is no longer being used, it is not immediately eliminated from the stream of production. There may be instances where both an insignificant amount of the startup gas and the blowing agent actually appear in the same end product. Under that scenario, EPA agrees that the class II substance in the startup gas should be viewed as de minimis in nature and products produced with it are not covered by this final action. Therefore, polyethylene products that are not manufactured with class II substances, where class II substances are used solely as startup gases, and therefore may contain incidental amounts of class II substances are not subject to the ban.

C. Temporary Exemptions

1. Existing Inventories

EPA received several comments regarding EPA's proposal to grandfather existing inventories. One commenter stated that there is a proven technology for the destruction of all the products containing or manufactured with a class II substance—incineration. Incineration units can be used to safely destroy products that will be banned under section 610(d). The commenter stated that there are three facilities that utilize high temperature incineration to reduce all HCFCs to carbon dioxide, water, and halogenated salts. The commenter further stated that trial data for HCFC–22 indicates a rate greater than 99.99 percent for the destruction removal efficiency. In addition, the commenter believes that there are sufficient facilities to handle the demand to destroy all existing inventories being grandfathered by this action. EPA applauds the efforts of this commenter; however, EPA is concerned about the lack of wide availability of such facilities. EPA does not have enough information to determine if there are any other organizations that can provide such a service and whether sufficient incineration capacity exists in wide enough distribution throughout the country to allow incineration of all existing inventories otherwise covered by the class II ban. Furthermore, EPA has no means for ensuring that existing inventories would be sent to appropriate incineration facilities. Manufacturers could use another method for destroying existing inventories that would result in the release of HCFCs directly to the atmosphere. Moreover, EPA's proposed exemptions were based on the de minimis rationale for existing inventories. EPA believes that a review of the amounts of ozone-depleting substances allowed to be emitted based on the NPRM is still de minimis and thus, that the exemption is still warranted.

EPA received comment concerning an extension of the date for placing grandfathered products into initial inventory. One commenter believes that EPA should exempt products placed into initial inventories one hundred and eighty days after the date of publication of the final rule. Another comment suggested that the Agency change the date that products need to be placed into initial inventory from December 27, 1993, to December 31, 1993. The commenter believes that for the ease of compliance and enforcement, consistency with the federal-approval exemption, and conformance with the statute, EPA should switch the date. EPA would like to clarify that the exemption for inventories was based on a de minimis rationale; on the other hand, the federal-approval exemption was based on the ability of the federal entities to perform sufficient reviews by January 1, 1994. Ninety days between the date of publication and this exemption's effective date was based on research involving the length of time needed to convert facilities. Modifying that date by four days provides no significant additional environmental impacts. Since grandfathering is not called for by the statute, strict conformance is not an issue. EPA agrees that December 31, 1993, provides a more reasonable date for the manufacturers' compliance and provides an added benefit from an enforcement perspective. EPA had no way of knowing on which day the NPRM would be published and therefore could not predict the exact effective date of this exemption. In light of the proximity of the grandfathering date and the effective date of the ban, EPA believes it is reasonable to revise the exemption to grandfather all products placed into initial inventory by the manufacturers by December 31, 1993.

One commenter stated that EPA should exempt all products placed into inventories before March 27, 1994. The commenter lists the following reasons: legal authority under the *Alabama Power* decision; failure would cause economic hardship for certain manufacturers and distributors; these products would still meet the de minimis test; and it would not cause an adverse effect on stratospheric ozone. A second commenter stated that an extension should be considered because some products require more than ninety days to complete manufacturing. EPA agrees that not every product affected by this ban can be manufactured during the ninety-day time-frame; however, EPA disagrees with these commenters' concerns regarding extensions for the grandfathering provision. EPA believes that the *Alabama Power* decision does provide authority to grandfather certain existing inventories. However, EPA does not believe that within the meaning of section 610(d) there is any basis for considering exempting inventories created beyond the effective date of the self-executing ban. The Agency believes that such an exemption would only encourage additional production of nonessential products. The emissions of HCFCs would not be considered de minimis in nature because the additionally manufactured products would contribute increased emissions to the stratospheric ozone problem. The crux of EPA's reasoning for providing any exemption for existing inventories was that emissions from products already in existence were de minimis. EPA is aware that during the ninety

days provided in the NPRM for alterations of manufacturing processes, some manufacturers may have continued to produce nonessential products that would otherwise have been banned and that will now be exempted; however, that was not the intention of the exemption. The exemption was designed to allow manufacturers the time necessary to convert their facilities from the time they became aware that their products would likely be banned. A further extension would solely allow for continued manufacturing which clearly contradicts Congressional intent. Furthermore, with a self-effectuating statutory ban date of January 1, 1994, EPA believes it cannot legally provide grandfathering for banned products manufactured beyond that date.

One commenter stated that they faced many hurdles regarding their ability to replace HCFCs in replacement parts for their products. The commenter cited difficulties with storing large inventories of certain products, particularly integral skin products for use in meeting automobile safety standards. The commenter requested that EPA allow the sale of replacement parts used to meet these safety standards and made with HCFCs on a permanent basis because the rule should only apply to new products. EPA disagrees with this commenter. Nothing in the statutory language indicates that section 610(d) should not apply to replacement parts which in and of themselves are new products. The statute clearly states that the ban applies to aerosol products, pressurized dispensers, and foam products manufactured with, or containing a class II substance. The sale of a replacement part into interstate commerce is equivalent to the sale of any other product. A replacement part is a product and is sold as a new product when introduced into interstate commerce. The exemptions that EPA has offered for existing inventories, including the exemption for integral skin foams used to meet motor vehicle safety standards, are aimed at protecting the distributor and retailer. If EPA had not included the exemptions, integral skin products manufactured with or containing a class II substance not yet sold to the ultimate consumer (e.g. the user of the end product) would be banned from further sale and distribution in interstate commerce on January 1, 1996, regardless of where that product was in the chain of distribution, even where the product had been placed into initial inventory prior to January 1, 1996.

If manufacturers are concerned about their ability to convert the manufacturing of all components and replacement parts that will be banned after January 1, 1996, the manufacturer may choose to make a lifetime buy of the replacement parts prior to January 1, 1996. Replacement parts and components placed into initial inventory prior to January 1, 1996 will not be subject to the ban.

In many cases producers that have already reformulated their production processes to comply with the class II ban may have inventory either at their facilities or still in the distribution chain. The Food Service and Packaging Institute estimates that the capital expenditures to retrofit equipment have cost their industry more than $10 million. This figure reportedly does not portray the disruption to the product lines and manpower that occurred during the conversion. These manufacturers fully supported EPA's grandfathering provision because it would alleviate the additional burden of recalling stock already sold by the manufacturers and destroying these products.

EPA received one comment from a manufacturer of food service disposable products indicating that, to comply with the class II ban, the manufacturer spent more that $3 million to retrofit their facilities. The conversion away from HCFCs has already been completed. However, the comment points out that hundreds of cases of products that were produced with HCFCs are still awaiting sale in the manufacturer's warehouses, and may still be on the shelves of their customers. This commenter described the grandfather provision as crucial due to the nature of their business.

One commenter, a manufacturer of dusters and noise horns, stated that more than 85 percent of their product line was produced with CFC–12 as recently as 1989. The commenter described their conversion as both "painful" and "costly," yet recognizes the benefits to society. In 1988, the manufacturer used 1,250,000 pounds of class I substances. In 1992, the same manufacturer had reduced the ODP-weighted use of class I and class II substances to 57,000 pounds. This amount will be further reduced for 1993 to approximately 25,000 to 30,000 pounds. Reductions were necessary, in meeting the February 16, 1993, ban on the sale and distribution of products releasing CFCs specifically referred to in the statute and meeting the January 17, 1994, effective date for products EPA found meet the criteria for nonessentiality. The commenter agrees with EPA's determination to treat existing inventory as de minimis. The commenter categorizes EPA's decision as a "very fair method to help business make a smooth transition." The commenter further states that the ninety days to convert was not impossible given that supplies of alternatives were available and that, regardless of the grandfathering provision, manufacturers would need to convert by year's end. EPA agrees with many of the points raised by this commenter.

One commenter, who agrees with EPA's proposed grandfathering provision, requests clarification of the term "initial inventory." The commenter provides an example where the producer of the foam product may not be the same entity as the final producer of the product to be sold. The commenter questions which inventory represents the initial inventory, and suggests that initial inventory should, for foam products, mean the inventory of the manufacturer of the foam itself. EPA agrees that the term initial inventory may require clarification. In this final action EPA clarifies that the term "initial inventory," with regard to the temporary exemptions listed in § 82.65, means that the original product has completed all of its manufacturing processes and is ready for sale by that manufacturer (e.g. the foam is manufactured). That product may be subsequently incorporated into another product by a different manufacturer after purchase. This would not affect the applicability of the exemption.

To continuing selling products after January 1, 1994, the manufacturer or distributor must be able to show, upon request by EPA, that the product was in fact manufactured, and thus placed into initial inventory prior to December 31, 1993. EPA identified shipping forms, lot numbers, manufacturer date stamps or codes, invoices, or the like as records that are normally kept by manufacturers and distributors. The Agency believes this type of information is routinely maintained for several years.

2. Products Requiring Federal Approvals

EPA received three comments regarding the temporary exemptions for products requiring federal approval prior to selling a reformulated product. One commenter states that the proposed thirty-day period for manufacturers to continue to manufacture banned products after being denied federal approval should be reconsidered. The commenter states that thirty days is inconsistent with the ninety days allowed for those that did receive approval to reformulate. Additionally, the commenter believes that the

manufacturers may not have submitted every possible alternative originally or may have subsequently devised a new potential reformulation. The commenter proposes that the ban should not apply to a manufacturer whose reformulation request is denied, so long as the manufacturer submits another reformulation request within ninety days of receipt of the notice of denial. If the subsequent reformulation is approved, the commenter suggests that the manufacturer should continue to be grandfathered for ninety days after receipt of the approval. If the second request is denied, then so long as another request is submitted, in good faith, within ninety days, again grandfathering should continue. The commenter suggests that the Agency may wish to place a restriction by either limiting the number of submissions by a single company or by limiting the total amount of time that a product can be exempted without having received federal approval. EPA received a second comment indicating that the Agency should allow one hundred and eighty days for products that are denied a federal approval for reformulations to allow the manufacturer to locate a new formulation and reapply for approval to the appropriate federal agency.

EPA believes that in many cases after receiving denial for a reformulation, the manufacturer may be forced to shut down that product line. The time needed to shut down a product line is significantly less than the time required to retool to manufacture the products using an alternative formulation. Therefore, EPA proposed only thirty days for manufacturers that were denied approval for a reformulation. EPA agrees that thirty days may be insufficient, but believes that forty-five days is sufficient time for manufacturers to cease using class II substances, once denial of application for reformulation has been received. Further, EPA agrees that if a manufacturer devises a new formulation, a method for submitting that formulation should be available to that manufacturer. Therefore, in this final rule, EPA is providing a continued temporary exemption if the manufacturer submits a viable new reformulation to the same federal agency within forty-five days of receiving a denial. For the purposes of Section 610(d) only, a viable application means that the application is complete, accurate and has been filed with the appropriate federal agency. If after forty-five days no application has been submitted, the manufacturer can no longer manufacture a banned product. EPA believes forty-five days gives the manufacturer adequate time in which to re-submit an application or phase out a product. EPA disagrees with establishing a limit on the total amount of time a product can be exempted. The time frames associated with federal review processes represent the amount of time necessary for the federal agency to conduct a responsible review of the formulations and determine the acceptability of the formulation under applicable statutes and regulations. The federal agencies cannot expedite their internal processing procedures simply because a formulation would otherwise be subject to the class II ban without compromising the integrity of their own program reviews. In addition, EPA does not believe it is appropriate to limit severely the number of submissions that can be made, if those submissions are made in good faith and represent newly devised formulations; however, EPA believes that without some type of constraint, some manufacturers may perceive this exemption as a way to continually circumvent the ban. Therefore, EPA will review each re-submittal for completeness and accuracy, in conjunction with the appropriate federal entities. These applications must be made in good faith and must represent formulations that could not have been submitted earlier. If the application is deemed to be nonviable, the manufacturer will have forty-five days in which to cease manufacturing the product with a class II substance after being informed that the application is nonviable. EPA will therefore allow forty-five days for a manufacturer to either shutdown or reapply to the same federal agency.

One commenter suggested that the term "federal approval" should also include approval by non-governmental bodies, such as laboratories, if accepted under applicable regulations as meeting federal approval requirements. The commenter further suggested that EPA consider the approval of finished products that incorporate approved products if the finished product cannot be reformulated without federal approval of a particular component. The commenter demonstrated the need to consider such situations with life vests requiring approval by the U.S. Coast Guard. EPA agrees with this commenter with respect to both issues. If the appropriate applications were submitted prior to January 1, 1994, manufacturers that require the approval of both the finished product and a particular component will be grandfathered by this final action until such time as they receive approval or denial. In addition, if the manufacturer can demonstrate that approval by a non-government entity is required under a federal statute or a federal regulation, EPA will consider that situation as equivalent to direct review by the federal agency and use of a class II substance will be grandfathered until ninety days after receipt of approval or forty-five days after denial.

D. Interstate Commerce

EPA received a comment supporting the Agency's proposed definition of interstate commerce. The commenter particularly agreed with the EPA's proposed exclusion for the resale of used products.

EPA received three comments regarding the treatment of products produced solely for export. Two commenters stated that EPA should consider the interpretation the Agency adopted in the regulations promulgated under section 611 (the labeling rule). One commenter referred to the following discussion in the preamble to the final labeling rule: "Section 611 applies to products that are 'introduced into interstate commerce,' but makes no reference to foreign commerce. The Clean Air Act does not define 'interstate commerce.' However, EPA believes that section 611's use of interstate commerce does not include 'foreign commerce' * * * EPA recognizes the competitive disadvantage that U.S. manufacturers would have in the foreign marketplace as a result of having to label" (58 FR 8136, 8154). The commenter further states that there is no Congressional direction to include exports and that including exports could put companies at a competitive disadvantage.

EPA would like to clarify that the statutory language in section 610 and section 611 is markedly different. EPA agrees that Congress did not intend for EPA to require products never *introduced* into interstate commerce to be labeled. Section 610 encompasses all sales and offers for distribution in interstate commerce until the final sale to the ultimate consumer. EPA proposed a definition of interstate commerce and the treatment of exports and imports for the class II ban, consistent with the definition used in the class I ban. This includes products ultimately destined for export if sold in interstate commerce prior to export, and imports if sold in interstate commerce after import. If a manufacturer could demonstrate that their product is manufactured entirely within the borders of one state, that the raw materials and components and labor used to manufacture the product also originate within the same state, and if that product does not enter interstate

commerce in any way (e.g. the shipping port is within the same state), EPA would agree that product would not be considered part of interstate commerce and could thus be sold for export.

There are strong policy reasons for the different interpretations of sections 610 and 611. Ozone depletion is a global concern. The United States is a leader among the parties to the Montreal Protocol. Imposing the labeling rule on exports would make little sense however, in that foreign citizens would often be unable to read the English labels, thus rendering them ineffective; and labels would not serve their intended purpose of distinguishing between products containing and those not containing ozone-depleting substances, since foreign-made products containing such substances would not be labeled. To allow U.S. companies to effectively "dump" goods banned in the United States (for purposes of global environmental protection) in foreign countries would defeat the purposes of, and undermine the spirit of, the Montreal Protocol.

EPA received one comment concerning EPA's legal authority to regulate exports. The commenter indicated that EPA could not regulate exports because EPA was not listed in Department of Commerce (DOC) regulations, listing agencies authorized to regulate exports. EPA wishes to clarify that EPA did not in the proposal intend to regulate the foreign commerce aspect of products destined for ultimate export. As explained above, in this final rule, EPA is only regulating the sales in interstate commerce of products that may eventually be exported. If products are not sold in interstate commerce, this rule will have no effect on export of such products. Thus, DOC regulations governing the foreign commerce aspects of exports sales have no reference to this rulemaking. The regulation cited by the commenter, 15 CFR 770.10, is entitled "Exports which are not controlled by the office of export licensing." EPA confirmed with the DOC that this regulation does not in any way limit any agency's independent authority to regulate sales in interstate commerce of products that may ultimately be exported. Further, EPA notes that the listing in § 770.10 is not complete, and that where an agency is authorized by another statute to regulate foreign commerce, it may do so, notwithstanding § 770.10. Although EPA is not in the case of section 610 claiming authority to regulate foreign commerce, EPA is authorized under other statutes such as the Toxic Substances Control Act and the Resource Conservation and Recovery Act to regulate foreign commerce.

EPA received one comment stating that since the statute only authorizes EPA to regulate intrastate commerce, EPA cannot require the seller of products in intrastate commerce to provide proof that the products are not part of intra state commerce. EPA believes that few products will actually meet the definition of intrastate commerce; however, in cases where clearly a particular product is sold within intrastate commerce, the sale and distribution of that product will not be subject to this rule. Because EPA believes that so few products could meet the definition of interstate commerce, EPA believes that where it is appropriate within the scope of this rulemaking to question whether a person selling or distributing a particular product is falsely asserting that the product is exempt based on intrastate commerce, the Agency is justified in requiring verification of the product's status. Therefore, EPA believes it has authority to request verification where the Agency questions the status of a product that a person claims is exempt based on intrastate commerce.

EPA received one comment stating that a retailer may not be aware of when the product was manufactured and, therefore, should not be held liable for any prior sales. The commenter further stated that "interstate commerce" is tied to each event in the chain of sales. Only where a sale crosses a state line should that sale be subject to the ban. EPA disagrees with this commenter. EPA's interpretation of interstate commerce does not include products that were manufactured, distributed, and/or sold exclusively within a particular state, nor products where the components, equipment, and labor that went into manufacturing, distributing, selling, and/or offering to sell or distribute such a product originated within that state as well. Furthermore, the sale of the product includes every sale up to and including the sale to the ultimate consumer, and to be considered not part of interstate commerce all of those sales must take place without ever crossing a state line. If any phase of manufacture occurs in interstate commerce the product is considered "in" interstate commerce at any stage in its production. Therefore, the sale and distribution of banned products in interstate commerce is not legal, even when the one particular sale takes place within the same state, unless the product is sold entirely in intrastate commerce as described above.

E. Verification and Public Notice Requirements for Cleaning Fluids for Non-Commercial Electronic and Photographic Equipment

EPA received several comments asking for clarification regarding the exemption for lubricants, coatings, or cleaning fluids using a class II substance for solvent purposes and the requirement to sell aerosol cleaning fluids for electronic and photographic equipment to only commercial users. Many commenters found these two requirements to be either confusing or contradictory.

Section 610(b)(2) required EPA to ban the sale of chlorofluorocarbon-containing cleaning fluids for electronic and photographic equipment to non-commercial users. Consequently, EPA, in the class I ban, included a ban on the sale, distribution, or offer of sale or distribution of chlorofluorocarbon-containing cleaning fluids for electronic and photographic equipment to non-commercial users. As a result, there is no remaining chlorofluorocarbon which legally could be substituted for a class II substance in non-commercial cleaning fluids for electronic and photographic equipment.

The class II ban restricts the sale of aerosol products and pressurized dispensers; therefore, cleaning fluids in a non-pressurized dispenser are not subject to the ban. However, in order to continue selling aerosol cleaning fluids that contain a class II substance, for electronic and photographic equipment where flammability or worker safety justifies an exemption, the only alternative must be the legal use of a class I substance. For aerosol cleaning fluids used to clean electronic and photographic equipment sold to commercial users, such a legal use does exist, and EPA proposed an exemption under the class II ban, only for commercial uses. The class I ban and statute requires that these cleaning fluids be restricted to commercial users only; therefore, a verification requirement is necessary to ensure these products are not sold for non-commercial uses.

V. Summary of Changes From Proposal

This final action promulgates regulations under section 610. Several additional exemptions have been provided under the class II ban and revisions have been made to the class I ban.

Under § 82.65(c), EPA has changed the length of time a product can be manufactured after being denied federal approval from 30 days to 45 days. EPA also added a provision to allow for the

submission of new applications to the same federal agency, within forty-five days of denial.

Under §§ 82.66(d)(2)(vii), 82.66(d)(2)(viii) and 82.66(d)(2)(x), EPA has added exceptions for the use of CFC–12 as a propellant in various uses.

Under §§ 82.70(a)(2)(iv) and 82.70(a)(2)(v), EPA has added an exemption for propellant uses of certain class II substances.

EPA has added § 82.70(a)(2)(vi), an exception from the class II ban for document preservation sprays containing HCFC–141b and HCFC–22 used under specific circumstances.

EPA has added § 82.70(a)(2)(vii), an exception from the class II ban for commercial portable fire extinguishers containing class II substances as fire extinguishants where no alternative other than halons are available.

VI. Effective Dates

This final rule makes it unlawful to sell, distribute, or offer to sell or distribute, in interstate commerce, the products identified as nonessential in 40 CFR 82.70(a), 40 CFR 82.70(b) and 40 CFR 82.70(c) effective January 1, 1994. In addition, this final rule bans the sale, distribution, or offer of sale or distribution, in interstate commerce, of the products identified as nonessential in 40 CFR 82.70(c)(ii) effective January 1, 1996.

EPA has authority under 5 U.S.C. 553(d)(1)(iii) to expedite the effective date of a rulemaking. While generally EPA must provide thirty days notice, in cases involving a substantive rule which grants or recognizes an exemption or relieves a restriction and "as otherwise provided by the agency for good cause found and, published with the rule," an agency may accelerate the effective date of a rule. Without accelerating the effective date of this rule, the statutory ban will become effective on, January 1, 1994, inadvertently banning products that meet the statutory criteria for exemptions and that will only be exempted after this rule is effective. Since this rule grants and recognizes an exemption, EPA believes that there is good cause to accelerate the effective date of this rule to coincide with the effective statutory date of the ban on class II products. Therefore, the effective date for this rulemaking will be January 1, 1994. EPA would like to clarify that while the class II ban is effective January 1, 1994, this action does not revise the effective dates contained in the class I ban. The ban on the sale, distribution, or offer of sale or distribution, in interstate commerce of the products specifically mentioned in § 82.66 (a) and (b) was effective on February 16, 1993. The ban on the sale or distribution of products identified in § 82.66 (c) and (d) is effective on January 17, 1994.

VII. Summary of Supporting Analyses

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1994), the Agency must determine whether this regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant" regulatory action as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review under the executive order OMB and EPA have agreed with this determination.

EPA has prepared two background documents (see references Background Document on Foam Products Made With Class II Substances and Background Document on Aerosol Products and Pressurized Dispensers Containing Class II Substances in Docket A–93–20) which include a qualitative study of the economic impact of this regulation for each product identified as nonessential and prohibited from sale or distribution.

Most foam is produced by large businesses. This is due to high market entry barriers, including the need for large capital investments. However, the class II ban affects all the groups involved in the sale and distribution of the foam products; therefore, other entities besides the producers, including small retail or distribution businesses, are involved. In many cases, foam represents one component of a finished product that is produced by a small business. In addition, the finished products are often sold by small retail business operations. EPA has researched the numbers and types of firms that manufacture and sell foam products affected by the class II ban, and the potential economic impact the class II ban may have on these entities.

EPA believes that the class II ban will have no economic impact for the manufacturers of open cell rigid polyurethane foam, because EPA is not aware of any manufacturers of this product that currently use HCFCs. The class II ban is likely to have minimal impact on the manufacturers of flexible molded foam since information indicates that most have moved directly from CFCs to methylene chloride and water formulations. Most of the production of semi-rigid integral skin foam relies on the use of halocarbon blowing agents. However, the exemption for foams used to meet automotive safety standards will significantly alleviate the impact the ban will have on these products. Most other types of polyurethane foams are made with HCFCs. Information indicates that approximately 85 to 90 percent of extruded polystyrene sheet foam does not rely on HCFCs. Companies that were still using HCFCs are required to switch blowing agents; thus, these companies are affected by the ban. EPA does not believe the ban will have any impact on polyethylene bead foam, since information available to EPA indicates the manufacturers of this product have already switched to hydrocarbons. EPA is aware of at least six extruded polyethylene manufacturers that have converted to hydrocarbons; however, as discussed earlier, some of the other producers of extruded polyethylene foam, not used solely as pipe wrap, will be significantly affected. EPA believes the ban will have no impact on expanded polypropylene bead manufacturers since these manufacturers have converted to hydrocarbons. However, the sole American producer of extruded polypropylene may incur significant costs. Further details concerning the results of this research appear in the Background Document on Foam Products Made With Class II Substances.

Many manufacturers of aerosol products could be characterized as small businesses. EPA believes that few companies that primarily manufacture aerosol products have more than 100 employees. However, several facilities are actually part of larger companies that produce a range of other products. In both cases, the entire product line produced by the manufacturers may not consist of products containing class II substances. Distributors and retailers may vary considerably in size and

product line. EPA has researched the numbers and types of firms that manufacture and sell aerosol products and pressurized dispensers affected by the class II ban, and the potential economic impact the class II ban may have on these entities.

EPA has examined a number of aerosol products affected by the class II ban. This research included both products that could meet the narrow criteria for receiving exceptions established by Congress in section 610(d), and those that do not meet the criteria. Much of the information collected by EPA is qualitative and anecdotal in nature but is sufficiently conclusive for the Agency to be able to obtain a reasonable picture of the overall impact. Examples of these findings are discussed below.

EPA is aware of formulations for document preservation sprays that do not use class I or class II substances. However, at least one major manufacturer has tested and is now using class II substances as both propellants and solvents. Therefore, while EPA is providing an exemption for certain propellant and solvent uses in this product, the class II ban in limited circumstances will affect this product. Many pesticide products using class II substances will be affected by the class II ban. However, the impacts will be reduced because of the provision allowing manufacturers that require federal approval for reformulation for a product or approval of a specific substitute product to continue to sell or distribute, or offer for sale or distribution in interstate commerce, their existing formulations until ninety days after receiving all appropriate federal agency approvals or forty-five days after denial. The provision will also provide relief for other products requiring approval prior to reformulation. Manufacturers of dusters and freezants that have continued to use HCFC formulations will be affected by the class II ban; however, companies that have already moved to alternatives such as carbon dioxide or HFCs will not be affected. Many manufacturers of defensive sprays also will be significantly affected by the class II ban. Further details concerning the results of this research appear in the Background Document on Aerosol Products and Pressurized Dispensers Containing Class II Substances.

EPA has considered the benefits that can be attributed to the class II ban. In order to calculate the benefits, EPA considered the total annual consumption of HCFCs in products that will be banned. EPA estimates that the annual HCFC consumption in foam products that will be banned is approximately 27.31 million pounds. The annual HCFC consumption in aerosol products that will be banned is approximately 11.8 million pounds. EPA attributes all of the avoided emissions and corresponding benefits to the class II ban. EPA believes that if the self-executing ban was not included in the Clean Air Act Amendments, the current amount of HCFCs used in the foam and aerosol sectors would have been greater. Furthermore, without the ban, these annual emissions actually would continue to increase, especially during the next several years and following the phaseout of class I substances. These increases would have leveled off and only begun to decrease as the phaseout dates for HCFCs approached (2003–2030). EPA estimates the benefits for this rule range between $148 million and $604 million when using a 2 percent discount rate, and between $107 million and $438 million when using a 7 percent discount rate.

EPA requested comment on the overall benefits of the class II ban and the costs the class II ban will have on affected businesses. In particular, EPA requested comment on the size and diversity of the companies affected by the ban, the potential costs associated with the class II ban, and the impact the class II ban will have on small entities. In addition, EPA requested comment on the cost and benefits associated with the proposed regulations. Specifically, EPA requested comment on the offsetting beneficial effects that the proposed exceptions, grandfathering of existing inventories, and grandfathering for products waiting for required federal approvals, will have on affected businesses. EPA did not receive comments regarding the overall impacts of the ban; however, EPA did receive comments concerning the grandfathering provisions and the costs associated with retrofitting facilities to meet the ban. The Food Service and Packaging Institute estimated that their members spent more that $10 million on capital costs to retrofit existing equipment. This number does not include the costs of disrupting normal operations while these retrofits occurred. One member alone spent more than $3 million to complete their capital costs for retrofits. This member believes that the cost of recalling and destroying products that were already produced with class II substances prior to the member's conversions, would cost a significantly larger sum, while producing no added environmental benefits. Several other commenters that have already completed converting to non HCFC-formations, such as one producer of dusters and noise horns, indicated that the grandfathering provisions represent a fair method to help businesses make a smooth transition. This manufacturer further stated that the key costs of the ban involve the short time frames for facilities' conversions and the need to change the art work that appears on the aerosol cans, converting the packaging to handle the properties of all the new substitutes, and educating the customers. This commenter believes that their organization spent $500,000 to meet both the class I and class II bans. An additional $200,000 was also incurred due to the tax on CFC.

The statutory ban is self-executing. If EPA did not promulgate regulations to create exemptions, the ban would impose significantly higher costs. Furthermore, without the temporary exemptions for existing inventories and products requiring federal approval prior to reformulation, the statutory ban would impose significantly higher costs on the distributors and retailers of banned products. The rule creates exemptions and clarifies the exceptions provided by the statute, therefore lessening the burden of the self-executing ban imposed by the statute.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–602, requires that Federal agencies examine the impacts of their regulations on small entities. Under 5 U.S.C. 604(a), whenever an agency is required to publish a general notice of proposed rulemaking, it must prepare and make available for public comment an initial regulatory flexibility analysis (RFA). Such an analysis is not required if the head of an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, pursuant to 5 U.S.C. 605(b).

EPA believes that any impact that this regulation will have on certain small entities is unavoidable given the straightforward nature of the statutory provision this regulation implements. An examination of the impacts on small entities was discussed in the background documents accompanying the NPRM and has since been updated to include information supplied by comments. Revised versions of the background documents are contained in the docket. The background document assesses the impact this regulation may have on small entities and provides examples of such impacts. In general, the impact of the ban is overall minimal; and in particular, the impact of this rule, according to the information

supplied by commenters, will serve to relieve some of the burden the self-executing ban places on certain products.

C. Paperwork Reduction Act

Any information collection requirements in a rule must be submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Because no informational collection requirements were proposed and none are being required by today's action, EPA has determined that the Paperwork Reduction Act does not apply to this rulemaking and no Information Collection Request document has been prepared.

VIII. Judicial Review

Under Section 307(b)(1) of the Act, EPA finds that these regulations are of national applicability. Accordingly, judicial review of this action is available only by the filing of a petition for review in the United States Court of Appeals for the District of Columbia Circuit within sixty days of publication of this action in the **Federal Register**. Under section 307(b)(2), the requirements of this rule may not be challenged later in judicial proceedings brought to enforce those requirements.

IX. References

United Nations Environment Programme. Report of the Aerosol Products, Sterilants, Miscellaneous Uses and Carbon Tetrachloride Technical Options Committee (December 1991).

United Nations Environment Programme. Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (November 25, 1992).

United Nations Environment Programme. Scientific Assessment of Ozone Depletion: 1991 (December 17, 1991).

United Nations Environment Programme. Solvents, Coatings and Adhesives: Technical Options Committee Report (December 1991).

United Nations Environment Programme. Third Meetings of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer: UNEP/OzL.Pro.3/L.4/Add.4 (Nairobi, 19–21 June, 1991).

United Nations Environment Programme. 1991 UNEP Flexible and Rigid Foams Technical Options Report (December 20, 1991).

United States Environmental Protection Agency. Alternative Formulations to Reduce CFC Use in U.S. Exempted and Excluded Aerosol Products (November 1989).

United States Environmental Protection Agency. Background Document on Aerosol and Pressurized Dispenser Products Containing Class II Substances (March 1993).

United States Environmental Protection Agency. Background Document on Identification of Nonessential Products that Release Class I Substances (November 1992).

United States Environmental Protection Agency. Essential Use Determination—Revised: Support Document Fully Halogenated Chlorofluoroalkanes (March 17, 1978).

United States Environmental Protection Agency. Handbook for Reducing and Eliminating Chlorofluorocarbons in Flexible Polyurethane Foams (April 1991).

United States Environmental Protection Agency. Manual of Practices to Reduce and Eliminate CFC–113 Use in the Electronics Industry (March, 1990).

United States Environmental Protection Agency. Response to Comments for Proposed Rule on Nonessential Products Made with Class I Substances (October 30, 1992).

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Chlorofluorocarbons, Exports, Hydrochlorofluorocarbons, Imports, Interstate commerce, Nonessential products, Reporting and recordkeeping requirements, Stratospheric ozone layer.

Dated: December 22, 1993.

Carol M. Browner,

Administrator.

Title 40, Code of Federal Regulations, part 82, is amended as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

2. Subpart C is revised to read as follows:

Subpart C—Ban on Nonessential Products Containing Class I Substances and Ban on Nonessential Products Containing or Manufactured With Class II Substances

Sec.

Subpart C—Ban on Nonessential Products Containing Class I Substances and Ban on Nonessential Products Containing or Manufactured With Class II Substances

§ 82.60 Purpose.

The purpose of this subpart is to implement the requirements of sections 608 and 610 of the Clean Air Act as amended in 1990 on emission reductions and nonessential products.

§ 82.62 Definitions.

For purposes of this subpart:

(a) *Chlorofluorocarbon* means any substance listed as Class I group I or Class I group III in 40 CFR part 82, appendix A to subpart A.

(b) *Commercial,* when used to describe the purchaser of a product, means a person that uses the product in the purchaser's business or sells it to another person and has one of the following identification numbers:

(1) A federal employer identification number;

(2) A state sales tax exemption number;

(3) A local business license number; or

(4) A government contract number.

(c) *Consumer,* when used to describe a person taking action with regard to a product, means the ultimate purchaser, recipient or user of a product.

(d) *Distributor,* when used to describe a person taking action with regard to a product means:

(1) The seller of a product to a consumer or another distributor; or

(2) A person who sells or distributes that product in interstate commerce for export from the United States.

(e) *Product* means an item or category of items manufactured from raw or recycled materials which is used to perform a function or task.

(f) *Release* means to emit into the environment during the manufacture, use, storage or disposal of a product.

(g) *Class II Substance* means any substance designated as class II in 40 CFR part 82, appendix B to subpart A.

(h) *Foam Insulation Product,* when used to describe a product containing or consisting of plastic foam, means a product containing or consisting of the following types of foam:

(1) Closed cell rigid polyurethane foam;

(2) Closed cell rigid polystyrene boardstock foam;

(3) Closed cell rigid phenolic foam; and

(4) Closed cell rigid polyethylene foam when such foam is suitable in shape, thickness and design to be used as a product that provides thermal

insulation around pipes used in heating, plumbing, refrigeration, or industrial process systems.

(i) *Hydrochlorofluorocarbon* means any substance listed as class II in 40 CFR part 82, appendix B to subpart A.

(j) *Owner of a boat or marine vessel* means any person who possesses a title, registration or other documentation that indicates that the person presenting this documentation is in possession of a marine vessel as defined in 33 CFR part 177.

(k) *Owner of a noncommercial aircraft* means any person who possesses a title, registration or other documentation that indicates that the person presenting this documentation is in possession of a noncommercial aircraft.

§ 82.64 Prohibitions.

(a) Effective February 16, 1993, no person may sell or distribute, or offer to sell or distribute, in interstate commerce any of the products identified as being nonessential in § 82.66(a).

(b) Effective February 16, 1993, no person may sell or distribute, or offer to sell or distribute, in interstate commerce any of the products specified in § 82.66(b) to a person who does not provide proof of being a commercial purchaser, as defined under § 82.62.

(c) Effective January 17, 1994, no person may sell or distribute, or offer to sell or distribute, in interstate commerce any of the products identified as being nonessential in § 82.66(c) or § 82.66(d).

(d) Except as permitted under § 82.65, effective January 1, 1994, no person may sell or distribute, or offer for sale or distribution, in interstate commerce any product identified as being nonessential in § 82.70(a) or § 82.70(c).

(e) Except as permitted under § 82.65, effective January 1, 1994, no person may sell or distribute, or offer to sell or distribute, in interstate commerce any of the products specified in § 82.70(b) to a person who does not provide proof of being a commercial purchaser, as defined under § 82.62.

(f) Except as permitted under § 82.65(d), effective January 1, 1996, no person may sell or distribute, or offer for sale or distribution, in interstate commerce any product identified as being nonessential in § 82.70(c)(ii).

(g) It is a violation of this subpart to sell or distribute, or offer for sale or distribution, products effected by the provisions of § 82.68 if the seller knew or should have known that the purchaser was purchasing the product for a prohibited application.

§ 82.65 Temporary exemptions.

(a) Any person may sell or distribute, or offer to sell or distribute, in interstate commerce, at any time, any products specified as nonessential in § 82.70 which are manufactured and placed into initial inventory by December 31, 1993.

(b) Any person may sell or distribute, or offer to sell or distribute, in interstate commerce, at any time, any products specified as nonessential in § 82.70 which are manufactured and placed into initial inventory within the date 90 days after the effective date of any federal approvals required for product reformulation, where application for the required approval was timely and properly submitted to the approving federal agency prior to January 1, 1994.

(c)(1) Any person may sell or distribute or offer to sell or distribute, in interstate commerce, at any time, any products specified as nonessential in § 82.70 which are manufactured and placed into initial inventory within 45 days after the receipt of denial by any federal agency of an application for reformulation where initial application for the required approval was timely and properly submitted to the approving federal agency prior to January 1, 1994.

(2) If, within 45 days of receipt of a denial of an application for reformulation, a person submits a new viable application for federal approval of a reformulation, that person may continue to sell and distribute, or offer to sell and distribute until 45 days of denial of that application.

(d) Any person may sell or distribute, or offer to sell or distribute, in interstate commerce, at any time, any integral skin foam utilized to provide for motor vehicle safety in accordance with Federal Motor Vehicle Safety Standards, which are manufactured and placed into initial inventory prior to January 1, 1996.

(e) Any person selling or distributing, or offering to sell or distribute, any product specified in this section after January 1, 1994, or January 1, 1996 for subparagraph (d), must retain proof that such product was manufactured and placed into initial inventory before the relevant date specified in this section. Such proof may take the form of shipping forms, lot numbers, manufacturer date stamps, invoices or equivalent business records.

(f) Any person may sell or distribute, or offer to sell or distribute, in interstate commerce, any aircraft pesticide containing class I until an alternative aircraft pesticide containing class II is available in interstate commerce.

§ 82.66 Nonessential Class I Products and Exceptions.

The following products which release a Class I substance (as defined in 40 CFR part 82, appendix A to subpart A) are identified as being nonessential, and subject to the prohibitions specified under § 82.64—

(a) Any plastic party streamer or noise horn which is propelled by a chlorofluorocarbon, including but not limited to—

(1) String confetti;

(2) Marine safety horns;

(3) Sporting event horns;

(4) Personal safety horns;

(5) Wall-mounted alarms used in factories or other work areas; and

(6) Intruder alarms used in homes or cars.

(b) Any cleaning fluid for electronic and photographic equipment which contains a chlorofluorocarbon:

(1) Including but not limited to liquid packaging, solvent wipes, solvent sprays, and gas sprays; and

(2) Except for those sold or distributed to a commercial purchaser.

(c) Any plastic flexible or packaging foam product which is manufactured with or contains a chlorofluorocarbon;

(1) Including but not limited to:

(i) Open cell polyurethane flexible slabstock foam;

(ii) Open cell polyurethane flexible molded foam;

(iii) Open cell rigid polyurethane poured foam;

(iv) Closed cell extruded polystyrene sheet foam;

(v) Closed cell polyethylene foam; and

(vi) Closed cell polypropylene foam.

(2) Except—flexible or packaging foam used in coaxial cable

(d) Any aerosol product or other pressurized dispenser, other than those banned in § 82.64(a) or § 82.64(b), which contains a chlorofluorocarbon,

(1) Including but not limited to household, industrial, automotive and pesticide uses,

(2) Except—

(i) Medical devices listed in 21 CFR 2.125(e);

(ii) Lubricants for pharmaceutical and tablet manufacture;

(iii) Gauze bandage adhesives and adhesive removers;

(iv) Topical anesthetic and vapocoolant products;

(v) Lubricants, coatings or cleaning fluids for electrical or electronic equipment, which contain CFC–11, CFC–12, or CFC–113 for solvent purposes, but which contain no other CFCs;

(vi) Lubricants, coatings or cleaning fluids used for aircraft maintenance, which contain CFC–11 or CFC–113 as a solvent, but which contain no other CFCs;

(vii) Mold release agents used in the production of plastic and elastomeric materials, which contain CFC–11 or

CFC–113 as a solvent, but which contain no other CFCs, and/or mold release agents that contain CFC–12 as a propellant, but which contain no other CFCs;

(viii) Spinnerette lubricant/cleaning sprays used in the production of synthetic fibers, which contain CFC–114 as a solvent, but which contain no other CFCs, and/or spinnerette lubricant/cleaning sprays which contain CFC–12 as a propellant, but which contain no other CFCs;

(ix) Containers of CFCs used as halogen ion sources in plasma etching;

(x) Document preservation sprays which contain CFC–113 as a solvent, but which contain no other CFCs, and/or document preservation sprays which contain CFC–12 as a propellant, but which contain no other CFCs, and which are used solely on thick books, books with coated or dense paper and tightly bound documents; and

(xi) Red pepper bear repellent sprays which contain CFC–113 as a solvent, but which contain no other CFCs.

§ 82.68 Verification and public notice requirements.

(a) Effective February 16, 1993, any person who sells or distributes any cleaning fluid for electronic and photographic equipment which contains a chlorofluorocarbon must verify that the purchaser is a commercial entity as defined in § 82.62. In order to verify that the purchaser is a commercial entity, the person who sells or distributes this product must request documentation that proves the purchaser's commercial status by containing one or more of the commercial identification numbers specified in § 82.62 (b). The seller or distributor must have a reasonable basis for believing that the information presented by the purchaser is accurate.

(b) Effective February 16, 1993, any person who sells or distributes any cleaning fluid for electronic and photographic equipment which contains a chlorofluorocarbon must prominently display a sign where sales of such product occur which states:

It is a violation of federal law to sell, distribute, or offer to sell or distribute, any chlorofluorocarbon-containing cleaning fluid for electronic and photographic equipment to anyone who is not a commercial user of this product. The penalty for violating this prohibition can be up to $25,000 per sale. Individuals purchasing such products must present proof of their commercial status in accordance with § 82.68(a).

(c) Effective January 1, 1994, any person who sells or distributes any aerosol or pressurized dispenser of cleaning fluid for electronic and photographic equipment which contains a class II substance must verify that the purchaser is a commercial entity as defined in § 82.62(b). In order to verify that the purchaser is a commercial entity, the person who sells or distributes this product must request documentation that proves the purchaser's commercial status by containing one or more of the commercial identification numbers specified in § 82.62(b).

(d) Effective January 1, 1994, any person who sells or distributes any aerosol or other pressurized dispenser of cleaning fluid for electronic and photographic equipment which contains a class II substance must prominently display a sign where sales of such product occur which states:

It is a violation of federal law to sell, distribute, or offer to sell or distribute, any aerosol hydrochlorofluorocarbon-containing cleaning fluid for electronic and photographic equipment to anyone who is not a commercial user of this product. The penalty for violating this prohibition can be up to $25,000 per unit sold. Individuals purchasing such products must present proof of their commercial status in accordance with § 82.68(c).

(e) Effective January 1, 1994, in order to satisfy the requirements under § 82.68 (b) and (d), any person who sells or distributes cleaning fluids for electronic and photographic equipment which contain a class I substance and those aerosol or pressurized dispensers of cleaning fluids which contain a class II substance, may prominently display one sign where sales of such products occur which states:

It is a violation of federal law to sell, distribute, or offer to sell or distribute, any chlorofluorocarbon-containing cleaning fluid for electronic and photographic equipment or aerosol hydrochlorofluorocarbon-containing cleaning fluid for electronic and photographic equipment to anyone who is not a commercial user of this product. The penalty for violating this prohibition can be up to $25,000 per unit sold. Individuals purchasing such products must present proof of their commercial status in accordance with 40 CFR 82.68(a) or 82.68(c).

(f) Effective January 1, 1994, any person who sells or distributes any portable fire extinguisher containing a class II substance must prominently display a sign where sales of such products occur; or in cases where the purchaser does not physically come in contact with the point of sale, written notification must be given. This notification must state: "It is a violation of federal law to sell portable fire extinguishers containing hydrochlorofluorocarbons to anyone, *except* for use in applications where necessary to extinguish fire efficiently without irreparably damaging the equipment or area being protected or where the use of other alternatives can cause a hazard to persons in the area. The penalty for violating this prohibition can be up to $25,000 per unit sold. Individuals purchasing such products must present proof of their commercial status in accordance with 40 CFR 82.68(a), or of ownership of a marine vessel or boat in accordance with 40 CFR 82.62(j), or of ownership of a noncommercial aircraft in accordance with 40 CFR 82.62(k)." Written notification may by placed on sales brochures, order forms, invoices and the like.

(g) Effective January 1, 1994, any person who sells or distributes any portable fire extinguisher which contains a class II substance must verify that the purchaser is a commercial entity as defined in § 82.62(b) or is the owner of a marine vessel or boat in accordance with § 82.62(j) or the owner of a noncommercial aircraft in accordance with § 82.62(k). In order to verify that the purchaser is a commercial entity, the person who sells or distributes this product must be presented with documentation that proves the purchaser's commercial status by containing one or more of the commercial identification numbers specified in § 82.62(b). In order to verify that the purchaser is the owner of a marine vessel or boat, the person who sells or distributes this product must be presented with documentation specified in § 82.62(j) that proves the purchaser's status as the owner of a marine vessel or boat. In order to verify that the purchaser is in ownership of a noncommercial aircraft, the person who sells or distributes this product must be presented with documentation specified in § 82.62(k) that proves the purchaser's status as the owner of a noncommercial aircraft by containing one or more of the identification information specified in § 82.62(k). The seller or distributor must have a reasonable basis for believing that the information presented by the purchaser is accurate.

(h) Effective January 1, 1994, any person who sells or distributes any mold release agents containing a class II substance as a propellant must provide written notification to the purchaser prior to the sale that "It is a violation of federal law to sell mold release agents containing hydrochlorofluorocarbons as propellants to anyone, except for use in applications where no other alternative except a class I substance is available. The penalty for violating this prohibition can be up to $25,000 per unit sold." Written notification may be

placed on sales brochures, order forms, invoices and the like.

(i) Effective January 1, 1994, any person who sells or distributes any wasp and hornet spray containing a class II substance must provide written notification to the purchaser prior to the sale that "it is a violation of federal law to sell or distribute wasp and hornet sprays containing hydrochlorofluorocarbons as solvents to anyone, *except* for use near high-tension power lines where no other alternative except a class I substance is available. The penalty for violating this prohibition can be up to $25,000 per unit sold." Written notification may be placed on sales brochures, order forms, invoices and the like.

§ 82.70 Nonessential Class II products and exceptions.

The following products which release a class II substance (as designated as class II in 40 CFR part 82, appendix B to subpart A) are identified as being nonessential and the sale or distribution of such products is prohibited under § 82.64(d), (e), or (f)—

(a) Any aerosol product or other pressurized dispenser which contains a class II substance:

(1) Including but not limited to household, industrial, automotive and pesticide uses;

(2) Except—

(i) Medical devices listed in 21 CFR 2.125(e);

(ii) Lubricants, coatings or cleaning fluids for electrical or electronic equipment, which contain class II substances for solvent purposes, but which contain no other class II substances;

(iii) Lubricants, coatings or cleaning fluids used for aircraft maintenance, which contain class II substances for solvent purposes but which contain no other class II substances;

(iv) Mold release agents used in the production of plastic and elastomeric materials, which contain class II substances for solvent purposes but which contain no other class II substances, and/or mold release agents that contain HCFC–22 as a propellant where evidence of good faith efforts to secure alternatives indicates that, other than a class I substance, there are no suitable alternatives;

(v) Spinnerette lubricants/cleaning sprays used in the production of synthetic fibers, which contain class II substances for solvent purposes and/or contain class II substances for propellant purposes;

(vi) Document preservation sprays which contain HCFC–141b as a solvent, but which contain no other class II substance; and/or which contain HCFC–22 as a propellant, but which contain no other class II substance and which are used solely on thick books, books with coated, dense or paper and tightly bound documents;

(vii) Portable fire extinguishing equipment sold to commercial users, owners of marine vessels or boats, and owners of noncommercial aircraft that contains a class II substance as a fire extinguishant where evidence of good faith efforts to secure alternatives indicate that, other than a class I substance, there are no suitable alternatives; and

(viii) Wasp and hornet sprays for use near high-tension power lines that contain a class II substance for solvent purposes only, but which contain no other class II substances.

(b) Any aerosol or pressurized dispenser cleaning fluid for electronic and photographic equipment which contains a class II substance, except for those sold or distributed to a commercial purchaser.

(c) Any plastic foam product which contains, or is manufactured with, a class II substance,

(1) Including but not limited to household, industrial, automotive and pesticide uses,

(2) Except—

(i) Any foam insulation product, as defined in § 82.62(h); and

(ii) Integral skin foam utilized to provide for motor vehicle safety in accordance with Federal Motor Vehicle Safety Standards until January 1, 1996, after which date such products are identified as nonessential and may only be sold or distributed or offered for sale or distribution in interstate commerce in accordance with § 82.65(d).

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Thursday
December 30, 1993

Part X

Environmental Protection Agency

40 CFR Part 82

Protection of Stratospheric Ozone; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 82

[FRL-4819-9]

Protection of Stratospheric Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rulemaking.

SUMMARY: In this document EPA is promulgating regulations to amend the Class I Nonessential Products Ban published in the Federal Register of January 15, 1993, and promulgated under section 610(b) of the Clean Air Act, as amended. This action is being undertaken by EPA in order to exempt certain replacement parts that were placed into initial inventory prior to April 16, 1992. The substances affected by this proposed rulemaking include chlorofluorocarbons (CFCs). This action will provide relief for manufacturers, distributors, and retailers of replacement parts that were previously designed and manufactured for specific product models and that are no longer being produced.

EFFECTIVE DATE: This action will become effective on February 28, 1994 unless EPA is notified by January 31, 1994 that any person wishes to submit adverse comment. Should EPA receive such notice, EPA will publish one subsequent notice in the Federal Register to withdraw this final action and another notice proposing this action and requesting comments.

ADDRESSES: Comments and materials supporting this rulemaking are contained in Public Docket No. A-91-39, Waterside Mall (Ground Floor) Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460 in room M-1500. Dockets may be inspected from 8:30 a.m. until 12 noon, and from 1:30 p.m. until 3 p.m., Monday through Friday. A reasonable fee may be charged for copying docket materials. Those wishing to notify EPA of their intent to submit adverse comments on this rule should contact Cynthia Newberg, Program Implementation Branch, Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation (6205-J), 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Cynthia Newberg, Program Implementation Branch, Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation (6205-J), 401 M Street, SW., Washington, DC 20460. (202) 233-9729. The Stratospheric Ozone Information Hotline at 1-800-296-1996 can also be contacted for further information.

SUPPLEMENTARY INFORMATION: The contents of this preamble are listed in the following outline:

I. Class I Nonessential Products Ban

Title VI of the Clean Air Act as amended in 1990 (the Act), divides ozone-depleting chemicals into two distinct classes. Class I is comprised of chlorofluorocarbons (CFCs), halons, carbon tetrachloride and methyl chloroform. Class II is comprised of hydrochlorofluorocarbons (HCFCs). (See listing notice January 22, 1991; 56 FR 2420.) Section 610(b) requires EPA to promulgate regulations that "identify nonessential products that release class I substances into the environment (including any release occurring during manufacture, use, storage, or disposal) and prohibit any person from selling or distributing any such product, or offering any such product for sale or distribution, in interstate commerce." The statute requires that at a minimum, EPA must ban the sale and distribution of CFC-propelled plastic party streamers and noise horns, and restrict the sale and distribution of CFC-containing cleaning fluids for electronic and photographic equipment to commercial users. Final regulations implementing the Class I Nonessential Products Ban were published in the Federal Register on January 15, 1993 (58 FR 4768).

In developing regulations to implement the class I ban under section 610 (a), (b) and (c), EPA took into consideration the statutory prohibition required by section 610(d) on products containing or manufactured with class II substances. Section 610(d) provides for a self-executing ban of certain products made with class II substances that becomes effective on January 1, 1994. Section 610(d) bans the sale or distribution, or offer for sale or distribution, in interstate commerce of "any aerosol product or other pressurized dispenser which contains a class II substance;" and "any plastic foam product which contains, or is manufactured with, a class II substance." Section 610(d) provides limited criteria for granting exemptions to the Class II Nonessential Products Ban. The Notice Of Proposed Rulemaking (NPRM) implementing the class II ban was published in the Federal Register on September 27, 1993 (58 FR 50463).

During the development of the class I ban, EPA was concerned about the potential of creating an environmentally adverse incentive through implementation of the statutory ban on use of class II substances in certain products on January 1, 1994, while permitting the use of the more harmful class I substances in the same products. Thus, the statutory prohibition in section 610(d) provided direction in choosing products on which to focus under section 610(b). Therefore, EPA considered those products for which the use of HCFCs would be eliminated in determining which products to identify as nonessential under the class I ban.

Products Subject To The Class I Ban

In § 82.66 of the final regulations implementing the class I ban, EPA banned the following products which release a class I substance that are identified as being nonessential:

- Any plastic party streamer or noise horn which is propelled by a chlorofluorocarbon, including but not limited to—

—String confetti;
—Marine safety horns;
—Sporting event horns;
—Personal safety horns;
—Wall-mounted alarms used in factories or other work areas; and
—Intruder alarms used in homes or cars.

EPA also restricted the sale of any cleaning fluid for electronic and photographic equipment which contains a chlorofluorocarbon, except for those sold or distributed to a commercial purchaser.

These products were specifically identified as nonessential in section 610(b) of the Act putting manufacturers on notice of the upcoming ban. Therefore, the effective date for the implementation of the ban on the sale and distribution of the products listed above was February 16, 1993, thirty days after publication of the final class I ban.

In addition to these products, the final rule identifies and bans the following nonessential products based on EPA's review of various criteria specified in the Act:

- Any plastic flexible or packaging foam product which is manufactured with or contains a chlorofluorocarbon (except flexible or packaging foam used in coaxial cable,) including but not limited to:

—Open cell polyurethane flexible slabstock foam;
—Open cell polyurethane flexible molded foam;
—Open cell rigid polyurethane poured foam;
—Closed cell extruded polystyrene sheet foam;
—Closed cell polyethylene foam; and
—Closed cell polypropylene foam.

• Any aerosol product or other pressurized dispenser, which contains a chlorofluorocarbon, including but not limited to, household, industrial, automotive and pesticide uses, except—
—Medical devices listed in 21 CFR 2.125(e);
—Lubricants for pharmaceutical and tablet manufacture;
—Gauze bandage adhesives and adhesive removers;
—Topical anesthetic and vapocoolant products;
—Lubricants, coatings or cleaning fluids for electrical or electronic equipment, which contain CFC–11, CFC–12, or CFC–113 for solvent purposes, but which contain no other CFCs;
—Lubricants, coatings or cleaning fluids used for aircraft maintenance, which contain CFC–11 or CFC–113, but which contain no other CFCs;
—Mold release agents used in the production of plastic and elastomeric materials, which contain CFC–11 or CFC–113, but which contain no other CFCs;
—Spinnerette lubricant/cleaning sprays used in the production of synthetic fibers, which contain CFC–114, but which contain no other CFCs;
—Containers of CFCs used as halogen ion sources in plasma etching;
—Document preservation sprays which contain CFC–113, but which contain no other CFCs; and
—Red pepper bear repellent sprays which contain CFC–113, but which contain no other CFCs.

While EPA based its determination of nonessential products in addition to those specified in the statute on a consideration of section 610 in its entirety, EPA understands that many producers, distributors, and retailers may not have been able to foresee that their products would be considered under the class I ban until the publication of the NPRM on January 16, 1992. Therefore, the effective date for banning these products did not coincide with the effective date for banning products specifically referred to in section 610(b). These additional products can no longer be sold or distributed or offered for sale or distribution in interstate commerce after January 17, 1994, one year from the publication of the final rule.

II. Today's Revisions to the Class I Nonessential Products Ban

The class I ban provided one year for manufacturers, distributors and retailers to eliminate inventories of nonessential products not specifically listed in the statute. EPA generally believes that sufficient time was provided under that rulemaking for manufacturers to alter production and for retailers to liquidate any remaining stocks of prohibited products. The Agency believes that the effect of the rulemaking was quite clear after the publication of the NPRM on January 16, 1992. The NPRM provided notice to the producers, distributors, and retailers of aerosol and foam products that such products would be covered by the class I ban. In general, EPA believes that this period of time constitutes adequate notice for affected businesses. However, the Agency has been contacted by manufacturers and suppliers concerned with the treatment of existing inventories of replacement parts with long shelf lives made for specific makes or models of products. These are primarily cases where the environmental damage resulting from use of a class I substance in a product occurred during production of the products and the products were produced prior to the publication of the proposal for the class I ban.

Prior to the publication of the NPRM on January 16, 1992, manufacturers may not have known that future regulations would affect their existing inventories. Furthermore, in cases where the products were produced prior to the signing of the Clean Air Act Amendments in November of 1990, manufacturers may not have been able to predict what if any regulations affecting their inventories were imminent. However, in most cases, EPA believes that adequate time was provided in the class I ban rulemaking to allow for the elimination of most existing inventories prior to the established effective dates. The manufacturers of plastic party streamers and noise horns were on notice of the upcoming ban since the Clean Air Act Amendments were signed. The manufacturers of aerosol and foam products were on notice since the publication of the NPRM on January 16, 1992. However, EPA recently has learned of a few specific cases, where, because of very long shelf lives, no set length of time would be practical for the depletion of the existing inventories. EPA has reviewed numerous inquires about existing inventories. In the situation of certain replacement parts, as described below, EPA believes that authority to provide relief does exist and that the relief is appropriate.

There are particular types of replacement parts that were manufactured and are currently stored solely for use in specific product models. Inventories often remain in existence for more than ten years. Manufacturers that produced replacement parts designed solely for a specific product model often manufactured the part at the same time the original product was manufactured, and had the replacement parts placed into inventory at that time, for use in the future. This situation generally occurs where product models change rapidly or drastically and it would not be practical to produce replacement parts at a later date.

For example, the American Automobile Manufacturers Association and the Association of International Automobile Manufacturers estimate that automobile manufacturers have well over one million separate part numbers and a significantly larger number of replacement parts in inventory. Often replacement parts are only fully compatible with one model. Many of the replacement parts used in automobiles have long shelf lives and are retained in inventory for many years. Routinely, during production of a vehicle, the manufacturer will order a "lifetime buy" of particular parts needed to service the vehicle line during the expected life of the model. For example, an automobile manufacturer may have authorized the production of surplus car seats during the production of a particular car model to allow for a lifetime supply of seats designed for that specific car model. The manufacturer created a lifetime supply of these seats to be used to replace seats damaged after the car had been purchased by the ultimate consumer.

Since those parts were produced to meet the specifications of a particular model, it may not be possible to manufacture new substitute parts at this time. The suppliers of the equipment needed to produce the part may no longer exist. If the equipment does still exist, it may have been greatly reconfigured. Even in cases where the supplier still exists and has the properly configured equipment to produce a new replacement part without CFCs, the cost of redesigning and producing the new replacement part to replace those in existing inventories may be prohibitively expensive. Therefore, the class I ban may have the unintended effect of causing specific products to be scrapped before the end of their useful lifetime due to the unavailability of replacements. This situation may be

especially pronounced with replacement parts for automobiles and other durable goods that by their very nature have long product lifetimes.

In some cases, particularly for replacement parts that were originally placed in inventory prior to the signing of the Clean Air Act Amendments, the manufacturers may not have initially determined whether each replacement part was manufactured with, or contains, CFCs. In addition, the manufacturer may not have initially determined if each replacement part was stored in packaging material that was manufactured with, or contains, CFCs.

EPA believes that there are a limited number of replacement parts placed in inventories prior to April 16, 1992 that are still in use today that fit this description. Furthermore, the types of parts and packaging material described above tend to be made with open cell foam products. In these cases, the environmental damage resulting from use of class I substances in such products would have occurred during the original production of the foam. Therefore, there would be no additional environmental benefit associated with the disuse of the replacement parts already in inventory.

Administrative creation of exemptions from statutory requirements are authorized in only limited circumstances, as outlined in *Alabama Power Co., et al.* v. *Costle, et al.*, 636 F. 2d 323 (D.C. Cir 1979). Agencies can create such exemptions only where necessary, based on administrative feasibility or the de minimis nature of the exemption. Through this rule, EPA is granting limited exemptions from the class I ban based on the de minimis nature of emissions resulting from use of replacement products produced and already placed in initial inventory prior to April 16, 1992, the date 90 days after publication of the NPRM for the original class I ban. The exemption EPA is authorizing is limited to existing inventories where the original product and the replacement parts are no longer manufactured today, the replacement parts were expressly manufactured for that specific product make or model, and is based on the de minimis rationale.

EPA believes that the vast majority of replacement parts with long shelf lives that will be exempted by this action are parts that either contain an open cell foam component or are stored in open cell foam packaging material. As to this majority of affected products, the environmental damage associated with the class I substance in the product has already occurred at the time of manufacture. While there may also be a few closed cell products that meet the narrow definition of exempt products under this rule, emissions to the environment from use of these products, once manufactured, will be little or no different from the releases of class I substances from these products if removed from commerce and subsequently disposed of. Thus, where such replacement parts already exist, subjecting products to the ban will have a de minimis environmental impact. Due to these circumstances, EPA believes it is appropriate to allow such products to be used for their intended purpose prior to disposal.

EPA wishes to clarify that this exemption does not apply to all product components. Specifically, this exemption would not apply to those products that are fully compatible with a full range of products. For example, a reusable pressurized dispenser may be designed to be removed from one container and affixed to another container. In addition, in the aftermarket for automotive parts, there are parts designed to be compatible with a full range of motor vehicles. These products would not be consistent with the intended meaning of the exemption for replacement parts outlined above.

This final action allows for continued sale of any replacement part meeting the criteria of this narrow exemption to be sold and distributed or offered for sale or distribution in interstate commerce after January 17, 1994. "Placed into initial inventory" within the meaning of this exemption means that the product has completed all manufacturing processes, is in all aspects ready for sale, and has been placed into the manufacturer's inventory.

April 16, 1992, the date prior to which products must have been placed into initial inventory to qualify for the exemption, represents ninety days after the class I NPRM was published in the **Federal Register**, allowing time for manufacturers to revise manufacturing processes to exclude class I substances. EPA believes that the publication of the January 16, 1992 NPRM provided sufficient notice of the Agency's intentions with respect to class I substances that manufacturers should have moved swiftly to alter their manufacturing processes. Therefore, any replacement parts that release class I substances into the environment during manufacture, use, storage, or disposal which are placed into initial inventory after April 16, 1992 are subject to the class I ban and cannot be sold or distributed, or offered for sale or distribution in interstate commerce after January 17, 1994.

To continue selling affected products after January 17, 1994, the manufacturer or distributor must be able to show that the product was manufactured and placed into initial inventory by April 16, 1992. Routine business records, such as shipping forms, lot numbers, manufacturer date stamps or codes, invoices, or the like, may be used to identify the date the product was placed into initial inventory. EPA believes these types of records are normally kept by manufacturers and distributors of products affected by today's action and that this final rule will not require the preparation of any additional records.

III. Effective Dates

This direct-final rulemaking will be effective February 28, 1994 unless EPA receives notice indicating that any person wishes to submit adverse comment. Should EPA receive such notice, EPA will withdraw this final action and propose such action with a request for public comment.

IV. Summary of Supporting Analysis

A. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether this regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines "significant" regulatory action as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of $100 million or more, or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined by OMB and EPA that this rule is not a "significant regulatory action" under the terms of Executive Order 12866 and is therefore not subject to OMB review under the Executive Order.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–602, requires that Federal agencies examine the impacts of their regulations on small entities. Under 5

U.S.C. 604(a), whenever an agency is required to publish a general notice of proposed rulemaking, it must prepare and make available for public comment an initial regulatory flexibility analysis (RFA). Such an analysis is not required if the head of an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, pursuant to 5 U.S.C. 605(b).

EPA believes that any impact that this amendment will have on the regulated community will serve only to provide relief from otherwise applicable regulations, and will therefore limit the negative economic impact associated with the regulations previously promulgated under section 610. An examination of the impacts on small entities was discussed in the final class I ban (58 FR 4797). That final rule assessed the impact the ban may have on small entities and provided examples of such impacts. In general, such impacts were found to be minimal. I certify that this amendment to the class I ban will not have any additional negative economic impacts on any small entities.

C. Paperwork Reduction Act

Any information collection requirements in a rule must be submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq*. Because no informational collection requirements were implemented in the final class I regulations and none are being required by this amendment, EPA has determined that the Paperwork Reduction Act does not apply to this rulemaking and no Information Collection Request document has been prepared.

V. Judicial Review

Under section 307(b)(1) of the Act, EPA finds that these regulations are of national applicability. Accordingly, judicial review of this action is available only by the filing of a petition for review in the United States Court of Appeals for the District of Columbia Circuit within sixty days of publication of this action in the **Federal Register**. Under section 307(b)(2), the requirements of this rule may not be challenged later in judicial proceedings bought to enforce those requirements.

VI. References

United Nations Environment Programme. Report of the Aerosol Products, Sterilants, Miscellaneous Uses and Carbon Tetrachloride Technical Options Committee (December 1991).

United Nations Environment Programme. Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (November 25, 1992).

United Nations Environment Programme. Scientific Assessment of Ozone Depletion: 1991 (December 17, 1991).

United Nations Environment Programme. Solvents, Coatings and Adhesives: Technical Options Committee Report (December, 1991).

United Nations Environment Programme. Third Meetings of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer: UNEP/OzL.Pro.3/L.4/Add.4 (Nairobi, 19–21 June, 1991).

United Nations Environment Programme. 1991 UNEP Flexible and Rigid Foams Technical Options Report (December 20, 1991).

United States Environmental Protection Agency. Alternative Formulations to Reduce CFC Use in U.S. Exempted and Excluded Aerosol Products (November 1989).

United States Environmental Protection Agency. Background Document on Aerosol and Pressurized Dispenser Products Containing Class II Substances (March 1993).

United States Environmental Protection Agency. Background Document on Identification of Nonessential Products that Release Class I Substances (November 1992).

United States Environmental Protection Agency. Essential Use Determination—Revised: Support Document Fully Halogenated Chlorofluoroalkanes (March 17, 1978).

United States Environmental Protection Agency. Handbook for Reducing and Eliminating Chlorofluorocarbons in Flexible Polyurethane Foams (April 1991).

United States Environmental Protection Agency. Manual of Practices to Reduce and Eliminate CFC–113 Use in the Electronics Industry (March, 1990).

United States Environmental Protection Agency. Response to Comments for Proposed Rule on Nonessential Products Made with Class I Substances (October 30, 1992).

List of Subjects in 40 CFR Part 82

Environmental protection, Administrative practice and procedure, Air pollution control, Chemicals, Chlorofluorocarbons, Exports, Hydrochlorofluorocarbons, Imports, Interstate commerce, Nonessential products, Reporting and recordkeeping requirements, Stratospheric ozone layer.

Dated: December 22, 1993.

Carol M. Browner,

Administrator.

Title 40, Code of Federal Regulations, part 82, is amended as follows:

PART 82—PROTECTION OF STRATOSPHERIC OZONE

1. The authority citation for part 82 continues to read as follows:

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

2. Subpart C is revised to read as follows:

Subpart C—Ban on Nonessential Products Containing Class I Substances and Ban on Nonessential Products Containing or Manufactured with Class II Substances

Sec.

Subpart C—Ban on Nonessential Products Containing Class I Substances and Ban on Nonessential Products Containing or Manufactured with Class II Substances

§ 82.60 Purpose.

The purpose of this subpart is to implement the requirements of sections 608 and 610 of the Clean Air Act as amended in 1990 on emission reductions and nonessential products.

§ 82.62 Definitions.

For purposes of this subpart:

(a) *Chlorofluorocarbon* means any substance listed as Class I group I or Class I group III in 40 CFR part 82, appendix A to subpart A.

(b) *Commercial*, when used to describe the purchaser of a product, means a person that uses the product in the purchaser's business or sells it to another person and has one of the following identification numbers:

(1) A federal employer identification number;

(2) A state sales tax exemption number;

(3) A local business license number; or

(4) A government contract number.

(c) *Consumer*, when used to describe a person taking action with regard to a product, means the ultimate purchaser, recipient or user of a product.

(d) *Distributor*, when used to describe a person taking action with regard to a product means:

(1) The seller of a product to a consumer or another distributor; or

(2) A person who sells or distributes that product in interstate commerce for export from the United States.

(e) *Product* means an item or category of items manufactured from raw or recycled materials which is used to perform a function or task.

(f) *Release* means to emit into the environment during the manufacture, use, storage or disposal of a product.

(g) *Class II Substance* means any substance designated as class II in 40 CFR part 82, appendix B to subpart A.

(h) *Foam Insulation Product,* when used to describe a product containing or consisting of plastic foam, means a product containing or consisting of the following types of foam:

(1) Closed cell rigid polyurethane foam;

(2) Closed cell rigid polystyrene boardstock foam;

(3) Closed cell rigid phenolic foam; and

(4) Closed cell rigid polyethylene foam when such foam is suitable in shape, thickness and design to be used as a product that provides thermal insulation around pipes used in heating, plumbing, refrigeration, or industrial process systems.

(i) *Hydrochlorofluorocarbon* means any substance listed as class II in 40 CFR part 82, appendix B to subpart A.

(j) *Owner of a boat or marine vessel* means any person who possesses a title, registration or other documentation that indicates that the person presenting this documentation is in possession of a marine vessel as defined in 33 CFR part 177.

(k) *Owner of a noncommercial aircraft* means any person who possesses a title, registration or other documentation that indicates that the person presenting this documentation is in possession of a noncommercial aircraft.

§ 82.64 Prohibitions.

(a) Effective February 16, 1993, no person may sell or distribute, or offer to sell or distribute, in interstate commerce any of the products identified as being nonessential in § 82.66(a).

(b) Effective February 16, 1993, no person may sell or distribute, or offer to sell or distribute, in interstate commerce any of the products specified in § 82.66(b) to a person who does not provide proof of being a commercial purchaser, as defined under § 82.62.

(c) Effective January 17, 1994, no person may sell or distribute, or offer to sell or distribute, in interstate commerce any of the products identified as being nonessential in § 82.66(c) or § 82.66(d) except as permitted under § 82.65(g).

(d) Except as permitted under § 82.65, effective January 1, 1994, no person may sell or distribute, or offer for sale or distribution, in interstate commerce any product identified as being nonessential in § 82.70(a) or § 82.70(c).

(e) Except as permitted under § 82.65, effective January 1, 1994, no person may sell or distribute, or offer to sell or distribute, in interstate commerce any of the products specified in § 82.70(b) to a person who does not provide proof of being a commercial purchaser, as defined under § 82.62.

(f) Except as permitted under § 82.65(d), effective January 1, 1996, no person may sell or distribute, or offer for sale or distribution, in interstate commerce any product identified as being nonessential in § 82.70(c)(ii).

(g) It is a violation of this subpart to sell or distribute, or offer for sale or distribution, products effected by the provisions of § 82.68 if the seller knew or should have known that the purchaser was purchasing the product for a prohibited application.

§ 82.65 Temporary exemptions.

(a) Any person may sell or distribute, or offer to sell or distribute, in interstate commerce, at any time, any products specified as nonessential in § 82.70 which are manufactured and placed into initial inventory by December 31, 1993.

(b) Any person may sell or distribute, or offer to sell or distribute, in interstate commerce, at any time, any products specified as nonessential in § 82.70 which are manufactured and placed into initial inventory within the date 90 days after the effective date of any federal approvals required for product reformulation, where application for the required approval was timely and properly submitted to the approving federal agency prior to January 1, 1994.

(c)(1) Any person may sell or distribute or offer to sell or distribute, in interstate commerce, at any time, any products specified as nonessential in § 82.70 which are manufactured and placed into initial inventory within 45 days after the receipt of denial by any federal agency of an application for reformulation where initial application for the required approval was timely and properly submitted to the approving federal agency prior to January 1, 1994.

(2) If, within 45 days of receipt of a denial of an application for reformulation, a person submits a new viable application for federal approval of a reformulation, that person may continue to sell and distribute, or offer to sell and distribute until 45 days of denial of that application.

(d) Any person may sell or distribute, or offer to sell or distribute, in interstate commerce, at any time, any integral skin foam utilized to provide for motor vehicle safety in accordance with Federal Motor Vehicle Safety Standards, which are manufactured and placed into initial inventory prior to January 1, 1996.

(e) Any person selling or distributing, or offering to sell or distribute, any product specified in this section after January 1, 1994, or January 1, 1996 for paragraph (d) of this section, or after January 17, 1994 for any product specified in paragraph (g) of this section, must retain proof that such product was manufactured and placed into initial inventory before the relevant date specified in this section. Such proof may take the form of shipping forms, lot numbers, manufacturer date stamps, invoices or equivalent business records.

(f) Any person may sell or distribute, or offer to sell or distribute, in interstate commerce, any aircraft pesticide containing class I until an alternative aircraft pesticide containing class II is available in interstate commerce.

(g) Any person may sell or distribute, or offer to sell or distribute, in interstate commerce, at any time, any replacement part that was manufactured with, or contains a class I substance or was packaged in material that was manufactured with or contains a class I substance only if:

(1) The replacement part was manufactured for use in a single model of a product; and

(2) The replacement part and product model are no longer manufactured; and

(3) The replacement part was placed into initial inventory prior to April 16, 1992.

§ 82.66 Nonessential Class I products and exceptions.

The following products which release a Class I substance (as defined in 40 CFR part 82, appendix A to subpart A) are identified as being nonessential, and subject to the prohibitions specified under § 82.64—

(a) Any plastic party streamer or noise horn which is propelled by a chlorofluorocarbon, including but not limited to—

(1) String confetti;

(2) Marine safety horns;

(3) Sporting event horns;

(4) Personal safety horns;

(5) Wall-mounted alarms used in factories or other work areas; and

(6) Intruder alarms used in homes or cars.

(b) Any cleaning fluid for electronic and photographic equipment which contains a chlorofluorocarbon:

(1) Including but not limited to liquid packaging, solvent wipes, solvent sprays, and gas sprays; and

(2) Except for those sold or distributed to a commercial purchaser.

(c) Any plastic flexible or packaging foam product which is manufactured with or contains a chlorofluorocarbon;

(1) Including but not limited to:

(i) Open cell polyurethane flexible slabstock foam;

(ii) Open cell polyurethane flexible molded foam;

(iii) Open cell rigid polyurethane poured foam;

(iv) Closed cell extruded polystyrene sheet foam;

(v) Closed cell polyethylene foam; and

(vi) Closed cell polypropylene foam.

(2) Except—flexible or packaging foam used in coaxial cable.

(d) Any aerosol product or other pressurized dispenser, other than those banned in § 82.64(a) or § 82.64(b), which contains a chlorofluorocarbon,

(1) Including but not limited to household, industrial, automotive and pesticide uses,

(2) Except—

(i) Medical devices listed in 21 CFR 2.125(e);

(ii) Lubricants for pharmaceutical and tablet manufacture;

(iii) Gauze bandage adhesives and adhesive removers;

(iv) Topical anesthetic and vapocoolant products;

(v) Lubricants, coatings or cleaning fluids for electrical or electronic equipment, which contain CFC–11, CFC–12, or CFC–113 for solvent purposes, but which contain no other CFCs;

(vi) Lubricants, coatings or cleaning fluids used for aircraft maintenance, which contain CFC–11 or CFC–113 as a solvent, but which contain no other CFCs;

(vii) Mold release agents used in the production of plastic and elastomeric materials, which contain CFC–11 or CFC–113 as a solvent, but which contain no other CFCs, and/or mold release agents that contain CFC–12 as a propellant, but which contain no other CFCs;

(viii) Spinnerette lubricant/cleaning sprays used in the production of synthetic fibers, which contain CFC–114 as a solvent, but which contain no other CFCs, and/or spinnerette lubricant/cleaning sprays which contain CFC–12 as a propellant, but which contain no other CFCs;

(ix) Containers of CFCs used as halogen ion sources in plasma etching;

(x) Document preservation sprays which contain CFC–113 as a solvent, but which contain no other CFCs, and/or document preservation sprays which contain CFC–12 as a propellant, but which contain no other CFCs, and which are used solely on thick books, books with coated or dense paper and tightly bound documents; and

(xi) Red pepper bear repellent sprays which contain CFC–113 as a solvent, but which contain no other CFCs.

§ 82.68 Verification and public notice requirements.

(a) Effective February 16, 1993, any person who sells or distributes any cleaning fluid for electronic and photographic equipment which contains a chlorofluorocarbon must verify that the purchaser is a commercial entity as defined in § 82.62. In order to verify that the purchaser is a commercial entity, the person who sells or distributes this product must request documentation that proves the purchaser's commercial status by containing one or more of the commercial identification numbers specified in § 82.62(b). The seller or distributor must have a reasonable basis for believing that the information presented by the purchaser is accurate.

(b) Effective February 16, 1993, any person who sells or distributes any cleaning fluid for electronic and photographic equipment which contains a chlorofluorocarbon must prominently display a sign where sales of such product occur which states: "It is a violation of federal law to sell, distribute, or offer to sell or distribute, any chlorofluorocarbon-containing cleaning fluid for electronic and photographic equipment to anyone who is not a commercial user of this product. The penalty for violating this prohibition can be up to $25,000 per sale. Individuals purchasing such products must present proof of their commercial status in accordance with § 82.68(a)."

(c) Effective January 1, 1994, any person who sells or distributes any aerosol or pressurized dispenser of cleaning fluid for electronic and photographic equipment which contains a class II substance must verify that the purchaser is a commercial entity as defined in § 82.62(b). In order to verify that the purchaser is a commercial entity, the person who sells or distributes this product must request documentation that proves the purchaser's commercial status by containing one or more of the commercial identification numbers specified in § 82.62(b).

(d) Effective January 1, 1994, any person who sells or distributes any aerosol or other pressurized dispenser of cleaning fluid for electronic and photographic equipment which contains a class II substance must prominently display a sign where sales of such product occur which states: "It is a violation of federal law to sell, distribute, or offer to sell or distribute, any aerosol hydrochlorofluorocarbon-containing cleaning fluid for electronic and photographic equipment to anyone who is not a commercial user of this product. The penalty for violating this prohibition can be up to $25,000 per unit sold. Individuals purchasing such products must present proof of their commercial status in accordance with § 82.68(c)."

(e) Effective January 1, 1994, in order to satisfy the requirements under § 82.68 (b) and (d), any person who sells or distributes cleaning fluids for electronic and photographic equipment which contain a class I substance and those aerosol or pressurized dispensers of cleaning fluids which contain a class II substance, may prominently display one sign where sales of such products occur which states: "It is a violation of federal law to sell, distribute, or offer to sell or distribute, any chlorofluorocarbon-containing cleaning fluid for electronic and photographic equipment or aerosol hydrochlorofluorocarbon-containing cleaning fluid for electronic and photographic equipment to anyone who is not a commercial user of this product. The penalty for violating this prohibition can be up to $25,000 per unit sold. Individuals purchasing such products must present proof of their commercial status in accordance with 40 CFR 82.68(a) or 82.68(c)."

(f) Effective January 1, 1994, any person who sells or distributes any portable fire extinguisher containing a class II substance must prominently display a sign where sales of such products occur; or in cases where the purchaser does not physically come in contact with the point of sale, written notification must be given. This notification must state: "It is a violation of federal law to sell portable fire extinguishers containing hydrochlorofluorocarbons to anyone, *except* for use in applications where necessary to extinguish fire efficiently without irreparably damaging the equipment or area being protected or where the use of other alternatives can cause a hazard to persons in the area. The penalty for violating this prohibition can be up to $25,000 per unit sold. Individuals purchasing such products must present proof of their commercial status in accordance with 40 CFR 82.68(a), or of ownership of a marine vessel or boat in accordance with 40 CFR 82.62(j), or of ownership of a noncommercial aircraft in accordance with 40 CFR 82.62(k)." Written

notification may be placed on sales brochures, order forms, invoices and the like.

(g) Effective January 1, 1994, any person who sells or distributes any portable fire extinguisher which contains a class II substance must verify that the purchaser is a commercial entity as defined in § 82.62(b) or is the owner of a marine vessel or boat in accordance with § 82.62(j) or the owner of a noncommercial aircraft in accordance with § 82.62(k). In order to verify that the purchaser is a commercial entity, the person who sells or distributes this product must be presented with documentation that proves the purchaser's commercial status by containing one or more of the commercial identification numbers specified in § 82.62(b). In order to verify that the purchaser is the owner of a marine vessel or boat, the person who sells or distributes this product must be presented with documentation specified in § 82.62(j) that proves the purchaser's status as the owner of a marine vessel or boat. In order to verify that the purchaser is in ownership of a noncommercial aircraft, the person who sells or distributes this product must be presented with documentation specified in § 82.62(k) that proves the purchaser's status as the owner of a noncommercial aircraft by containing one or more of the identification information specified in § 82.62(k). The seller or distributor must have a reasonable basis for believing that the information presented by the purchaser is accurate.

(h) Effective January 1, 1994, any person who sells or distributes any mold release agents containing a class II substance as a propellant must provide written notification to the purchaser prior to the sale that "It is a violation of federal law to sell mold release agents containing hydrochlorofluorocarbons as propellants to anyone, except for use in applications where no other alternative except a class I substance is available. The penalty for violating this prohibition can be up to $25,000 per unit sold." Written notification may be placed on sales brochures, order forms, invoices and the like.

(i) Effective January 1, 1994, any person who sells or distributes any wasp and hornet spray containing a class II substance must provide written notification to the purchaser prior to the sale that "it is a violation of federal law to sell or distribute wasp and hornet sprays containing hydrochlorofluorocarbons as solvents to anyone, except for use near high-tension power lines where no other alternative except a class I substance is available. The penalty for violating this prohibition can be up to $25,000 per unit sold." Written notification may be placed on sales brochures, order forms, invoices and the like.

§ 82.70 Nonessential Class II products and exceptions.

The following products which release a class II substance (as designated as class II in 40 CFR part 82, appendix B to subpart A) are identified as being nonessential and the sale or distribution of such products is prohibited under § 82.64(d), (e), or (f)—

(a) Any aerosol product or other pressurized dispenser which contains a class II substance:

(1) Including but not limited to household, industrial, automotive and pesticide uses;

(2) Except—

(i) Medical devices listed in 21 CFR 2.125(e);

(ii) Lubricants, coatings or cleaning fluids for electrical or electronic equipment, which contain class II substances for solvent purposes, but which contain no other class II substances;

(iii) Lubricants, coatings or cleaning fluids used for aircraft maintenance, which contain class II substances for solvent purposes but which contain no other class II substances;

(iv) Mold release agents used in the production of plastic and elastomeric materials, which contain class II substances for solvent purposes but which contain no other class II substances, and/or mold release agents that contain HCFC–22 as a propellant where evidence of good faith efforts to secure alternatives indicates that, other than a class I substance, there are no suitable alternatives;

(v) Spinnerette lubricants/cleaning sprays used in the production of synthetic fibers, which contain class II substances for solvent purposes and/or contain class II substances for propellant purposes;

(vi) Document preservation sprays which contain HCFC–141b as a solvent, but which contain no other class II substance; and/or which contain HCFC–22 as a propellant, but which contain no other class II substance and which are used solely on thick books, books with coated, dense or paper and tightly bound documents;

(vii) Portable fire extinguishing equipment sold to commercial users, owners of marine vessels or boats, and owners of noncommercial aircraft that contains a class II substance as a fire extinguishant where evidence of good faith efforts to secure alternatives indicate that, other than a class I substance, there are no suitable alternatives; and

(viii) Wasp and hornet sprays for use near high-tension power lines that contain a class II substance for solvent purposes only, but which contain no other class II substances.

(b) Any aerosol or pressurized dispenser cleaning fluid for electronic and photographic equipment which contains a class II substance, except for those sold or distributed to a commercial purchaser.

(c) Any plastic foam product which contains, or is manufactured with, a class II substance,

(1) Including but not limited to household, industrial, automotive and pesticide uses,

(2) Except—

(i) Any foam insulation product, as defined in § 82.62(h); and

(ii) Integral skin foam utilized to provide for motor vehicle safety in accordance with Federal Motor Vehicle Safety Standards until January 1, 1996, after which date such products are identified as nonessential and may only be sold or distributed or offered for sale or distribution in interstate commerce in accordance with § 82.65(d).

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Thursday
December 30, 1993

Part XI

The President

Executive Order 12889—Implementation of the North American Free Trade Agreement

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Vol. 58, No. 249
Thursday, December 30, 1993

Presidential Documents

Title 3—

The President

Executive Order 12889 of December 27, 1993

Implementation of the North American Free Trade Agreement

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the North American Free Trade Agreement Implementation Act (Public Law 103–182, 107 Stat. 2057) (the NAFTA Implementation Act) and section 302 of title 3, United States Code, and in order to implement the North American Free Trade Agreement (NAFTA), it is hereby ordered:

Section 1. *Establishment of United States Section of the NAFTA Secretariat.* Pursuant to section 105(a) of the NAFTA Implementation Act, a United States section of the NAFTA Secretariat shall be established within the Department of Commerce and shall carry out the functions set out in that section.

Sec. 2. *Acceptance by the President of Panel and Committee Decisions.* Pursuant to subparagraph 516A(g)(7)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. 1516a(g)(7)(B), in the event that the provisions of that subparagraph take effect, I accept, as a whole, all decisions of binational panels and extraordinary challenge committees.

Sec. 3. *Implementation of Safeguard Provisions for Textile and Apparel Goods.* Pursuant to section 201 of the NAFTA Implementation Act, the Committee for the Implementation of Textile Agreements (the Committee) shall take such action as necessary to implement the bilateral safeguard provisions (tariff actions) set out in section 4 of Annex 300–B of the NAFTA. The United States Customs Service shall take such actions to carry out those safeguard provisions as directed by the Secretary of the Treasury, upon the advice and recommendation of the Chairman of the Committee.

Sec. 4. *Publication of Proposed Rules regarding Technical Regulations and Sanitary and Phytosanitary Measures.* (a) In accordance with Articles 718 and 909 of the NAFTA, each agency subject to the provisions of the Administrative Procedure Act, as amended (5 U.S.C. 551 *et seq.*), shall, in applying section 553 of title 5, United States Code, with respect to any proposed Federal technical regulation or any Federal sanitary or phytosanitary measure of general application, other than a regulation issued pursuant to section 104(a) of the NAFTA Implementation Act, publish or serve notice of such regulation or measure not less than 75 days before the comment due date, except:

(1) in the case of a technical regulation relating to perishable goods, in which case the agency shall, to the greatest extent practicable, publish or serve notice at least 30 days prior to adoption of such regulation;
(2) in the case of a technical regulation, where the United States considers it necessary to address an urgent problem relating to safety or to protection of human, animal or plant life or health, the environment or consumers; or
(3) in the case of a sanitary or phytosanitary measure, where the United States considers it necessary to address an urgent problem relating to sanitary or phytosanitary protection.

(b) For purposes of this section, the term "sanitary or phytosanitary measure" shall be defined in accordance with section 463 of the Trade Agreements

Act of 1979, and "technical regulation" shall be defined in accordance with section 473 of the Trade Agreements Act of 1979.

(c) This section supersedes section 1 of Executive Order No. 12662 of December 31, 1988.

Sec. 5. *Government Procurement Procedures.* (a) Waiver.

(1) With respect to eligible products (as defined in section 381(c) of the NAFTA Implementation Act) of Canada and Mexico, and suppliers of such products, the application of any law, regulation, procedure, or practice regarding Federal Government procurement that would, if applied to such products or suppliers, result in treatment less favorable than the most favorable treatment accorded:

(A) to United States products and services and suppliers of such products and services; or

(B) to eligible products of either Mexico or Canada, shall be waived.

(2) This waiver shall be applied by all executive agencies listed in Annexes 1 and 2 of this Executive order in consultation with, and when deemed necessary at the direction of, the United States Trade Representative (Trade Representative).

(b) The Secretary of Defense, or his designee, in consultation with the Trade Representative, shall be responsible for determinations under Article 1018(1), pursuant to Annex 1001.1b-1(A)(4), of the NAFTA. The Secretary of Defense, or his designee, and the Trade Representative shall establish procedures for this purpose.

(c) The executive agencies listed in Annex 2 are directed to procure eligible products in compliance with the procedural provisions of Chapter 10 of the NAFTA.

(d) The Trade Representative shall be responsible for calculating and adjusting the threshold as required by Article 1001(1)(c) of the NAFTA.

(e) This order shall apply only to solicitations issued on or after the date of entry into force of the NAFTA for the United States.

(f) Although regulatory implementation of this order must await revisions to the Federal Acquisitions Regulation (FAR), it is expected that agencies listed in Annexes 1 and 2 of this order will take all appropriate actions in the interim to implement those aspects of the order that are not dependent upon regulatory revision.

(g) Pursuant to section 25 of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 421(a)), the Federal Acquisition Regulatory Council shall ensure that the policies established herein are incorporated in the FAR within 30 days from the date this order is issued.

Sec. 6. *Government Use of Patented Technology.* (a) Each agency shall, within 30 days from the date this order is issued, modify or adopt procedures to ensure compliance with Article 1709(10) of the NAFTA regarding notice when patented technology is used by or for the Federal Government without a license from the owner, except that the requirement of Article 1709(10)(b) regarding reasonable efforts to obtain advance authorization from the patent owner:

(1) is hereby waived for an invention used or manufactured by or for the Federal Government, except that the patent owner must be notified whenever the agency or its contractor, without making a patent search, knows or has demonstrable reasonable grounds to know that an invention described in and covered by a valid United States patent is or will be used or manufactured without a license; and

(2) is waived whenever a national emergency or other circumstances of extreme urgency exists, except that the patent owner must be notified as soon as it is reasonably practicable to do so.

(b) Agencies shall treat the term "remuneration" as used in Articles 1709(10)(h) and (j) and 1715 of the NAFTA as equivalent to "reasonable

and entire compensation" as used in section 1498 of title 28, United States Code.

(c) In addition to the general provisions of section 7 of this order regarding enforceable rights, nothing in this order is intended to suggest that the giving of notice to a patent owner under Article 1709(10) of the NAFTA constitutes an admission that the Federal Government has infringed a valid privately-owned patent.

Sec. 7. *Judicial Review.* This order does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

Sec. 8. *Effective Date.* This order shall take effect upon the date of entry into force of the NAFTA for the United States.

William J. Clinton

THE WHITE HOUSE,
December 27, 1993.

Billing code 3195-01-P

Annex 1

Department of Agriculture
Department of Commerce
Department of Defense
Department of Education
Department of Energy
Department of Health and Human Services
Department of Housing and Urban Development
Department of the Interior
Department of Justice
Department of Labor
Department of State
Department of Transportation
Department of the Treasury
United States Agency for International Development
General Services Administration
National Aeronautics and Space Administration
Department of Veterans Affairs
Environmental Protection Agency
United States Information Agency
National Science Foundation
Panama Canal Commission
Executive Office of the President
Farm Credit Administration
National Credit Union Administration
Merit Systems Protection Board
ACTION Agency

United States Arms Control and Disarmament Agency
Office of Thrift Supervision
Federal Housing Finance Board
National Labor Relations Board
National Mediation Board
Railroad Retirement Board
American Battle Monuments Commission
Federal Communications Commission
Federal Trade Commission
Interstate Commerce Commission
Securities and Exchange Commission
Office of Personnel Management
United States International Trade Commission
Export-Import Bank of the United States
Federal Mediation and Conciliation Service
Selective Service System
Smithsonian Institution
Federal Deposit Insurance Corporation
Consumer Product Safety Commission
Equal Employment Opportunity Commission
Federal Maritime Commission
National Transportation Safety Board
Nuclear Regulatory Commission
Overseas Private Investment Corporation
Administrative Conference of the United States
Board for International Broadcasting
Commission on Civil Rights
Commodity Futures Trading Commission
Peace Corps
National Archives and Records Administration

Annex 2

The Power Marketing Administrations of the Department of Energy
Tennessee Valley Authority
St. Lawrence Seaway Development Corporation

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Reader Aids

Federal Register

Vol. 58, No. 249

Thursday, December 30, 1993

INFORMATION AND ASSISTANCE

Federal Register

Index, finding aids & general information	202–523–5227
Public inspection desk	523–5215
Corrections to published documents	523–5237
Document drafting information	523–3187
Machine readable documents	523–3447

Code of Federal Regulations

Index, finding aids & general information	523–5227
Printing schedules	523–3419

Laws

Public Laws Update Service (numbers, dates, etc.)	523–6641
Additional information	523–5230

Presidential Documents

Executive orders and proclamations	523–5230
Public Papers of the Presidents	523–5230
Weekly Compilation of Presidential Documents	523–5230

The United States Government Manual

General information	523–5230

Other Services

Data base and machine readable specifications	523–3447
Guide to Record Retention Requirements	523–3187
Legal staff	523–4534
Privacy Act Compilation	523–3187
Public Laws Update Service (PLUS)	523–6641
TDD for the hearing impaired	523–5229

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FEDERAL REGISTER PAGES AND DATES, DECEMBER

CFR PARTS AFFECTED DURING DECEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

944.....69182
955.....64103
980.....69186
981.....64105
987.....64103
989.....64106, 64107
997.....64109
998.....67304
999.....69186
1001.....63283
1002.....63283
1004.....63283
1005.....63283
1007.....63283
1011.....63283
1030.....63283
1033.....63283
1036.....63283
1040.....63283
1044.....63283
1046.....63283
1049.....63283
1065.....63283
1068.....63283
1075.....64110
1079.....63283
1093.....63283
1094.....63283
1096.....63283
1097.....63283
1098.....63283
1099.....63283
1106.....63283
1108.....63283
1124.....63283
1126.....63283
1131.....63283
1135.....63283
1138.....63283
1220.....64670
1421.....68016
1427.....65102
1464.....68017
1610.....66250
1703.....67306
1710.....66260
1714.....66260
1735.....66250
1737.....66250
1744.....66250
1751.....66250
1753.....66250
1910.....68717, 69190
1924.....69190
1941.....69190
1943.....69190
1945.....69190
1946.....65871
1951.....64455, 69190
1955.....68722
1980.....65871, 68717, 69190
3416.....65646

Proposed Rules:

271.....64172
301.....66304
319.....66304, 66305
321.....66305
704.....66308
723.....67376
810.....65939
930.....68065
981.....64175
985.....67378
1001.....67380
1002.....67380
1004.....67380
1005.....67380
1006.....67380
1007.....65135, 67380
1011.....67380
1012.....67380
1013.....67380
1030.....67380
1032.....67380
1033.....67380
1036.....67380
1040.....64176, 67380
1044.....67380
1046.....67380
1049.....67380
1050.....67380
1064.....67380
1065.....67380
1068.....67380
1075.....67380
1076.....67380
1079.....67380
1093.....67380
1094.....67380
1096.....67380
1099.....67380
1106.....67380
1108.....67380
1124.....67380
1126.....67380
1131.....67380, 67703
1134.....67380
1135.....67380
1137.....67380
1138.....67380
1139.....67380
1250.....65939
1410.....66308
1525.....65941
1735.....68780
1910.....69374
1924.....69374
1941.....69374
1943.....69374
1945.....69374
1951.....69374
1962.....69374
1980.....69374

8 CFR

103.....69205
212.....69205
214.....69205
235.....69205
264.....68024
274a.....69205

Proposed Rules:

210a.....64695

9 CFR

78.....68505
85.....68506
92.....68508
94.....65103, 66247
130.....67647
156.....67647
317.....66075
318.....63521, 65254
381.....65254
401.....65254

Proposed Rules:

2.....68559
51.....68561
71.....67708
92.....67709

10 CFR

1.....64110
2.....67657
19.....67657
20.....64110, 67657, 69219
30.....64110, 67657, 68726
31.....67657
32.....67657
34.....67657
35.....67657
36.....67657
39.....67657
40.....64110, 67657, 68726
50.....67657, 68726
52.....69220
61.....67657
70.....64110, 67657, 68726
72.....67657, 68726
73.....64110
780.....68732
835.....65458, 67441

Proposed Rules:

430.....67710
710.....64509

11 CFR

Proposed Rules:

100.....64190
102.....65559
113.....64190

12 CFR

7.....68464
24.....68464
201.....68509
202.....65657, 68735
204.....64112
208.....68735
225.....68735
265.....65539
303.....64455
332.....64458
333.....64460
360.....67662
362.....64462
611.....67644
613.....67644
614.....67644, 67665
620.....67664
621.....67664
627.....67644

Proposed Rules:

3.....68065
25.....67466
208.....68563
210.....68566
211.....65560
225.....68563
228.....67466
230.....64190, 65293
325.....68781
330.....64521
345.....67466
510.....64695
563e.....67466
611.....64442, 68069
618.....68069
620.....68069

13 CFR

121.....65281
123.....64672

14 CFR

39.....63523, 63524, 64112, 64114, 64487, 64874, 64875, 64877, 65104, 65115, 65282, 65283, 65662, 65888, 65890, 65984, 65895, 66268, 66270, 66271, 66273, 66274, 66276, 67306, 67307, 67310, 67311, 67665, 67667, 68025, 68026, 68028, 68291, 69221
71.....63293, 63885, 63886, 64116, 64117, 64444, 64488, 64879, 64880, 64880, 65897, 65900, 67668, 67669, 67770, 67771, 68740
73.....69128
95.....65901
97.....65904, 65905, 68515, 68516
121.....68194, 68198
125.....69620
135.....69620
158.....64118

Proposed Rules:

25.....64700, 67716
31.....64450
33.....63902, 68784
39.....63305, 63307, 64198, 64199, 64200, 64386, 64705, 64707, 64708, 65567, 65569, 65943, 67381, 67723, 68570, 68572, 68575, 68786, 68787, 68789, 69298, 69299
71.....63308, 63309, 63903, 63904, 63905, 63906, 64387, 64525, 64710, 65945, 65946, 65947, 65948, 65949, 65950, 67725, 67726, 67727, 67728, 67909, 68328, 68329, 68577
73.....63908
91.....65950

15 CFR

770.....65540, 68740
771.....64674
772.....65540
773.....68740
778.....68029
785.....68740
788.....65540
799.....64674
943.....65664
946.....64088

Proposed Rules:

303.....65294
935.....65686
936.....65686
942.....65686
944.....65686
946.....64202

16 CFR

228.....64881
229.....68292
232.....68292
436.....69223, 69224
1000.....64119
1210.....67671

Proposed Rules:

307.....63488
309.....64914
1303.....63311

17 CFR

1.....68518
200.....64120, 68520
204.....64369
230.....65541, 67312

239.....65541
240.....67729, 69225, 69225
270.....64353, 67729
274.....67729
Proposed Rules:
Ch. II.....68578
190.....68580
200.....67729
210.....68585
229.....67729
230.....68074, 68585
239.....67729, 68074, 68585
240.....67729
270.....67729, 68074, 68585
274.....67729, 68074, 68585

18 CFR

141.....65542
Proposed Rules:
Ch. 1.....66309
141.....63312
341.....66310
352.....66310
388.....63312

19 CFR

4.....67312, 68520
10.....68741, 69460
12.....69460
24.....68520, 69460
122.....68520
123.....67312, 68520, 69460
134.....68520, 69460
162.....69460
174.....69460
175.....68743
177.....69460
178.....69460
181.....69460
191.....69460
201.....64120
Proposed Rules:
151.....65135
142.....65135
175.....69301
210.....64711

20 CFR

10.....68031
404.....64121, 64882, 64883, 64886, 64890, 65243
416.....63887, 63888, 64883, 64892, 64893
626.....69098
638.....69098
655.....69226
702.....68031
Proposed Rules:
404.....64207, 67574
416.....64207

21 CFR

5.....64489
16.....65514
100.....64123
176.....65284
177.....65546
178.....64894, 67318
310.....65452
358.....65452
510.....63890
520.....65664
522.....65285
558.....63890
900.....67558, 67565
1220.....64137
1270.....65514
Proposed Rules:
1.....67444
5.....65139
25.....65139
100.....64208
101.....68791
170.....65139
171.....65139
174.....65139
179.....64526
201.....67444
501.....67444
701.....67444
801.....67444
812.....64209
813.....64209
820.....64353

22 CFR

41.....68526
89.....65118
Proposed Rules:
42.....68791

23 CFR

500.....63442, 64374
625.....64895
626.....63422, 64374
655.....65084
Proposed Rules:
420.....67510
511.....67510
657.....65830
658.....65677

24 CFR

200.....67671
219.....64138
246.....64032
266.....64032
905.....64141
970.....64141
Proposed Rules:
300.....64713
310.....64713
390.....64713
500.....64066
570.....68795
888.....68615

25 CFR

262.....65246

26 CFR

1.....64897, 67676, 67684, 67689, 68033, 68294, 68295, 68297, 68300, 68301, 68747, 68751, 68753
31.....68033
47.....68304
48.....68304
602.....68033, 68297, 68300, 68301, 68753, 68747, 68751, 68753
Proposed Rules:
1.....66310, 67744, 68091, 68330, 68334, 68335, 68336, 68337, 68798, 68799, 69302
47.....68338
48.....68338
301.....63541, 68092
602.....68336, 68337

27 CFR

9.....65123
Proposed Rules:
4.....65295

28 CFR

2.....65547
513.....68765
544.....65850, 65851
Proposed Rules:
2.....65571, 65572

29 CFR

402.....67594
507.....69226
2619.....65548, 66277
2621.....65551
2676.....65548
Proposed Rules:
552.....69310
2520.....68339
2530.....68339

30 CFR

50.....63528
56.....69596
57.....69596
70.....63528
71.....63528
90.....63528
207.....64899
208.....64899
210.....64899
216.....64899
218.....64899
219.....64899
220.....64899
228.....64899
229.....64899
243.....64899
925.....64142
931.....65907
936.....64374
938.....64151
Proposed Rules:
75.....69312
253.....66320
700.....63316
701.....63316
705.....63316
706.....63316
715.....63316
716.....63316
785.....63316
825.....63316
870.....63316
880.....68494
906.....64210
914.....64212, 65679
934.....64528, 68617
944.....64529
950.....65681

31 CFR

129.....68528
317.....63529
500.....68529
590.....64904

32 CFR

95.....63293
375.....69229
706.....64678
Proposed Rules:
2.....63542
118.....65956

33 CFR

1.....65665
3.....67909
66.....64153
80.....65667
100.....66279
110.....65140, 65285
117.....65668
155.....67988
162.....69231
165.....65669, 66279, 68305, 68306, 68307, 68308, 69232, 69233, 69234
334.....64383, 69232
Proposed Rules:
117.....66321, 66322, 66323 67745, 68093
156.....63544, 65683, 69313
157.....65298, 65683
165.....65684
166.....65686
167.....65686
402.....68618

34 CFR

648.....65838
668.....69594
Proposed Rules:
76.....65856
99.....65298
298.....65856
366.....67383
647.....63870
Ch. VI.....68619

36 CFR

Proposed Rules:
6.....65141
292.....65300
1220.....64915

37 CFR

Ch. III.....67690
1.....64154, 64155
2.....64154
5.....64155
10.....64154, 64155
304.....63294

38 CFR

2.....67691
21.....63529, 67691, 68766
Proposed Rules:
3.....65958

39 CFR

Proposed Rules:
111.....64918, 65959, 67747

40 CFR

35.....63876
52.....64155, 64157, 64158, 64161, 64678, 65286, 65930, 65933, 65934, 66280, 66282, 66283, 66285, 66286, 67324, 67326, 67330, 68036
60.....64158
63.....66287
75.....67692
79.....65552
80.....65552
81.....64161, 64490, 67334, 68031, 69235
82.....65018, 69235, 69638, 69672
85.....65552
86.....66289, 68532
88.....64679

93.....67441
122.....67966
123.....67966
124.....67966
144.....63890
146.....63890
180.....63294, 64492, 64493, 64495, 64496, 65554
191.....66398
228.....64497
300.....63531, 69238
372.....63496, 63500
501.....67966
712.....68310, 68317
716.....68311, 68317
721.....63500

Proposed Rules:

51.....65573
52.....63316, 63545, 63547, 63549, 64530, 65307, 65309, 65573, 65686, 65688, 65691, 65959, 66324, 66326, 66334, 67383, 67748, 67754, 68094
60.....65573
61.....65573
63.....65768, 66078, 66336, 68804
64.....65573
68.....65311
71.....68804
72.....69314
73.....69314
80.....64213, 68343
81.....66334, 68094
82.....69568
141.....65622, 68826
143.....65622
180.....64536, 64538, 67759, 68621, 68827
258.....68353
261.....67389
300.....63551, 64539
430.....66078

41 CFR

Ch. 301.....67950
101-38.....65288
101-39.....63631, 65288

Proposed Rules:

201-3.....64389
201-4.....64389
201-9.....64389
201-11.....64389
201-18.....64389
201-20.....64389
201-21.....64389
201-22.....64389
201-23.....64389
201-24.....64389
201-39.....64389

42 CFR

57.....66297
60.....67346
405.....63626
412.....67350
413.....67350
414.....63626
417.....68366
434.....65126
491.....63533

Proposed Rules:

67.....63909
410.....68829
413.....65130
417.....68829
435.....65312
436.....65312
440.....65312
447.....65312, 68829

43 CFR

Public Land Orders:

7012.....64498
7013.....64165
7014.....64498
7015.....64499
7016.....64499
7017.....64692
7018.....64692
7019.....64693
7020.....64166, 68462
7021.....65130
7022.....65936
7023.....66299
7024.....69239

Proposed Rules:

230.....65692
406.....65693
419.....65693
423.....65694
426.....64277
Group 3400.....64919

44 CFR

64.....63899, 67692
65.....69039, 68041, 68043, 68044
67.....68046, 68049

Proposed Rules:

67.....68101, 68105

45 CFR

400.....64499
607.....68769
608.....68772
1355.....67912, 67939
1356.....67912, 67939
1357.....67912
1602.....65291

Proposed Rules:

1370.....64920

46 CFR

1.....65130
16.....68164, 68274
67.....65130, 65243
232.....64798
585.....64909

Proposed Rules:

12.....64278
16.....64278
502.....68841

47 CFR

0.....68053
1.....66299, 68540
2.....68053
25.....68053
36.....69239
63.....64167
64.....65669
69.....65669
73.....63295, 63296, 63536, 65132, 65133, 65671, 65672, 65673, 66300
76.....64168, 67694, 68322, 68541, 68542
80.....68061
87.....67695, 68061
94.....68061
97.....64384

Proposed Rules:

3.....68373
15.....64541
63.....64280
68.....65153
73.....63318, 63319, 63320, 63321, 63553, 65155, 68843
76.....64541, 68844

48 CFR

232.....64353
501.....64693
509.....64693
525.....69243
552.....64693, 69243
1805.....69245
1834.....68687
1870.....68687
2801.....68774
2802.....68774
2806.....68774
2807.....68774
6101.....69246
9903.....65556

Proposed Rules:

2.....69588
4.....69588
5.....69588
8.....69588
9.....63494
12.....69588
13.....69588
14.....69588
15.....64824, 69588
16.....69588
49.....69588
52.....63492, 63494, 64826
53.....69588
904.....63553
917.....63553
936.....63553
939.....63556
943.....63553
49.....69588
52.....69588
53.....69588
952.....63553
970.....63553

49 CFR

7.....65824
10.....67696
171.....66302
199.....68194, 68258
217.....68194, 68232
219.....68194, 68232
390.....67370
391.....68194, 68220
392.....67370
541.....63296
544.....63299
571.....63302, 64168, 65673
614.....63442, 64374

Proposed Rules:

192.....68382
391.....65634
396.....64923
571.....63321, 65156, 67909, 68846
583.....63327
659.....64856
1105.....68383
1121.....68383
1152.....68383
1181.....65695
1182.....65695
1186.....65695
1188.....65695
1312.....64717, 68108

50 CFR

17.....65088, 68323, 68476, 68480
20.....65656
24.....68542
216.....63536, 65133
226.....68543
625.....65134, 65936, 68555
641.....68325
642.....68327, 69273
649.....68555
661.....68063
663.....64169
672.....65556
675.....65292, 65556, 69273
678.....68556
685.....67699

Proposed Rules:

17.....63328, 63560, 64281, 64828, 64927, 65097, 65325, 65696, 68383, 68623
20.....63488
36.....68012
21.....63488
215.....64285, 68848
216.....64285, 68848
222.....64285, 68848
227.....65961, 68108
285.....67761
301.....67762
611.....64798
625.....64393
630.....67761, 68109
638.....65327
641.....68385
650.....63329
672.....64798, 68848
675.....65574, 68386, 68848
678.....67761

LIST OF PUBLIC LAWS

Note: The list of Public Laws for the first session of the 103d Congress has been completed and will resume when bills are enacted into law during the second session of the 103d Congress, which convenes on January 25, 1994.

A cumulative list of Public Laws for the first session of the 103d Congress will be published in Part IV of the **Federal Register** on January 3, 1994.

Last List December 23, 1993